

**United States Court of Appeals  
for the Federal Circuit**

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VETERAN WARRIORS, INC., ANDREW D. SHEETS, KRISTIE SHEETS  
*Petitioners,*

v.

ROBERT L. WILKIE,  
SECRETARY OF VETERANS AFFAIRS,  
*Respondent.*

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**PETITION FOR REVIEW PURSUANT TO 38 U.S.C. § 502**

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Barton F. Stichman  
NATIONAL VETERANS  
LEGAL SERVICES  
PROGRAM  
1600 K Street, N.W.  
Suite 500  
Washington, DC 20006  
(202) 621-5724

Michael Franzinger  
Counsel of Record  
SIDLEY AUSTIN LLP  
1501 K Street, N.W.  
Washington, D.C. 20005  
(202) 736-8000  
mfranzinger@sidley.com

Timothy Q. Li  
SIDLEY AUSTIN LLP  
787 Seventh Avenue  
New York, NY 10019  
(212) 839-5300

*Counsel for Petitioners*

November 30, 2020

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## **I. INTRODUCTION**

Pursuant to 38 U.S.C. § 502, Rule 15 of the Federal Rules of Appellate Procedure, and Federal Circuit Rule 15(f), Petitioners Veteran Warriors, Inc. (“VW”), in its own right and on behalf of its members, and Andrew and Kristie Sheets, in their own right, hereby petition this Court for review of a Final Rule adopted by the Department of Veteran Affairs (“VA”) regarding the “Program of Comprehensive Assistance for Family Caregivers Improvements and Amendments Under the VA MISSION Act of 2018” (“Final Rule”). *See* Exhibit A.

## **II. JURISDICTION**

This Court has jurisdiction over this petition pursuant to 38 U.S.C. § 502, which vests this Court with exclusive jurisdiction to review direct challenges to agency actions, including substantive rules of general applicability, and revisions to prior rules. *See, e.g., Mil. Ord. of the Purple Heart v. Sec’y of Veterans Affairs*, 580 F.3d 1293, 1296 (Fed. Cir. 2009).

## **III. TIMELINESS**

This petition is timely under either 28 U.S.C. § 2401’s six-year

statute of limitations or Federal Circuit Rule 15(f)'s 60-day deadline because the Final Rule became effective on October 1, 2020.

#### **IV. PROCEDURAL AND FACTUAL BACKGROUND**

In 2010, Congress passed the “Caregivers and Veterans Omnibus Health Services Act” (“Caregiver Act”). Pub. L. No. 111-163, 124 Stat. 1130 (May 5, 2010). The Caregiver Act required VA to establish a comprehensive program to benefit family caregivers of eligible veterans who have had a serious injury incurred in the line of duty after September 11, 2001, and who are “in need of personal care services because of--(i) an inability to perform one or more activities of daily living; (ii) a need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury; (iii) 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,” or other reasons that VA considers appropriate. 38 U.S.C. § 1720G(a)(2)(C). The Caregiver Act also provided that the amount of the benefit “shall be determined . . . based upon the amount and degree of personal care services provided” and “[be] not less than the monthly amount a commercial home health care entity would pay an individual

in the geographic area of the eligible veteran to provide equivalent personal care services.” 38 U.S.C. § 1720G(a)(3)(C).

In accordance with the Caregiver Act, VA adopted rules for the Caregiver Program at 38 C.F.R. part 71. Prior to the Final Rule, VA did not require “personal care services” to be “in-person,” explaining that such services meant “ensuring the eligible veteran remains safe from hazards or dangers incident to his or her daily environment.” 38 C.F.R. § 71.15 (2015). It also did not require alternative in-person caregiving arrangements in the absence of an in-person caregiver. 38 C.F.R. § 71.15 (2015). Nor did it require any specific disability rating for a veteran to qualify for a “serious injury,” explaining that such a serious injury includes “any injury . . . that renders the veteran or servicemember in need of personal care services.” 38 C.F.R. § 71.15 (2015).

To evaluate a veteran’s inability to perform one or more activities of daily living (ADLs), VA set forth seven broad categories: (1) dressing, (2) bathing, (3) grooming, (4) frequent need to adjust a special prosthetic or orthopedic appliance, (5) toileting, (6) feeding, or (7) mobility or transferring. 38 C.F.R. § 71.15 (2015). It also set forth

seven supervision or protection impairments: (1) Seizures, (2) “Difficulty with planning and organizing,” (3) “Safety risks (wandering outside the home, danger of falling, using electrical appliances, etc.),” (4) “Difficulty with sleep regulation,” (5) “Delusions or hallucinations,” (6) “Difficulty with recent memory,” or (7) “Self-regulation (being able to moderate moods, agitation or aggression, etc.).” 38 C.F.R. § 71.15 (2015).

To calculate the benefit amount, VA initially established three tiers based on a veteran’s ability to complete and the amount of assistance needed to complete any of the seven ADLs or seven supervision or protection impairments: (1) a full-time stipend, (2) a mid-tier stipend with 62.5% of the benefit, and (3) a lower-tier with 25% of the benefit. *See* 38 C.F.R. § 71.40 (2015). VA calculated the full-time stipend based on a combined rate using the “hourly wage rate for home health aides at the 75th percentile in the eligible veteran’s geographic area of residence, multiplied by the [CPI].” 38 C.F.R. § 71.15 (2015).

In 2018, Congress expanded the Caregiver Act (through the VA MISSION Act) to add eligibility for additional veterans who incurred a serious injury in the line of duty before September 11, 2001. But instead of expanding eligibility based on the VA MISSION Act, VA

narrowed the eligibility criteria for the Caregiver Program in the Final Rule by restricting both the number of veterans who qualify for benefits and the amount of benefits for those who do qualify. 85 Fed. Reg.

46,226. The Final Rule requires, for example: (1) a service connected disability rating at 70% or more; (2) “in-person” personal care services; (3) assistance with an ADL 100% of the time, or supervision or protection to prevent “impairment” to “personal safety” on a “daily basis”; and (4) residence in a State of the United States, *id.* at 46,294-95, none of which was a Caregiver Program requirement before the VA MISSION Act, and none of which is a VA MISSION Act requirement.

The Final Rule also reduces the three-tier benefit system to a two-tier system. To qualify for a full-time stipend, a veteran must require: (1) assistance with three or more ADLs 100% of the time, or (2) supervision or protection on a continuous basis. It also reduces the benefit amount for a full-time stipend from that of a “commercial home health entity” to that of a government employee, even though the Caregiver Act mandates that the stipend be “not less than the monthly amount a commercial home health care entity would pay an individual” in the veteran’s geographic area. 38 U.S.C. § 1720G(a)(3)(C)(ii).

## **V. PARTIES ADVERSELY AFFECTED**

### **A. Veteran Warriors, Inc.**

VW is a not for profit organization that provides advocacy, research, and outreach for its 5,000 veteran members, of which about 70% (3,500) participate in the Caregiver Program. Many of these 3,500 Caregiver Program members would also have standing to sue in their own right because they have suffered or will suffer an injury in fact traceable to the changes in the Final Rule, including the changes discussed in detail below in Section VI, and that injury will be redressed by a favorable decision. These changes will also have a particularly adverse effect on VW's 3,500 members who are legacy participants and the original intended beneficiaries of the Caregiver Act.

VW is also well-known throughout the veteran community for its experience and expertise regarding the Caregiver Program. Over the past 4.5 years, VW has assisted thousands of veterans throughout all aspects of the Caregiver Program, including through providing guidance on the application, continuing eligibility, and appeals processes.

Protecting its Caregiver Program members by challenging the Final Rule is also germane to VW's mission, which seeks solutions and

accountability for veterans and their families who are entitled to benefits that they have earned through their service, including for the Caregiver Program. See <https://veteran-warriors.org/our-mission>. Neither VW's claim nor the relief requested requires participation of individual VW members. Yet the Final Rule frustrates VW's mission because it will unlawfully exclude VW's Caregiver Program members who should be entitled to benefits pursuant to the Caregiver Act or reduce their benefits contrary to the statutory text. Denial of access would impede VW's ability to represent and assist these Caregiver Program members.

VW itself will also suffer an injury in fact because it has expended and continues to expend a great deal of time and resources to identify and counteract VA's unlawful actions, including countless meetings with Congressional members, Executive Branch officials, and VA officials regarding the Final Rule's unlawful negative impact on VW's Caregiver Program members. This injury will be redressed by a favorable decision that invalidates the unlawful portions of the Final Rule that exceed VA authority because it will enable VW to re-direct its



resources to helping its individual Caregiver Program members apply for benefits.

**B. Andrew and Kristie Sheets**

Andrew Sheets is a highly decorated U.S. Navy SEAL veteran who deployed to Afghanistan in October 2003, wherein he undertook 33 combat missions through February 2004. During his deployment, Mr. Sheets was prescribed mefloquine (under the trade name Lariam®) as an anti-malarial agent. He reported that he began having vivid, “hallucinogenic” dreams on the first night after taking the prescribed dosage of mefloquine, and that he developed an intense paranoia about situations on base.

After his honorable discharge in August 2006, VA awarded Mr. Sheets service connection for post-traumatic stress disorder (“PTSD”), with anxiety and panic attacks and secondary depression and episodic alcohol abuse in sustained remission, and a 70% rating, effective in September 2006. VA also awarded him service connection for several other disabilities, including psoriasis and injuries to his shoulder, elbow, fingers, knees, and feet. His total combined disability rating was 90%, effective as of September 2006.

In October 2011, VA increased Mr. Sheets' rating to 100% for PTSD. VA also granted his application for Caregiver Program benefits, effective in 2011, based on his service-connected PTSD. VA's Final Rule adversely affects Mr. Sheets and his primary caregiver, Kristie Sheets, because it risks causing VA to determine that he does not qualify for full benefits, even though he is exactly the type of disabled veteran the Caregiver Act contemplates to receive full benefits, and despite his qualification for and receipt of full Caregiver Program benefits since 2011.

## **VI. PORTIONS OF THE FINAL RULE REQUIRING REVIEW**

This petition challenges several portions of the Final Rule directed to both eligibility for benefits and reduction in the amount of benefits.

### **A. Eligibility for Benefits**

Petitioners challenge the Final Rule's new eligibility requirements regarding serious injury; being in need of personal care services; 100% inability to perform one or more of seven ADLs; a need for supervision, protection or instruction; and geographic residence. VA represents that these new eligibility requirements will restrict Caregiver Program benefits to only those veterans with "moderate and severe needs." 85

Fed. Reg. 46,226. But VA's new term "moderate and severe needs" appears nowhere in the Caregiver Act, 38 U.S.C. § 1720G, nor is "moderate and severe needs" defined in VA's Final Rule. *E.g.*, 85 Fed. Reg. 46,227. Moreover, VA's reliance on the Final Rule's new eligibility requirements itself exceeds VA's authority, because nothing in the Caregiver Act authorizes any such new eligibility requirements.

### **1. Serious Injury**

Before the Final Rule, VA defined "serious injury" as "any injury, including traumatic brain injury, psychological trauma, or other mental disorder, incurred or aggravated in the line of duty in the active military, naval, or air service on or after September 11, 2001, that renders the veteran or servicemember in need of personal care services." 38 C.F.R. § 71.15 (2015). This definition was firmly grounded in the statutory text of the Caregiver Act, which referred to "a serious injury (including traumatic brain injury, psychological trauma, or other mental disorder) [as] incurred or aggravated in the line of duty." 38 U.S.C. § 1720G(a)(2)(B). The Final Rule, however, departs from the Caregiver Act because the Final Rule adopts an entirely new definition without any basis in the statutory text, namely that a "serious injury"

means a threshold disability rating of 70%. 38 C.F.R. § 71.15 (Oct. 1, 2020).

VA's Final Rule is arbitrary and capricious and exceeds VA's authority because nothing in the Caregiver Act authorizes VA to impose a disability-rating-based threshold for a "serious injury." When Congress passed the Caregiver Act, it provided a joint statement that "[s]everely injured veterans are defined as those who need personal care services because they are unable to perform one or more independent activities of daily living, require supervision as a result of neurological or other impairments, or need personal care services because of other matters specified by the VA." *See* Congressional Record—Senate, Joint Statement on Caregivers and Veterans Omnibus Health Services Act, 2010 WL 1627641, 156 Cong. Rec. S2566-01, S2567 (Apr. 22, 2010).

Both the statutory text and legislative history show that Congress intended a "serious injury" to be defined based on a veteran's inability to perform one or more ADLs or need for supervision due to mental impairments, not a disability rating of 70% or higher. VA itself has recognized that the Caregiver Program provides distinct benefits from disability benefits, and Caregiver Program benefits are "not designed to

supplement, replace, *or be dependent on the level of* disability compensation received by the veteran.” Caregivers Program Final Rule, 80 Fed. Reg. 1357, 1368 (Jan. 9, 2015) (emphasis added).

Even if VA could support a disability-rating-based definition for a serious injury, VA’s selection of a 70% threshold rating requirement is arbitrary and excessive. A 70% rating is associated with providing VA-required nursing home care, yet Congress considered and rejected cabining Caregiver Program eligibility to veterans who would otherwise require nursing home care by a vote of 66-32. *See* Congressional Record—Senate, Caregiver and Veterans Omnibus Health Services Act of 2009, 2009 WL 3877308, 155 Cong. Rec. S11523-02 (Nov. 19, 2009). Senators recognized that such a limitation could “potentially shut out veterans suffering from severe mental illness, or those learning to adapt to life at home with blindness or amputations.” *Id.* at S11537-538; *see also* Statement of Ralph Ibson, Senior Fellow for Health Policy, Wounded Warrior Project, Hearing on Pending Health-Related Legislation, S. Hrg. 111-76 at 112 (Apr. 22, 2009), <https://www.govinfo.gov/app/details/CHRG-111shrg49462/CHRG-111shrg49462>.

## 2. In Need of Personal Care Services

VA also previously defined “personal care services” as “care or assistance of another person necessary in order to support the eligible veteran’s health and well-being, and perform personal functions required in everyday living ensuring the eligible veteran remains safe from hazards or dangers incident to his or her daily environment.” 38 C.F.R. § 71.15 (2015). The Final Rule keeps this definition, but adds a new requirement that personal care services must be performed “in-person” for the Caregiver Program. 38 C.F.R. § 71.15 (Oct. 1, 2020).

The Final Rule exceeds VA authority because the Caregiver Act already expressly defines the term “personal care services” as “services that provide the veteran” with “[a]ssistance with one or more activities of daily living,” “[s]upervision or protection based on symptoms or residuals of neurological or other impairment or injury,” “[r]egular or extensive instruction or supervision without which the ability of the veteran to function in daily life would be seriously impaired,” or “[a]ny other non-institutional extended care (as such term is used in section 1701(6)(E) of this title).” 38 U.S.C. § 1720G(d)(4). VA recognizes that the Caregiver Act expressly provides this definition for “personal care

services.” 85 Fed. Reg. 46,236. No part of the definition requires services to be “in-person.” Nor does any part of the definition require any “alternative in-person caregiving arrangements” in the absence of “in-person” personal care services. 85 Fed. Reg. 46,229.

VA attempts to sidestep this statutory definition by theorizing that the Caregiver Act was “intended to provide assistance to Family Caregivers who are required to be physically present to support eligible veterans in their home,” 85 Fed. Reg. 46,228, but that is also incorrect. The Caregiver Act defines a “family caregiver” as “a member of the family of the veteran” without any requirement that such a member of the family must live with the veteran. 38 U.S.C. § 1720G(d)(3)(A). By contrast, if the family caregiver is not a member of the family of the veteran, that caregiver must live with the veteran. 38 U.S.C. § 1720G(d)(3)(B). Thus, the Caregiver Act seeks to enable a veteran to obtain care in his or her home regardless of where his or her caregiver resides, by providing the option of care from a family member who lives separately, without any specific requirement for “alternative in-person caregiving arrangements.” 85 Fed. Reg. 46,229.

While “personal care services” are often performed in-person, they may also be performed remotely, such as when the caregiver checks in to remind the veteran to take medication, guides the veteran through a task that does not require physical assistance, provides mental or emotional support to the veteran, or remains on call or available to physically assist the veteran as the need arises—all activities that may impose sizeable and unscheduled demands on the caregiver’s time.

### **3. Inability to Perform Daily Activities of Living**

Before the Final Rule, a veteran qualified for Caregiver Program benefits based on an inability to perform one or more of seven ADLs, wherein the frequency of the required assistance determined the amount of compensation, but the frequency did not affect eligibility. 38 C.F.R. § 71.40(c)(4)(ii) (2015). VA would assign clinical ratings based on the veteran’s ability to complete each ADL, from zero assistance (0%), to “minimal assistance” (1-25%), “moderate assistance” (26-50%), “maximal assistance” (51-75%), and “total assistance” (76-100%). 38 C.F.R. § 71.40(c)(4)(iii) (2015). A veteran who on average required “maximal assistance” (51-75%) or “total assistance” (76-100%) for seven ADLs would qualify for a full-time stipend. 38 C.F.R. § 71.40(c)(4)(iii)-



(iv) (2015). VA also previously reasonably found that a requirement for less assistance on one ADL could be offset by a requirement for more assistance on another ADL. *Id.*

The Final Rule, however, is arbitrary and capricious because a veteran could require “maximal assistance” (51-75%) or even “total assistance” (which includes 76-99%) on one ADL, yet be ineligible for any benefits. *See* 38 C.F.R. § 71.15 (Oct. 1, 2020). Even if a veteran requires “total assistance” (which includes 76-99%) for all seven ADLs, that veteran would not even be eligible for benefits under the Final Rule because he or she does not require assistance 100% of the time for any single ADL. *See id.* Nothing in the Caregiver Act provides VA with authority to set such a draconian new threshold of 100% assistance to qualify for benefits. Nor is there any such support in the legislative history. Congress tacitly approved VA’s prior method of determining eligibility for benefits using zero, minimal, moderate, maximal, and total assistance, as well as the ability to offset assistance required for one or more ADLs against other ADLs, without requiring a veteran to show assistance 100% of the time on a single ADL, because Congress could have adopted a rule requiring 100% assistance but chose not to.

#### **4. Need for Supervision, Protection, or Instruction**

In addition to qualifying for benefits based on the seven ADLs listed above, a veteran could also previously qualify based on either a need for supervision or protection based on one or more of the seven supervision or protection impairments listed above, or “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.” 38 U.S.C. § 1720G(a)(2)(C)(ii)-(iii). The Final Rule, however, eliminated the seven supervision or protection impairments listed above and instead requires a veteran to show “a functional impairment that directly impacts the individual’s ability to maintain his or her personal safety on a daily basis.” 38 C.F.R. § 71.15 (Oct. 1, 2020).

The Final Rule exceeds VA authority because it impermissibly narrows the eligibility criteria by requiring a veteran to meet two statutory eligibility criteria, even though the Caregiver Act requires meeting only one out of the two criteria to qualify for benefits. 38 U.S.C. § 1720G(a)(2)(C)(ii)-(iii). According to VA, the second and third statutory eligibility criteria are indistinguishable because they address mental impairments, while the first statutory eligibility criteria

addresses physical impairments based on an inability to perform ADLs. 85 Fed. Reg. 46,242. That is incorrect because the Caregiver Act makes no such distinction between physical and mental health impairments with regard to inability to perform ADLs, a need for supervision or protection, or a need for regular or extensive instruction or supervision to prevent impairment to a veteran’s ability to function in daily life. 38 U.S.C. § 1720G(a)(2)(C)(i)-(iii). The Final Rule is also arbitrary because it requires a veteran to show “impairment” to “personal safety” on a “daily basis,” when the statute only requires “impairment” to the veteran’s ability to “function” in “daily life.” *Compare* 38 C.F.R. § 71.15 (Oct. 1, 2020), *with* 38 U.S.C. § 1720G(a)(2)(C)(ii)-(iii).

Instead of improperly combining two statutory eligibility criteria into one narrower regulatory definition, VA could have and should have adopted two separate regulatory definitions consistent with the Caregiver Act.

## **5. Geographic Residence Restriction**

The Caregiver Program also previously did not restrict eligibility based on geographic residence. The Final Rule’s restriction on Caregiver Program eligibility to veterans who reside in a “State” as

defined at 38 U.S.C. § 101(20) (*see* 85 Fed. Reg. 46,293), is arbitrary and capricious because nothing in the Caregiver Act permits any geographic restriction on eligibility for benefits. 38 U.S.C. § 1720G. Far from allowing location to be a basis for denying benefits, the Caregiver Act expressly requires VA to consider the “geographic area” of the eligible veteran in determining the “amount” of benefits to award. 38 U.S.C. § 1720G(a)(3)(C)(ii). VA’s practice of requiring veterans to re-apply for benefits solely because the veteran moved to a new State is also improper for the same reason: the veteran’s State should impact only the benefits amount, not eligibility.

VA also routinely provides benefits under other programs to veterans who reside outside the U.S., such as the Specially Adaptive Housing, the Education and Vocational Training, and Foreign Medical programs. 38 C.F.R. § 36.4405(a)(5)(ii); 38 C.F.R. § 21.130; 38 C.F.R. § 17.35. The Congressional Research Service has also noted that one reason why Congress enacted the Caregiver Act was so that private sector caregivers could address geographic concerns. *See* CRS Report R45390, at 3 (Nov. 1, 2018), <https://fas.org/sgp/crs/misc/R45390.pdf>.

## **B. Benefit Calculation**

This Petition also challenges the Final Rule’s reduction of benefits based on the General Schedule (GS) scale, and the requirement that a veteran be unable to self-sustain to qualify for a full monthly stipend.

### **1. Reduction of Benefits Based on the GS-Scale**

VA’s initial regulations implementing the Caregiver Program properly recognized that the Caregiver Act required VA to calculate a stipend that was “not less than the monthly amount a commercial home health care entity would pay an individual in the geographic area of the eligible veteran to provide equivalent personal care services to the eligible veteran.” 38 U.S.C. § 1720G(a)(3)(C)(ii). VA calculated a “combined rate” based on “the Bureau of Labor Statistics (BLS) hourly wage rate for home health aides at the 75th percentile in the eligible veteran’s geographic area of residence, multiplied by the Consumer Price Index for All Urban Consumers (CPI-U).” 38 C.F.R. § 71.15 (2015). This calculation properly met both statutory requirements that the stipend be “not less than the monthly amount a commercial home health care entity would pay,” and account for the “geographic area of the eligible veteran[.]” 38 U.S.C. § 1720G(a)(3)(C)(ii).

The Final Rule, however, departs from the statutory mandate to pay commercial rates because it replaces the “combined rate” with a new government-rate-based “monthly stipend rate” using “the Office of Personnel Management (OPM) [GS] Annual Rate for grade 4, step 1, based on the locality pay area.” 85 Fed. Reg. 46,294. VA conceded that it is using the GS rate to avoid allegedly “inflated stipend rates” in certain “geographic regions.” 85 Fed. Reg. 46,270. Yet the Caregiver Act expressly provides that VA shall pay commercial rates. 38 U.S.C. § 1720G(a)(3)(C)(ii). The Final Rule exceeds VA authority by reducing benefits in certain geographic areas, contrary to the statutory mandate to pay commercial rates based on geographic residence. *Compare* Occupational Employment & Wages, 31-1120 Home Health & Personal Care Aides (May 2019), <https://www.bls.gov/oes/current/oes311120.htm>, with General Schedule (GS) PayScale Table for 2019, <https://www.federalpay.org/gs/2019>.

## **2. Reduction of Benefits Based on the “Unable to Self-Sustain” Requirement**

To calculate the amount of the monthly benefit for each eligible veteran, VA previously assigned a rating of zero, minimal, moderate, maximal, or total assistance for each of the seven ADLs, or each of the

seven supervision or protection impairments. 38 C.F.R. § 71.40(c)(4)(i)-(ii) (2015). VA then summed these ratings to determine eligibility for a full stipend. An average rating of maximal (51-75%) or total assistance (76-100%) across seven ADLs or seven supervision or protection impairments would qualify for a full stipend. *Id.* § 71.40(c)(4)(iii)-(iv). A lower rating for one ADL could be offset by a higher rating in another ADL. *Id.* An average rating of moderate assistance (26-50%) would qualify for a mid-tier stipend, and a rating of minimal assistance (1-25%) on at least one ADL would qualify for a low-tier stipend. *Id.*

The Final Rule abolishes these calculations and instead considers whether a veteran is “unable to self-sustain” because he or she requires assistance on three or more ADLs 100% of the time, or requires “supervision, protection, or instruction on a continuous basis.” 38 C.F.R. § 71.40(c)(4)(i)(A) (Oct. 1, 2020). The Final Rule is arbitrary and capricious for the same reasons discussed *supra*, § VI.A.3 regarding ADLs, because a veteran could require “maximal assistance” (51-75%) or “total assistance” (which includes 76-99%) for all seven ADLs, yet still be ineligible for any benefits because he or she does not require assistance 100% of the time for three or more ADLs, or “supervision,

protection, or instruction on a continuous basis.” 38 C.F.R. § 71.15 (Oct. 1, 2020).

The Final Rule is also arbitrary and capricious for the same reasons discussed *supra*, § VI.A.4 because it combines two statutory eligibility criteria and requires a veteran to show “impairment” to “personal safety” on a “daily basis.” Moreover, establishing a “[n]eed for supervision, protection, or instruction on a continuous basis” is virtually impossible to prove because it is basically standardless. VA represents that “[t]he terms daily and continuous relate to the frequency with which intervention is required” to maintain “personal safety,” and that “continuous” means a “higher level of personal care needs” than “daily.” 85 Fed. Reg. 46,239, 46,273. But even VA acknowledges that a “[n]eed for supervision, protection, or instruction on a continuous basis could be demonstrated by a regular, consistent, and prevalent need.” 85 Fed. Reg. 46,273. Thus, there are no criteria for veterans to establish their need for assistance on a “continuous” basis, leaving this determination open to inconsistent interpretation by VA and generally arbitrary.

Even if a veteran requires “total assistance” (which includes 76-99%) for all seven ADLs, or requires assistance 100% of the time on two



ADLs, he or she would not qualify for full benefits under the Final Rule because he or she does not require assistance 100% of the time for three or more ADLs, or “supervision, protection, or instruction on a continuous basis.” 38 C.F.R. § 71.15 (Oct. 1, 2020). These changes make it much harder for a family caregiver to receive a full stipend, which arbitrarily and adversely impacts veterans in the Caregiver Program.

The Final Rule also exceeds VA authority because the Caregiver Act requires VA to account for the “amount and degree of personal care services provided,” the “assessment by the family caregiver of the needs and limitations of the veteran,” the “extent to which the veteran can function safely and independently in the absence of such supervision, protection, or instruction,” and the “amount of time required for the family caregiver to provide such supervision, protection, or instruction to the veteran.” 38 U.S.C. § 1720G(a)(3)(C)(i), (iii). VA’s prior rules provided flexibility to consider these statutory requirements, but the Final Rule does not account for any assessment by the family caregiver of the needs and limitations of the veteran, nor does it consider the amount and degree of personal care services provided, or the amount of

time required for the family caregiver to provide any necessary supervision, protection or instruction to the veteran.

## CONCLUSION

For these reasons, Petitioners are adversely affected by the final rules challenged herein, and respectfully petition this Court for review.

Dated: November 30, 2020

/s/ Michael Franzinger

Michael Franzinger  
Counsel of Record  
SIDLEY AUSTIN LLP  
1501 K Street, N.W.  
Washington, D.C. 20005  
(202) 736-8000  
mfranzinger@sidley.com

Timothy Q. Li  
SIDLEY AUSTIN LLP  
787 Seventh Avenue  
New York, NY 10019  
(212) 839-5300

Barton F. Stichman  
NATIONAL VETERANS LEGAL  
SERVICES PROGRAM  
1600 K Street, N.W., Suite 500  
Washington, DC 20006  
(202) 621-5724

*Counsel for Petitioners*

## CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of November 2020, pursuant to Fed. Cir. Rule 25(b), I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit using the Court's CM/ECF system.

I further certify that on this same day, pursuant to Fed. Cir. Rule 25(e), a true and correct copy of the foregoing was served via Federal Express on the following:

Robert L. Wilkie  
Secretary of Veterans Affairs  
U.S. Department of Veterans Affairs  
810 Vermont Ave., N.W.  
Washington, DC 20420

/s/ Michael Franzinger  
Michael Franzinger  
Counsel of Record  
SIDLEY AUSTIN LLP  
1501 K Street, N.W.  
Washington, D.C. 20005  
(202) 736-8000  
mfranzinger@sidley.com  
  
*Counsel for Petitioners*

# **EXHIBIT A**

**DEPARTMENT OF VETERANS  
AFFAIRS**

**38 CFR Part 71**

**RIN 2900-AQ48**

**Program of Comprehensive Assistance  
for Family Caregivers Improvements  
and Amendments Under the VA  
MISSION Act of 2018**

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule.

**SUMMARY:** The Department of Veterans Affairs (VA) adopts as final, with changes, a proposed rule to revise its regulations that govern VA's Program of Comprehensive Assistance for Family Caregivers (PCAFC). This final rule makes improvements to PCAFC and updates the regulations to comply with the recent enactment of the VA MISSION Act of 2018, which made changes to the program's authorizing statute. This final rule allows PCAFC to better address the needs of veterans of all eras and standardize the program to focus on eligible veterans with moderate and severe needs.

**DATES:** The effective date is October 1, 2020.

**FOR FURTHER INFORMATION CONTACT:** Cari Malcolm, Management Analyst, Caregiver Support Program, Care Management and Social Work, 10P4C, Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Ave. NW, Washington, DC 20420, (202) 461-7337. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** Title I of Public Law 111-163, Caregivers and Veterans Omnibus Health Services Act of 2010 (hereinafter referred to as "the Caregivers Act"), established section 1720G(a) of title 38 of the United States Code (U.S.C.), which required VA to establish a program of comprehensive assistance for Family Caregivers of eligible veterans who have a serious injury incurred or aggravated in the line of duty on or after September 11, 2001. The Caregivers Act also required VA to establish a program of general caregiver support services, pursuant to 38 U.S.C. 1720G(b), which is available to caregivers of covered veterans of all eras of military service. VA implemented the program of comprehensive assistance for Family Caregivers (PCAFC) and the program of general caregiver support services (PGCSS) through its regulations in part 71 of title 38 of the Code of Federal Regulations (CFR). Through PCAFC, VA provides Family Caregivers of eligible veterans (as those terms are defined in 38 CFR 71.15) 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), a monthly stipend payment, and access to health care (if qualified) through the Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA). 38 U.S.C. 1720G(a)(3), 38 CFR 71.40.

On June 6, 2018, the John S. McCain III, Daniel K. Akaka, and Samuel R. Johnson VA Maintaining Internal Systems and Strengthening Integrated Outside Networks Act of 2018 or the VA MISSION Act of 2018, Public Law 115-182, was signed into law. Section 161 of 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, 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. The VA MISSION Act of 2018 established that expansion of PCAFC to Family Caregivers of eligible veterans who incurred or aggravated a serious injury in the line of duty before September 11, 2001, will occur in two phases. The first phase will begin when VA certifies to Congress that it has fully implemented a required information technology system (IT) that fully supports PCAFC and allows for data assessment and comprehensive monitoring of PCAFC. During the 2-year period beginning on the date of such certification to Congress, PCAFC will be expanded to include Family Caregivers of eligible veterans who have a serious injury (including traumatic brain injury, psychological trauma, or other mental disorder) incurred or aggravated in the line of duty in the active military, naval, or air service on or before May 7, 1975. Two years after the date of submission of the certification to Congress, PCAFC will be expanded to Family Caregivers of all eligible veterans who have a serious injury (including traumatic brain injury, psychological trauma, or other mental disorder) incurred or aggravated in the line of duty in the active military, naval, or air service, regardless of the period of service in which the serious injury was incurred or aggravated in the line of duty in the active military, naval, or air service. This final rule implements section 161 of the VA MISSION Act of 2018 as well as makes improvements to PCAFC to

improve consistency and transparency in decision making.

On March 6, 2020, VA published a proposed rule to revise its regulations that govern PCAFC to make improvements to PCAFC and update the regulations to comply with section 161 of the VA MISSION Act of 2018. 85 FR 13356 (March 6, 2020). In response to this proposed rule, VA received 273 comments, of which one comment was withdrawn by the submitter and one comment was a duplicate submission, for a total of 271 unique comments. More than 37 comments expressed general support for the proposed rule, in whole or in part. We appreciate the support of such comments, and do not address them below. Other comments expressed support or disapproval, in whole or in part, with substantive provisions in the proposed rule, and we discuss those comments and applicable revisions from the proposed rule below. We note that the discussion below is organized by the sequential order of the provisions as presented in the proposed rule; however, we only address the provisions that received comments below. Additionally, we have included a section on miscellaneous comments received. We further note that numerous commenters raised individual matters (e.g., struggles they may currently be having) which are informative to VA, and to the extent these individuals provided their personal information, we did attempt to reach out to them to address their individual matters outside of this rulemaking.

In the proposed rule and in this final rule, we provide various examples to illustrate how these regulations will be applied, but we emphasize here that clinical evaluation is complex and takes into account a holistic picture of the individual; therefore, we note that examples provided are for illustrative purposes only and should not be construed to indicate specific veterans and servicemembers and their caregivers will or will not meet certain regulatory criteria or requirements.

**§ 71.10 Purpose and Scope**

Several commenters raised concerns about restricting PCAFC to a "State" as that term is defined in 38 U.S.C. 101(20) because 38 U.S.C. 1720G does not place any geographic restrictions on PCAFC, and such restriction would be in the view of the commenters, arbitrary, unreasonable, and without sufficient justification, particularly as VA provides other benefits and services to veterans who reside outside of a State. One commenter shared that they lived in the United Kingdom (U.K.), but believed that they should be eligible for

PCAFC as many of the PCAFC processes and requirements can be completed in the U.K. despite being outside of a State (for example, the application can be submitted by mail or online; caregiver training is available online; assessments and monitoring can be done via telehealth, Foreign Medical Program (FMP), social media, or through the use of a contract with a home health agency); and benefits such as a stipend can be based on a U.K. locality rate. This same commenter recommended revising the language in this section to state that “these benefits are provided to those individuals residing in a State as that term is defined in 38 U.S.C. 101(2). Individuals who reside outside a State will be considered for benefits on a case by case basis.” While this commenter referenced section 101(2), we believe the commenter meant to reference section 101(20) as the definition of State, for purposes of title 38, is contained in section 101(20). Section 101(20) defines State, in pertinent part, to mean each of the several States, Territories, and possessions of the United States, the District of Columbia, and the Commonwealth of Puerto Rico. In suggesting that the program could be administered through VA’s FMP, we generally disagree. The legal authority for the FMP bars VA from furnishing “hospital care” and “medical services” outside of a State except in the case of the stated exceptions. 38 U.S.C. 1724. This authority, as implemented, generally covers only hospital care and medical services, as those terms are defined in 38 U.S.C. 1701 and 38 CFR 17.30, that are required to treat a service-connected disability or any disability held to be aggravating a service-connected condition. Because PCAFC involves benefits that do not constitute “hospital care” or “medical services” and accounts for the care needs of eligible veterans unrelated to their service-connected disability or disabilities, PCAFC could not be administered through FMP. Lastly, telehealth services are medical services and therefore not available outside a “State,” except as provided for under the FMP.

As stated in the proposed rule, it has been VA’s practice since the launch of PCAFC and PGCSS in 2011 to only provide benefits to those individuals residing in a State; thus, the proposed changes merely codify an existing practice. In addition, it is currently not feasible for VA to provide benefits under part 71 outside of a State, specifically because “requirements of this part include in-home visits such as an initial home-care assessment under

current 38 CFR 71.25(e) and the provision of certain benefits that can be provided in-home such as respite care under current § 71.40(a)(4) and (c)(2), which would be difficult to conduct and provide in a consistent manner outside of a State.” 85 FR 13358 (March 6, 2020). Also, as noted in the proposed rule, administrative limitations prevent us from providing certain benefits under this part even in remote areas within the scope of the term “State.” Additionally, “ensuring oversight of PCAFC and PGCSS outside of a State would be resource-intensive and we do not believe there is sufficient demand to warrant the effort that would be required.” *Id.* Furthermore, we do not believe the use of contracted services would provide standardized care for participants and would hinder our ability to provide appropriate oversight and monitoring. While we understand the commenters’ concerns and appreciate the suggested changes, we are not making any changes based on this comment.

#### § 71.15 Definitions

We received many comments that either suggested revisions to or clarification of some terms defined in the proposed rule. We address these comments below as they relate to the term in the order they were presented in § 71.15 as proposed.

##### *Financial Planning Services*

We received multiple comments about financial planning services. One commenter was pleased with VA’s proposal to include financial planning services in the menu of Family Caregivers’ supports and services under PCAFC and we thank the commenter for their feedback. One commenter questioned why this service is being provided, whether it is indicative of a deeper problem, and what precautions and safety nets will be in place to ensure veterans are not exploited or abused. Furthermore, one commenter asserted that regardless of what services are provided to help with budgeting, families will become accustomed to and spend according to the monthly stipend received each month.

As stated in the proposed rule, we are adding this term to address changes made to 38 U.S.C. 1720G by the VA MISSION Act of 2018. Specifically, the VA MISSION Act of 2018 added financial planning services relating to the needs of injured veterans and their caregivers as a benefit for Primary Family Caregivers. Accordingly, financial planning services will be added to the benefits available to Primary Family Caregivers under 38

CFR 71.40(c)(5). Legislative history reflects that the addition of financial planning services to PCAFC assistance was influenced by the 2014 RAND Corporation-published report, *Hidden Heroes: America’s Military Caregivers*, which identified that few military caregiver-specific programs provided long-term planning assistance, including legal and financial planning, for military caregivers. S. Rep. No. 115–212, at 58 (2018) (accompanying S.2193, which contained language nearly identical to that enacted in sections 161–163 of the VA MISSION Act of 2018). The purpose of this benefit is to increase the financial capability of Primary Family Caregivers to be able to manage their own personal finances and those of the eligible veteran, as applicable. Furthermore, we will include in any contracts requirements such as minimum degree attainment and national certifications for individuals providing financial planning services, as well as mechanisms that would prohibit exploitation or abuse of caregivers and veterans (e.g., prohibit any form of compensation from the eligible veteran or Family Caregiver for the services provided) and that allow us to take any appropriate actions necessary to address related breaches of contract. We note that the contractor would be responsible for any liability arising from the financial planning services provided by it. Further, contractors are not VA employees and therefore not covered by the Federal Tort Claims Act.

We are not making any changes to the regulation based on these comments.

##### *In Need of Personal Care Services*

We proposed to define “in need of personal care services” to mean that the eligible veteran requires in-person personal care services from another person, and without such personal care services, alternative in-person caregiving arrangements (including respite care or assistance of an alternative caregiver) would be required to support the eligible veteran’s safety. A few commenters supported this definition of in need of personal care services, and we appreciate their support. Others raised concerns with the definition, and we address those comments below.

One commenter found this definition too restrictive, and to be a major change to PCAFC that would result in exclusion of current participants from the program. Similarly, another commenter further explained that this definition may unfairly discriminate against veterans who served on or after September 11, 2001 (referred to herein

as post-9/11) who currently qualify for the program but may not yet need this required level of care, and also may result in younger veterans believing they are not “disabled enough” for PCAFC. The same commenter noted that this definition would exclude veterans who may need assistance with activities of daily living (ADL), but do not otherwise need a professional home health aide or nursing home care. While we appreciate the commenters’ concerns, we believe these changes are supported by the statute and would help to reduce clinical subjectivity in PCAFC eligibility determinations. As provided in the proposed rule:

The statute makes clear the importance of regular support to an eligible veteran by allowing more than one Family Caregiver to be trained to provide personal care services. 38 U.S.C. 1720G(a)(5) and (6). Likewise, eligible veterans are provided protections under the statute in the absence of a Family Caregiver such as respite care during a family member’s initial training if such training would interfere with the provision of personal care services for the eligible veteran. 38 U.S.C. 1720G(a)(6)(D). Thus, we believe “in need of personal care services” under section 1720G(a)(2)(C) means that without Family Caregiver support, VA would otherwise need to hire a professional home health aide or provide other support to the eligible veteran such as adult day health care, respite care, or facilitate a nursing home or other institutional care placement.<sup>85</sup> FR 13359 (March 6, 2020).

Also, as previously stated we are standardizing PCAFC to focus on eligible veterans with moderate and severe needs, and we believe this definition supports this focus. Furthermore, “alternative in-person caregiving arrangements” are not limited to a professional home health aide, or nursing home care. There are many types of alternative caregiving arrangements that a veteran or servicemember may utilize or require in the absence of his or her Family Caregiver providing in-person personal care services. The personal care needs of eligible veterans participating in PCAFC vary and as such, so would the types of alternative caregiving arrangements they may require. Such arrangements may include adult day health care or other similar day treatment programs, assistance provided by a friend or family member informally or formally through a VA or community Veteran-Directed care program, or through volunteer organizations that train individuals to provide respite care. Thus, we believe this definition would

not discriminate against post-9/11 veterans and servicemembers who may utilize other alternative in-person caregiving arrangements other than a professional home health aide or nursing home care in the absence of their Family Caregiver. We note that PCAFC has been and will remain available to post-9/11 eligible veterans, and that the changes we are making are intended to support veterans of all eras of service, consistent with expansion of the program under the VA MISSION Act of 2018. We further refer commenters to the discussion of § 71.20 addressing commenters’ concerns that the proposed regulations would negatively impact post-9/11 veterans. Additionally, we recognize that there may be reluctance by some veterans, including post-9/11 veterans, to seek care and assistance because of perceived stigma or a belief that they are not “disabled enough,” and our goal is to reduce those concerns through outreach and education on all VA programs and services, to include PCAFC, that may help meet the needs of veterans and servicemembers and their caregivers. We are not making any changes based on these comments.

One commenter supported our definition of “in need of personal care services” because it clarified that such services are required in person. In contrast, another commenter disagreed with our assertion that the PCAFC was “intended to provide assistance to Family Caregivers who are required to be physically present to support eligible veterans in their homes.” <sup>85</sup> FR 13360 (March 6, 2020). They asserted that the statute is intended to enable a veteran to obtain care in his or her home regardless of where the caregiver is located, such that he or she could receive care remotely “such as when the caregiver checks in to remind the veteran to take his or her medication, guide the veteran through a task that he or she can complete without physical assistance, or provide mental and emotional support should the need arise.” VA’s requirement that the eligible veteran requires “in-person personal care services” is supported by the statute, and we are not persuaded by the commenter’s arguments to the contrary. Even putting aside the meaning of “personal,” with which the commenter takes issue, we believe the statute makes clear the importance of providing in-person personal care services by indicating that personal care services are provided in the eligible veteran’s home (38 U.S.C. 1720G(a)(9)(C)(i)) and by establishing an expectation that Family Caregivers are providing services equivalent to that of

a home health aide, which are generally furnished in-person and at home (38 U.S.C. 1720G(a)(3)(C)(ii), (iv)). See <sup>85</sup> FR 13360 (March 6, 2020). Also, rather than supporting the commenter’s argument that VA’s definition is unduly restrictive, we believe that 38 U.S.C. 1720G(d)(3)(B) also illustrates the importance of in-person personal care services by only authorizing a non-family member to be a Family Caregiver if the individual lives with the eligible veteran. We do not discount the importance of remote support that caregivers provide to veterans, such as medication reminders, remote guidance through a task via telephone, and mental and emotional support, but we do not believe that type of support alone rises to the level of support envisioned by the statute for eligible veterans who are in need of personal care services in PCAFC. This is particularly true as we standardize PCAFC to focus on eligible veterans with moderate and severe needs. <sup>85</sup> FR 13356 (March 6, 2020). VA’s definition of “in need of personal care services” is a reasonable interpretation of the statute, and we are not making any changes based on this comment. We do, however, recognize the commenter’s concern regarding consistency between PCAFC and PGCSS. As noted in VA’s proposed rule, the definition of “in need of personal care services” will not apply to restrict eligibility under 38 U.S.C. 1720G(b), which governs PGCSS, or any other VA benefit authorities. VA will consider whether changes to the regulations governing PGCSS are appropriate in the future.

One commenter agreed with the definition to the extent that VA is not requiring the Family Caregiver to always be present. It is not our intent to require a Family Caregiver to be present at all times, rather this definition establishes that the eligible veteran requires in-person personal care services, and without such personal care services provided by the Family Caregiver, alternative in-person caregiver arrangements would be required to support the eligible veteran’s safety. As stated by the commenter, this definition speaks to the type of personal care services needed by the eligible veteran, as the kind that must be delivered in person. We appreciate this comment and make no changes based upon it.

One commenter asked (1) whether a legacy participant determined to need in-person care services from another person, but who does not require assistance daily and each time an ADL is performed, would still be eligible to continue to participate in the PCAFC; and (2) whether a veteran who served

before September 11, 2001 (referred to herein as pre-9/11) who VA determines needs in-person care services from another person, but does not require assistance daily and each time, would be eligible for PCAFC. The commenter's questions and examples seem to merge and possibly confuse separate PCAFC eligibility requirements. To qualify for PCAFC under § 71.20(a)(3), a veteran or servicemember would need to be in need of personal care services (meaning the veteran or servicemember requires "in-person personal care services from another person, and without such personal care services, alternative in-person caregiving arrangements . . . would be required to support the eligible veteran's safety") based on either (1) an inability to perform an activity of living, or (2) a need for supervision, protection, or instruction, as such terms are defined in § 71.15 and discussed further below. The definition of "inability to perform an activity of daily living" refers to the veteran or servicemember requiring personal care services "each time" one or more ADLs is completed, and the definition of "need for supervision, protection, or instruction" refers to the individual's ability to maintain personal safety on a "daily basis." The veteran or servicemember could qualify on both of these bases, but would be required to qualify based on only one of these bases. To the extent the commenter is concerned about these other definitions, we further address comments about those definitions separately in their respective sections below. We are not making any changes based on this comment.

Another commenter acknowledged an understanding of the "in person" requirement, but requested that we clearly state that the care does not need to be hands-on, physical care, and that assistance can be provided through supervision, protection, or instruction while the veteran completes an ADL. A veteran or servicemember that is eligible for PCAFC based on the definition of need for supervision, protection, or instruction would require in-person personal care services. However, that does not always mean hands-on care is provided or required. We note that if an eligible veteran is eligible for PCAFC because he or she meets the definition of inability to perform an ADL, the in-person personal care services required to perform an ADL would be hands-on care. We further refer that commenter to the discussion on the definition of inability to perform an ADL, where we address similar comments regarding veterans who may require supervision,

protection, or instruction to complete ADLs. We make no changes based on this comment.

One commenter asked whether the use of community support professionals and resources (e.g., art therapy services, life skills coaching) that provide active supervision to the eligible veteran while performing other activities when the designated Family Caregiver is not present would affect eligibility for PCAFC. It was recommended VA clarify the role that non-designated individuals or organizations such as those identified in the previous sentence may play in an eligible veteran's life, and the commenter advocated that use of such services should not disqualify a veteran from PCAFC. As previously explained, it is not our intent to require that a Family Caregiver be present at all times. We acknowledge that all caregivers need a break from caregiving. It is important to note that respite care is a benefit provided to assist Family Caregivers, and we encourage the use of respite care by Family Caregivers. The definition of "in need of personal care services" ensures that PCAFC is focused on veterans and servicemembers who require in-person personal care services, and that in the absence of such personal care services, such individuals would require alternative in-person caregiving arrangements. This definition as well as all other PCAFC eligibility criteria are not intended to discourage the utilization of community support resources or community-based organizations who may provide care or supervision to the eligible veteran while the Family Caregiver is not present. We note, however, it is our expectation that the Family Caregiver actually provide personal care services to the eligible veteran. The requirements in §§ 71.20(a)(5) and 71.25(f) make clear that personal care services must be provided by the Family Caregiver, and that personal care services will not be simultaneously and regularly provided by or through another individual or entity. We further refer the commenter to the discussion of § 71.25 below. We are not making any changes based on these comments.

One commenter asserted that VA's definition is further clarified by other regulatory requirements concerning neglect of eligible veterans, specifically § 71.25(b)(3) ("[t]here must be no determination by VA of . . . neglect of the eligible veteran by the [Family Caregiver] applicant") and § 71.45(a)(1)(i)(B) (authorizing VA to revoke the designation of a Family Caregiver for cause when the Family Caregiver has neglected the eligible veteran). We used the "in-person"

language to address the eligible veteran's level of need, which is distinct from §§ 71.20(a)(5) and 71.25(f), which establish the expectations of the Family Caregiver to provide personal care services, and §§ 71.25(b)(3) and 71.45(a)(1)(i)(B), which address neglect. If the veteran or servicemember does not require in-person personal care services, there may be other VA health care programs more suitable to meet his or her needs. If the Family Caregiver is not providing care, which pursuant to "in need of personal care services" will include in-person care, we could initiate revocation based on noncompliance under § 71.45(a)(1)(ii)(A), or for cause under § 71.45(a)(1)(i), depending on the circumstances. We note that these are distinct criteria and considerations. To the extent the commenter was remarking that the presence of requirements regarding neglect generally mean that the Family Caregiver is providing care in person rather than remotely, we agree. We make no changes based on this comment.

One commenter disagreed with the creation of the definition because of the existing statutory and regulatory definition of "personal care services," and asserted that VA, by defining "in need of personal care services," is restricting the bases upon which an eligible veteran can be deemed in need of personal care services in section 1720G(a)(2)(C). The commenter also asserted that VA has never created a definition for other programs and services in which similar language is used. We note that section 1720G(a)(2)(C) provides the bases upon which an individual may be deemed in need of personal care services; however, it does not define an objective standard for what it means to be in need of personal care services, and we found it necessary to define this term for purposes of PCAFC. We reiterate from the proposed rule that our interpretation of the term "in need of personal care services" for purposes of PCAFC would not apply to other sections in title 38, U.S.C., that use the phrase "in need of" in reference to other types of VA benefits that have separate eligibility criteria. We are not required to interpret "in need of" in the same manner in every instance the phrase is used in title 38, U.S.C. See *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932) ([although] "there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning . . . the presumption is not rigid and readily yields whenever there



is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent"). We are not making any changes based on this comment.

One commenter that supported the definition suggested that eligibility assessment teams include an occupational therapist or have applicants evaluated by an occupational therapist to help ensure a more objective assessment. The commenter believes PCAFC disproportionately relies on self-reporting of functioning. We note that centralized eligibility and appeals team (CEAT) will determine eligibility, including whether the veteran is determined to be unable to self-sustain in the community, for purposes of PCAFC. These teams will be comprised of a standardized group of inter-professional, licensed practitioners with specific expertise and training in the eligibility requirements for PCAFC and the criteria for the higher-level stipend, and will include occupational therapists, as appropriate. We thank the commenter for their suggestion; however, as this specific commenter did not make any suggestions regarding the proposed rule itself, we are not making any changes based on this comment.

Two commenters restated our belief, as indicated in the proposed rule, that under 38 U.S.C. 1720G(a)(2)(C), "in need of personal care services" means that without Family Caregiver support, VA would otherwise need to hire a professional home health aide or provide other support to the eligible veteran, such as adult day health care, respite care, nursing home, or other institutional care. These two commenters further opined that this description does not include jail or prison. One of these commenters also referred to Veterans Health Administration (VHA) policy on Geriatric and Extended Care Services, eligibility for homemaker/home aide or related respite care services and home hospice services, and an Office of Inspector General (OIG) report related to caregivers being incarcerated or hospitalized. These commenters provide no further context as to their concerns related to the definition of "in need of personal care services." To the extent that these comments concern incarcerated or hospitalized veterans and caregivers, we refer the commenter to the discussion on discharge and revocations under § 71.45 further below. It is unclear why these comments refer to other VA health care programs, but we note that PCAFC is one of many VHA programs available to meet the

needs of eligible veterans. We make no changes based on these comments.

Another commenter noted that VA added a definition of "in need of personal care services," but also referred to the definition for "personal care services" as it is currently defined in § 71.15, then stated the terminology "is not specific and very narrow." The commenter asserted that it could therefore "disqualify many veterans" and "allows one to think that family caregiver support is not allowed and only qualifies for a hired professional home health aide or provide other support to the eligible veteran such as adult day health care, respite care, or facilitate a nursing home or other institutional care placement." It is unclear if these comments were in reference to the proposed definition of "in need of personal care services" or to the current definition of "personal care services." To the extent the commenter believes the definition for "personal care services" in current § 71.15 is too narrow, we did not propose to change that definition in this rulemaking and consider such comment outside the scope of this rulemaking. To the extent the commenter believes the definition for "in need of personal care services" is too narrow such that it would disqualify many veterans, lead one to believe that that Family Caregiver support is not allowed, and allow only a hired professional home health aide or other similar support, we disagree and we refer the commenter to the previous paragraphs in this section discussing this definition. We are not making any changes based on this comment.

One commenter also requested that VA clearly state in regulation that working is not an exclusion criterion for either the veteran or the Family Caregiver. This commenter stated that while VA has often publicly stated that working is not an exclusion criterion, they are aware of many situations when a Family Caregiver was discharged from PCAFC because either the veteran or Family Caregiver worked. We also received a similar comment in response to the definition of inability to perform an ADL, in which another commenter urged VA to include in the PCAFC regulations that employment does not exclude the veteran or the Family Caregiver from PCAFC, and noted they are aware of several instances where participants have been discharged from PCAFC because of employment. This commenter further stated that a veteran's ability to work does not mean that he or she does not need the same or higher level of assistance with ADLs as those catastrophically disabled veterans who are unable to work.

Relatedly, some commenters opposed allowing veterans to be eligible for PCAFC if they work full time.

Employment is not an automatic disqualifier for PCAFC. However, we decline to include language in the regulation to explicitly state that, as doing so could suggest that employment is not considered by VA in determining eligibility for PCAFC, which is not the case. While maintaining employment would not automatically disqualify a veteran or servicemember for PCAFC, employment and other pursuits, such as volunteer services and recreational activities, can and do inform VA regarding an individual's functional ability and would be considered during the evaluation of the veteran or servicemember. For example, if a veteran or servicemember travels for work or leisure and can independently manage alone for weeks at a time without the presence of a caregiver, that would likely indicate that the individual does not require personal care services "each time" he or she completes one or more ADLs.

Creating any specific requirements regarding employment for eligible veterans or Family Caregivers would be difficult because of the unique needs of every individual and the vast employment options, both with and without accommodations. For example, an eligible veteran in need of personal care services due to an inability to perform multiple ADLs because of quadriplegia may be able to maintain any number of professional opportunities with proper accommodations, and still qualify for PCAFC. As the needs and condition for each veteran or servicemember and his or her caregiver are unique, we do not believe it is reasonable to place restrictions on a veteran's or servicemember's ability to work.

In regards to the Family Caregiver's employment, it is not our intent to prevent Family Caregivers from obtaining and maintaining gainful employment as we are cognizant that the monthly stipend is an acknowledgement of the sacrifices made by Family Caregivers, but may fall short of the income a Family Caregiver would otherwise earn if gainfully employed. The Family Caregiver may have the ability to provide the required personal care services to the eligible veteran while maintaining employment. We acknowledge that each Family Caregiver's situation is unique, such that he or she may be able to work from home, have a flexible work schedule, or have a standard workplace and schedule. We understand that Family Caregivers may not be present all of the

time to care for the eligible veteran, and we do not expect them to provide care 24/7. However, they would be required to be available to provide the required personal care services to the eligible veteran. Thus, we decline to include language to state that employment is not an exclusionary factor for eligibility under part 71, and make no changes based on these comments.

#### *In the Best Interest*

We proposed to revise the current definition of in the best interest to mean a clinical determination that participation in PCAFC is likely to be beneficial to the veteran or servicemember, and such determination will include consideration, by a clinician, of whether participation in the program significantly enhances the veteran's or servicemember's ability to live safely in a home setting, supports the veteran's or servicemember's potential progress in rehabilitation, if such potential exists, increases the veteran's or servicemember's potential independence, if such potential exists, and creates an environment that supports the health and well-being of the veteran or servicemember.

Multiple commenters stated that they believe the focus on the potential for independence in the proposed definition of "in the best interest" is contradictory to the proposed definition of "serious injury," which would require a service-connected disability rating of 70 percent or more, and the requirement that the veteran or servicemember be in need of personal care services for a minimum of 6 months. One commenter further explained that contradiction, stating that not all serious injuries become less over time and therefore, independence should not be the highest achievable goal for PCAFC. The commenter stated that focusing on the veteran's ability for improvement does not fully acknowledge that a veteran's condition may never heal or get better over time. First, we note that while the comments appear to focus on serious injury, we are not requiring that the serious injury be connected to the eligible veteran's need for personal care services. Conditions other than the serious injury may be the reason the eligible veteran has a need for personal care services. We agree with the commenters that some eligible veterans may have serious injuries or other conditions, for which they are in need of personal care services, that may never improve over time, and PCAFC will continue to be available to such veterans and their caregivers if eligible. However, each individual is unique, and some eligible veterans may have

serious injuries that improve over time, and we want to support such veterans if they are able to recover or improve over time. Furthermore, "in some cases a clinician may determine that other care and maintenance options would be better to promote the [veteran's or servicemember's] functional capabilities and potential for independence." 76 FR 26149 (May 5, 2011). We also want to emphasize that the potential for independence is only one factor that will be considered by VA in determining whether the program is in the veteran's or servicemember's best interest. We are not making any changes based on these comments.

Several commenters raised concerns about the definition including potential for rehabilitation, in particular the "if such potential exists" language, as some veterans may have little or no potential for rehabilitation and should not be excluded from PCAFC. One commenter recommended that while the language "if such potential exists" provides some comfort, new language should be added to more explicitly state that veterans who fail to show improvement will not be excluded from the program. Another commenter noted that the phrase "if such potential exists" is confusing as to whether the program is intended to be permanent or rehabilitative; the commenter explained the language implies the program is permanent if the potential for independence does not exist. One commenter also raised concerns that this language can lead to VA removing veterans from PCAFC when they are benefitting from it due to having better access to an advocate for their medical care.

The current definition for in the best interest includes a consideration of whether participation in the program supports the veteran's or servicemember's potential for rehabilitation, if such potential exists, and we did not propose any changes to this part of the definition. Rather, we proposed to include an additional consideration of whether participation in the program increases the veteran's or servicemember's potential independence, if such potential exists. While we appreciate the commenters' concerns regarding the potential for rehabilitation, we believe these comments are beyond the scope of this rulemaking as we did not propose any changes to this part of the definition. However, we would like to clarify that the use of the phrase "if such potential exists" is intended to acknowledge that due to the conditions and impairments of some participants, a potential for rehabilitation or improved independence may not be reasonable,

achievable, or expected. Many veterans participating in PCAFC will have injuries, conditions, or diseases that worsen over time that do not afford them the opportunity for rehabilitation or improved independence. Others, however, may indeed be able to achieve a level of increased functioning beyond their current abilities. We wish to make it clear that PCAFC is a clinical program, and the goal of clinical programs is to maximize health and well-being. If it is determined that participation in PCAFC is providing a disincentive for a veteran's well-being, PCAFC may be determined to not be in the individual's best interest. Similarly, we wish to make it clear that when such potential for improved functioning is not deemed reasonable, the lack of potential does not disqualify an individual from PCAFC. We make no changes based on these comments.

Several commenters expressed concern that eligibility determinations are based on a veteran's ability to recover. Commenters further asserted that it is unlawful for VA to deny or revoke eligibility based on a standard that focuses only on those who will recover or are likely to recover. While these commenters did not specifically provide these comments in the context of the definition for in the best interest, we believe these comments are best addressed in the discussion of this definition. We note that we are not basing eligibility decisions based on a veteran's ability to recover, and PCAFC eligibility is not dependent on a veteran's or servicemember's ability to recover. However, we do want to support an eligible veteran if they are able to recover, rehabilitate, or improve over time. There are many instances in which an eligible veteran has minimal ability to recover, rehabilitate or improve, and PCAFC will continue to be available to such veterans and their caregivers. We further note that as part of this rulemaking, we are extending eligibility to those with progressive illnesses (see definition of serious injury), from which an eligible veteran may never recover. We make no changes based on these comments.

One commenter explained that this definition perpetuates a paternalistic and condescending approach of how the Department should provide care to veterans, assuming a veteran is incapable of understanding what health care is and what is not in their best interest, and that the veteran is incapable of making their own health care decisions. Additionally, another commenter recommended that the definition focus on decision-making capacity and competence, and surrogate

decision making, consistent with VHA policy regarding informed consent for clinical treatments and procedures.

Under 38 U.S.C. 1720G(a)(1)(B), VA “shall only provide support under [PCAFc] to a family caregiver of an eligible veteran if [VA] determines it is in the best interest of the eligible veteran to do so.” As stated in VA’s interim final rule establishing part 71, VA concludes that determinations of “in the best interest” must be clinical determinations, guided by VA health professionals’ judgment on what care will best support the health and well-being of the veteran or servicemember. 76 FR 26149 (May 5, 2011). While we appreciate the commenters’ concerns and suggestions, which seem to concern the overall purpose and scope of this definition, the commenters did not specifically address our proposed changes to this definition regarding the additional consideration of whether participation in the program increases the veteran’s or servicemember’s potential independence, if such potential exists. We make no changes based on these comments.

One commenter suggested that this definition not focus on the quality of the veteran and caregiver relationship, particularly as it is not appropriate or ethical to do so, except in circumstances that meet the definition of substantiated abuse or neglect consistent with applicable, related VHA policy on elder abuse and vulnerable adults. While we appreciate the commenter’s concern, this definition is not focused on the relationship and quality of a veteran’s or servicemember’s relationship with their Family Caregiver; rather, it is focused on whether it is in the best interest of the eligible veteran to participate in PCAFC. The relationship of the veteran or servicemember and the Family Caregiver is considered, but is not a determining factor when deciding if participation in PCAFC is in the best interest of the veteran or servicemember. We make no changes based on this comment.

Another commenter recommended that the definition be revised to automatically presume a veteran’s participation in PCAFC is in their best interest unless VA determines such participation is not in their best interest. As previously explained, we did not propose a new definition for “in the best interest.” Rather, we proposed to add an additional criterion to an already existing definition in § 71.15. Therefore, we believe this comment is beyond the scope of this rulemaking and we make no changes based on this comment.

Several commenters expressed concern about which clinician should

be allowed to make the determination of whether PCAFC is in the best interest for a veteran or servicemember.

Specifically, commenters were concerned that the clinician making the determination may not be the treating physician nor have any prior knowledge or experience with the veteran or servicemember. Additionally, one commenter suggested that the determination should be made with both the eligible veteran’s primary care doctor and primary provider of care to ensure those who have knowledge of the veteran’s needs are involved. As explained throughout this final rule, CEATs, composed of a standardized group of inter-professional, licensed practitioners, with specific expertise and training in the eligibility requirements for PCAFC, will make determinations of eligibility, including “in the best interest,” and whether the veteran is determined to be unable to self-sustain in the community. Clinical staff at local VA medical centers will conduct evaluations of PCAFC applicants with input provided by the primary care team to the maximum extent practicable. This information will be provided to the CEATs for use in making eligibility determinations, including whether the veteran is determined to be unable to self-sustain in the community for the purposes of PCAFC. As explained in the discussion on primary care team, we are revising the definition of primary care team in this final rule to ensure that those medical professionals, including a VA primary care provider, who care for the veteran and have knowledge of the veteran’s needs and treatments, are part of the primary care team. We further note that any documentation from a non-VA provider that the veteran or servicemember provides will be available to VA for purposes of PCAFC evaluation and eligibility determinations. We make no changes based on these comments.

A few commenters questioned why VA did not provide the proposed revised definition for in the best interest so that the public could review and comment. As indicated in the proposed rule, the current language in the definition would generally remain; however, we are replacing the phrase “veteran or servicemember’s” with “veteran’s or servicemember’s” and adding that a clinician would also consider whether participation in PCAFC “increases the veteran’s or servicemember’s potential independence, if such potential exists.” 85 FR 13360 (March 6, 2020). Furthermore, the proposed rule

provided the revised definition for the public to review and comment on:

In the best interest means, for the purpose of determining whether it is in the best interest of the veteran or servicemember to participate in the Program of Comprehensive Assistance for Family Caregivers under 38 U.S.C. 1720G(a), a clinical determination that participation in such program is likely to be beneficial to the veteran or servicemember. Such determination will include consideration, by a clinician, of whether participation in the program significantly enhances the veteran’s or servicemember’s ability to live safely in a home setting, supports the veteran’s or servicemember’s potential progress in rehabilitation, if such potential exists, *increases the veteran’s or servicemember’s potential independence, if such potential exists*, and creates an environment that supports the health and well-being of the veteran or servicemember.

85 FR 13405 (March 6, 2020) (emphasis added). We are not making any changes based on these comments.

#### *Inability To Perform an Activity of Daily Living (ADL)*

VA proposed to modify its definition of inability to perform an activity of daily living (ADL) to mean that a veteran or servicemember requires personal care services each time he or she completes one or more of the specified ADLs, and would thereby exclude veterans and servicemembers who need help completing an ADL only some of the time the ADL is completed. VA received numerous comments about this proposed definition. Many commenters believe this definition to be too limiting and some suggested a less restrictive definition. Others requested clarification or suggested alternative approaches.

Several commenters raised concerns with the part of this definition that would require that a veteran or servicemember require personal care services “each time” he or she completes one or more ADL, and urged VA to not impose this requirement. Specifically, their concerns are that this definition is too limiting, is more restrictive than the current PCAFC, is too narrow to properly evaluate a veteran’s disability and symptoms, and may result in veterans being ineligible for PCAFC when they may need more assistance than those who are determined eligible. Several commenters asserted that some veterans may not need assistance with one or more ADLs each time every day; they may only need assistance some or most of the time; and that the assistance needed can vary over time, may fluctuate (even throughout the day, based on medication or repeated motion, etc.), and can vary based on

circumstances (e.g., weather, after surgery or physical therapy, seasonally). Numerous examples were provided by commenters of situations in which they assert a veteran may need caregiving on a regular basis (and potentially more so than others who would qualify under the definition) but would not meet the definition of inability to perform an ADL because they do not need assistance every time they perform an ADL. For example, one commenter indicated a veteran with severe traumatic brain injury (TBI) who has an inability to regulate mood, memory loss, or an inability to follow proper hygiene standards may not require assistance every day, but still requires caregiving on a regular basis. Another commenter asserted that the proposed criteria “would discriminate against severely disabled veterans with musculoskeletal and/or neurological conditions that limit muscle endurance,” that is, “veterans with sufficient muscle force to complete one ADL instance without assistance but due to having to repeat the ADL throughout the course of the day would eventually require assistance would therefore not be eligible,” and “would also discriminate against other severe disabilities that relapses and remits, or that waxes and wanes, including mental health and cognitive impairments.” One commenter asserted that this “all or nothing” approach is contrary to how health care and caregiving should be treated, resulting in harm to veterans. One commenter recommended the definition should use “requires personal care services most of the time when attempting to complete one or more of the following . . .” or similar language. Other commenters recommended clarifying that required assistance may vary over time or from one day to the next. Another commenter asserted that the requirement is not consistent with VA’s “long-established acknowledgement that an injury is not stable and changes,” and specifically cited to VBA’s Schedule for Rating for the musculoskeletal system at 38 CFR 4.40 and 4.45 in asserting that a veteran with functional loss of the musculoskeletal system may experience additional loss of function during repeated motions over time and flare-ups.

Other commenters requested clarification on how VA would consider ADLs that are not completed every day, including a commenter who recognized that the frequency with which some ADLs are completed can vary based on the individual’s clinical needs, such as bathing.

Some commenters asserted that the definition fails to support efforts by a

catastrophically disabled veteran to exert even a small level of independence, when possible, and that because some veterans have spent years and decades striving for a degree of independence, an ability to infrequently perform ADLs should not disqualify a veteran from PCAFC.

While we appreciate the commenters’ concerns, we make no changes based on these comments, and address them below.

First, we note that the definition of inability to perform an ADL is an objective standard used to evaluate eligibility for PCAFC. This determination is specific to PCAFC and does not indicate whether a veteran or servicemember is in need of, and eligible for, other health care benefits and services. If a veteran or servicemember does not meet this definition, they may not otherwise be eligible for PCAFC. However, it does not mean that he or she does not require, or is ineligible for, other VA benefits and services. For veterans and servicemembers who are not eligible for PCAFC, we will assist them, as appropriate, in considering what other health care programs may best meet their needs.

As explained in the proposed rule and reiterated here, this definition requires that a veteran or servicemember need personal care services each time he or she completes any of the ADLs listed in the definition. 85 FR 13360 (March 6, 2020). We would not require the veteran or servicemember qualifying for PCAFC based on an inability to perform an ADL need personal care services on a daily basis. As stated in the proposed rule:

Although the statute refers to an eligible veteran’s inability to perform one or more activities of daily living as a basis upon which he or she can be deemed in need of personal care services (38 U.S.C. 1720G(a)(2)(C)(i)), we recognize that not all activities of daily living need to be performed every day. For example, bathing is included in the current § 71.15 definition of “[i]nability to perform an activity of daily living,” but bathing may not be required every day. A veteran may be able to maintain health and wellness by adhering to a less frequent bathing routine. *Id.* at 13361.

As we also explained in the proposed rule, this definition is not met if a veteran or servicemember needs help completing an ADL only some of the time that the ADL is completed. *Id.* We believe the proposed definition delineates an objective frequency requirement that will enable VA to operationalize and standardize PCAFC across the country and is consistent

with our goal of focusing PCAFC on eligible veterans with moderate and severe needs. The definition sets forth a consistent, standardized, and clear requirement, by specifying that a veteran or servicemember requires personal care services each time the ADL is completed, regardless of which ADL it is. We believe that the requirement that assistance be needed each time the ADL is completed equates to a veteran or servicemember requiring a moderate amount of personal care services. Each ADL is treated the same irrespective of the specific tasks required to complete the ADL or frequency with which it is completed. Reliance on a Family Caregiver for any one of the seven ADLs results in a self-care deficit that affects the veteran’s or servicemember’s quality of life.

The definition of an inability to perform an ADL would only be met if a veteran or servicemember needs personal care services each time that he or she completes an ADL as indicated through a clinical evaluation of the veteran’s functional abilities, with input by the veteran or servicemember and caregiver. We acknowledge the degree of assistance may vary; however, a degree of hands-on assistance will be required each time the ADL is performed. In some cases, the degree of assistance that a veteran or servicemember may need to complete the ADL may vary throughout the day. In some instances, the veteran or servicemember may only need minimal assistance completing the ADL, but in other instances throughout the day may require moderate assistance. For example, veterans and servicemembers who have muscle weakness, lack of dexterity, or fine motor skills, may only need assistance with removing clothing when toileting at the beginning of the day, but later in the day they may require assistance with removing clothing, performing appropriate hygiene and redressing when completing the task of toileting.

We considered whether we should require the definition of inability to perform an ADL include daily assistance with an ADL instead of assistance each time an ADL is completed, but we have determined that use of daily instead of each time would result in less consistency and clarity, as it would require us to include exceptions for certain ADLs, such as grooming and bathing, that may not be completed on a daily basis. These exceptions would create confusion in applying the definition and result in less consistency and standardization in the application of this definition.

Similarly, we did not define inability to perform an ADL to require assistance

with an ADL most or majority of the time because we believe such terms are too vague and subjective, leading to inconsistencies in interpretation and application. Using most or majority of the time instead of each time would be difficult to quantify, and would require us to establish an arbitrary threshold.

To the extent that a commenter was concerned that this definition would exclude veterans who may need more assistance than those who cannot independently accomplish one ADL, we respectfully disagree for the reasons described above. We believe that if a veteran or servicemember needs assistance with multiple ADLs, it is likely that at least one of those ADLs requires assistance each time the ADL is completed.

Furthermore, the monthly stipend provided to a Primary Family Caregiver under 38 U.S.C. 1720G is not disability compensation and it is not designed to supplement or replace the disability compensation received by the veteran. Therefore, we disagree with the assertion that this definition must maintain consistency with the rating schedule in 38 CFR part 4, subpart B.

Commenters raised concerns that catastrophically disabled veterans would not meet this definition. We assume these commenters are referring to the definition of catastrophically disabled veterans as used by VHA in 38 CFR 17.36(b). We disagree that catastrophically disabled veterans will inevitably be excluded based upon this definition. Veterans who are catastrophically disabled are those with a severely disabling injury, disorder, or disease that permanently compromises their ability to carry out activities of daily living. See 38 CFR 17.36(e). Some veterans with such a designation will be in need of personal care services based on an inability to perform an ADL (*i.e.*, requiring personal care services each time one or more ADLs is completed). However, through adaptive equipment, home modifications, or other resources, there may be veterans who do not require another individual to perform personal care services, or otherwise do not qualify for PCAFC. VA will evaluate each veteran and servicemember based on the eligibility criteria set forth in § 71.20.

We are not making any changes based on these comments.

One commenter provided data they collected from veterans concerning the performance of ADLs and noted that there were extremely few veterans who were completely dependent on caregivers to complete ADLs. Another commenter similarly asserted that even veterans with moderate and severe

needs “may not meet this high threshold, and the proposed revision may exclude vast numbers of veterans from the program,” noting that “even a veteran who needs assistance with an ADL nine times out of ten would nonetheless fail to meet the requirement.” Additionally, one commenter believed the definition of inability to perform an ADL to suggest the program would be limited to veterans requiring 24/7 care, and that 95 percent of current PCAFC participants would fail to qualify based on the definition of inability to perform an ADL.

We appreciate the concerns raised by these commenters and the data provided by one of the commenters, as these are informative. However, we cannot verify that the data provided are accurate. We do not currently track and maintain data on how many current PCAFC participants qualify for PCAFC based on the current definition of inability to perform an ADL versus the current definition of need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury. While inability to perform an ADL is one way in which an individual can qualify for PCAFC, it is not the only way, as individuals may meet the definition of need for supervision, protection, or instruction (*i.e.*, an individual may have a functional impairment that directly impacts his or her ability to maintain personal safety on a daily basis). We do know that a majority of current PCAFC participants have a mental health diagnosis amongst their diagnoses, but we do not track if that mental health diagnosis is the reason they are eligible for PCAFC. We do not believe this definition of inability to perform an ADL will be as restrictive as the commenters assert, but we cannot verify if the data provided by the commenters is accurate. This does not change our decision to use the definition of inability to perform an ADL as we proposed and now make final, as we find the benefits (*e.g.*, clarity, objectivity, consistency) of using this definition outweigh any potential risks identified by the commenters. We will track and monitor PCAFC participants to determine the basis for their eligibility for PCAFC (*i.e.*, whether it is because he or she has an inability to perform an ADL or a need for supervision, protection, or instruction) moving forward. Additionally, VA will also track individuals who apply and are not eligible based on the definition of in need of personal care services. If over time we find that this definition is

as restrictive as the commenters assert it will be, we will adjust and revise the definition accordingly in a future rulemaking.

Further, we do not believe that the definition of inability to perform an ADL will exclude vast numbers of veterans and servicemembers from PCAFC, as there will be veterans and servicemembers who meet this definition with regards to only one ADL. We believe requiring assistance with one ADL each time such ADL is performed encompasses a broad and inclusive range of injuries and illnesses which may cause an individual to require the care and assistance of another. For example, a veteran with Parkinson’s disease who needs assistance with grooming each time, but does not need assistance with other ADLs, may meet this definition. A veteran who requires assistance donning prosthetic equipment, but once equipment is in place is otherwise independent, may also meet this definition. Similarly, a veteran with mobility impairment may meet this definition if he or she requires assistance with lower body dressing, but is otherwise independent. While some veterans may need assistance with more than one ADL, others will not but would still qualify so long as they need assistance with at least one ADL each time it is performed.

Contrary to the commenter’s statement that PCAFC would be limited to veterans requiring 24/7 care, we note that it is not our intent that PCAFC be limited to only those veterans and servicemembers that require 24/7 care and we refer the commenter to the previously-cited examples above. We further note that we do not expect or require Family Caregivers to provide 24/7 care as part of PCAFC. This definition would not restrict PCAFC to only those requiring 24/7 care, as this definition requires that assistance be needed each time the ADL is completed, which we believe equates to a veteran or servicemember requiring a moderate amount of personal care services.

We make no changes based on these comments.

One commenter stated that they believe this definition of inability to perform an ADL is more aligned with the definition of “incapability” rather than “inability” because they interpret the definition of inability as contemplating degrees along a spectrum. This commenter further asserted that VA’s definition of inability to perform an ADL does not align with Congressional intent for PCAFC. While we acknowledge that incapability and inability may have similar definitions,

we interpret and define inability to perform an ADL, as required by 38 U.S.C. 1720G, to mean that the veteran or servicemember needs personal care services each time an ADL is completed. We believe this interpretation is reasonable and rational, because it will provide objective criteria for evaluating this term and will ensure those with moderate and severe needs are eligible for PCAFC. It is also important to note that while “ability” can be considered along a spectrum, that does not mean that “inability” or “lack” of ability must similarly be considered along a spectrum. We make no changes based on this comment.

One commenter asserted that VA failed to state if the care provided must be hands-on, physical care to meet the definition of inability to perform an ADL and recommended VA state that assistance can also be in the form of supervision, protection, or instruction as the veteran completes each ADL. Relatedly, another commenter, in addressing the definition of “need for supervision, protection, or instruction,” suggested that VA had muddled the statutory language, which the commenter asserted “neither limits the inability to perform one or more [ADLs] to physical impairments nor excludes physical impairments from causing the need for supervision or protection.” Other commenters provided examples that seemed to confuse the definitions of “inability to perform an activity of daily living” and “need for supervision, protection, or instruction,” which are separate bases upon which an eligible veteran can be deemed in need of personal care services under § 71.20(a)(3). For example, one commenter referred to veterans who may not be able to remember to take medication, eat, or bathe unless directed to do so and supervised.

We reiterate from the proposed rule that VA considers inability to perform an ADL separate from a need for supervision, protection, or instruction, and that an inability to perform an ADL would involve physical impairment, while need for supervision, protection, or instruction would involve cognitive, neurological, or mental health impairment. See 85 FR 13363 (March 6, 2020). That does not mean, however, that veterans or servicemembers who require assistance with ADLs cannot qualify for PCAFC based on a need for supervision, protection, or instruction, as they may have a functional impairment that directly impacts their ability to maintain personal safety on a daily basis. It is important to note that when we evaluate veterans and servicemembers for PCAFC, we make a

clinical determination that is comprehensive and holistic, and based on the whole picture of the individual.

We also note that the care required under the definition of inability to perform an ADL is hands-on, physical care. If that requirement of hands-on, physical care is not met, a veteran or servicemember may still qualify under the definition of need for supervision, protection, or instruction, as that definition does not require hands-on, physical care. To the extent that commenters suggested we include need for supervision, protection, or instruction as the level of assistance required for the definition of inability to perform an ADL, we decline to adopt that suggestion. The definition of need for supervision, protection, or instruction already includes a type of assistance, which we believe would accurately capture veterans with a functional impairment that impacts their ability to maintain their personal safety on a daily basis due to an inability to perform an ADL.

We are not making any changes based on these comments.

One commenter explained that posttraumatic stress disorder (PTSD) and TBI can lead to fluctuations in a veteran’s level of functioning and requested VA clearly define what it means to require assistance with an ADL each time it is completed. The commenter also requested VA clarify how VA will consistently assess, across VA, a veteran’s inability to perform an ADL. This will be a clinical determination based on a clinical assessment and evaluation of the veteran and include input from the Family Caregiver or Family Caregiver applicant. Additionally, we will provide ongoing education and training to field staff and CEATs. We anticipate fluctuations in functioning, especially with mental health conditions such as PTSD, but if such fluctuations mean that a veteran or servicemember does not require personal care services each time an ADL is completed, then the veteran or servicemember would not meet this definition. A veteran or servicemember could require only a minimal amount of assistance with an ADL on some occasions and a lot of assistance with an ADL on other occasions. However, they must require some amount of assistance with an ADL each time. Thus, if the veteran or servicemember can complete the ADL independently and without personal care services, even on remote occasions, the veteran or servicemember would not meet the requirement of this definition to require assistance “each time” with regards to an ADL. However, we note that if a veteran or

servicemember does not meet the definition of inability to perform an ADL, they may be eligible under the definition of need for supervision, protection, or instruction. We are not making any changes based on this comment.

One commenter stated that this definition fails to consider the detrimental effect that delayed care would have on the veteran’s or servicemember’s health, and further raised concerns with the definition in suggesting that it conditions eligibility on deterioration of the veteran’s or servicemember’s health, which would be detrimental to the veteran or servicemember and create higher health care costs for the VA system. While we understand the commenter’s concern, we believe that excluding veterans and servicemembers who need help completing an ADL only some of the time he or she completes any of the ADLs listed in the definition is consistent with our goal of focusing PCAFC on eligible veterans with moderate and severe needs. As stated in the proposed rule:

This distinction is especially important for eligible veterans whose care needs may be more complex, particularly as personal care service needs related to a physical impairment can evolve over time. For example, infrequent assistance may be needed in the immediate time period following the onset of a disease (such that the individual needs help completing an ADL only some of the time it’s completed), but over time and as the individual begins to age, the individual’s care needs can progress. We would thus distinguish between veterans and servicemembers needing assistance with an ADL only some of the time from those who need assistance every time the ADL is completed, those who we believe have an “inability” to perform an ADL. 85 FR 13361 (March 6, 2020).

Furthermore, we note that PCAFC is just one of many VA programs available to support veterans and his or her caregiver, as VA offers a menu of supports and services that support caregivers caring for veterans such as homemaker and home health aides, home based primary care, Veteran-Directed care, and adult day care health care to name a few. In addition, VA offers supports and services provided directly to caregivers of eligible veterans through PGCSS including access to Caregiver Support Coordinators (CSCs) located at every VA medical center, a caregiver website, training and education offered on-line and in person on topics such as self-care, peer support, and telephone support by licensed social workers through VA’s Caregiver Support Line. A determination that a veteran or servicemember is not eligible

for PCAFC would not exclude the veteran or servicemember and his or her caregiver from receiving VA support through alternative support and services as applicable. We are not making any changes based on this comment.

One commenter further noted that a veteran's use of an assistive device to perform an ADL should not be used against them. This same commenter also advocated that inability to perform an ADL should mean that the veteran or servicemember is unable to perform an ADL at any point of time, and suggested that this could be monitored in the wellness checks or annual assessment, and where assistance is required indefinitely, a permanent status could be noted in the record. First, use of an assistive device would not alone exclude a veteran or servicemember from PCAFC. However, we note that to qualify for PCAFC, the veteran or servicemember must be in need of personal care services, which means, in part, that the individual requires in-person care or assistance from another person. If the veteran's or servicemember's needs with respect to ADLs are met with an assistive device, the individual would not be in need of personal care services based on an inability to perform an ADL. Second, annual reassessments will include an assessment of whether an eligible veteran has an inability to perform an ADL, as appropriate, as the eligible veteran may have improved or worsened. While VA does not intend to assess PCAFC eligibility through wellness contacts, including whether an eligible veteran has an inability to perform an ADL, the need for a reassessment may be identified through a wellness contact. VHA is not imposing the "each time" requirement for purposes of oversight. We believe recurring reassessment and wellness checks are appropriate regardless of the frequency with which an eligible veteran is in need of personal care services. The "each time" requirement is solely for the purposes of determining whether a veteran or servicemember meets the definition of inability to perform an ADL. As discussed below with respect to other commenters who advocated for a permanent designation, we will not designate individuals as permanently eligible for PCAFC in their medical records, even for eligible veterans who are expected to need assistance indefinitely; however, there would be documentation of the eligible veteran's on-going needs in the medical record. Additionally, we note that the frequency of reassessments would be annually, unless there is a

determination made and documented by VA to conduct reassessments on a more or less frequent basis. 85 FR 13379, 13408 (March 6, 2020). We make no changes based on these comments.

One commenter who objected to the definition of "unable to self-sustain in the community" (discussed further below) provided descriptions and examples of mobility or transferring, feeding or eating, toileting, and shower/bathing, to include descriptions of progressive stages of assistance. It is not clear what the commenter is recommending; however, we do not believe it is necessary for VA to further describe the ADLs listed in this definition as the individual needs for each veteran and servicemember are unique. It is important to note that the definition of inability to perform an ADL and the list of ADLs are based on widely-accepted and commonly understood definitions of ADL needs in the clinical context. Thus, we find it unnecessary to add any further descriptors, particularly as doing so could lead to confusion.

We are not making any changes based on this comment.

One commenter asked why certain instrumental activities of daily living (IADL) were not addressed in the PCAFC eligibility criteria. While we understand and recognize that many caregivers may assist with IADLs, we are required by the authorizing statute to consider ADLs specifically. As stated in the final rule implementing PCAFC and PGCSS, we believe that Congress specifically considered and rejected the use of the term "instrumental activities of daily living" in the Caregivers Act. See 80 FR 1357, at 1367 (January 9, 2015). Moreover, in section 162(b)(1) of the VA MISSION Act of 2018, Congress replaced the term "independent activities of daily living" with the term "activities of daily living" in the statutory definition of "personal care services" in 38 U.S.C. 1720G(d)(4) removing any doubt regarding the scope of the term "activities of daily living." We are not making any changes based on this comment.

One commenter recommended VA use the guidance set forth in a procedural guide for the administration of the Servicemembers' Group Life Insurance Traumatic Injury Protection (TSGLI) program, which is authorized under 38 U.S.C. 1980A. Specifically, in the context of determining whether an individual has a loss of ADL, the TSGLI procedural guide states that the member must require assistance to perform at least two of the six ADLs. The TSGLI procedural guide defines "requires assistance" as: (1) Physical assistance:

When a patient requires hands-on assistance from another person; (2) stand-by assistance: When a patient requires someone to be within arm's reach because the patient's ability fluctuates and physical or verbal assistance may be needed; and (3) verbal assistance: When a patient requires verbal instruction in order to complete the ADL due to cognitive impairment and without these verbal reminders, the patient would not remember to perform the ADL. See TSGLI Procedural Guide, Version 2.46 at 19–20 (June 12, 2019).

First, we note that TSGLI and PCAFC are two distinct programs with distinct purposes, as TSGLI provides "monetary assistance to help the member and the member's family through an often long and arduous treatment and rehabilitation period." 70 FR 75940 (December 22, 2005). TSGLI is modeled after Accidental Death and Dismemberment (AD&D) insurance coverage. *Id.* These programs also have distinct eligibility criteria. For example, qualifying losses for TSGLI include, but are not limited to, total and permanent loss of sight; loss of a hand or foot by severance at or above the wrist or ankle; total and permanent loss of speech; total and permanent loss of hearing; loss of thumb and or other four fingers of the same hand by severance at or above the metacarpophalangeal joints; quadriplegia, paraplegia, hemiplegia, uniplegia; certain burns; coma or the inability to carry out the ADLs resulting from traumatic injury to the brain. 38 U.S.C. 1980A(b)(1); 38 CFR 9.20(f). While TSGLI does provide payments for an inability to carry out ADLs, those are limited to where that inability results from traumatic injury, including traumatic brain injury, and coma. See 38 U.S.C. 1980A; 38 CFR 9.20(f)(17) and (20). Additionally, inability to carry out ADLs is defined in section 1980A to mean the inability to independently perform two or more of the following six functions: Bathing, continence, dressing, eating, toileting, and transferring. 38 U.S.C. 1980A(b)(2)(D).

Under PCAFC, a veteran with TBI could be considered to be in need of personal care services; that is, because of either physical disabilities resulting in an inability to perform an ADL, or a cognitive, neurological, or mental health impairment resulting in a need for supervision, protection, or instruction. Stand-by and verbal assistance are covered under the need for supervision, protection, or instruction definition. Thus, we do not believe it is necessary to add these under the definition of inability to perform an ADL.

As we explained in the proposed rule, rather than quantifying losses, PCAFC is

designed to support the health and well-being of eligible veterans, enhance their ability to live safely in a home setting, and support their potential progress in rehabilitation, if such potential exists. Unlike TSGLI, which is limited to lump-sum monetary assistance, PCAFC provides eligible Family Caregivers with training and technical support to assist Family Caregivers in their role as a caregiver for an eligible veteran.

Additionally, we note that the monthly stipend provided to a Primary Family Caregiver under 38 U.S.C. 1720G is part of a clinical program rather than a rider to an insurance policy, thus we do not believe that this definition must maintain consistency with TSGLI. We are not making any changes based on this comment.

One commenter recommended that VA not evaluate inability to perform an ADL for those veterans receiving Special Monthly Compensation (SMC) for housebound status or aid and attendance, as they have already been certified by both medical providers and VBA to be in need of another person to perform an ADL, thereby suggesting that veterans in receipt of such benefits should be considered to meet the “inability to perform an activity of daily living” definition for purposes of PCAFC eligibility. SMC for aid and attendance is payable when a veteran, due to mental or physical disability, requires the regular aid and attendance of another person. 38 U.S.C. 1114(l), (r); 38 CFR 3.350(b), (h). SMC for housebound status is payable when a veteran, due to mental or physical disability, has a service-connected disability rated as total and (1) has additional service-connected disability or disabilities independently ratable at 60 percent or more, or (2) by reason of service-connected disability or disabilities, is permanently housebound. 38 U.S.C. 1114(s); 38 CFR 3.350(i). Section 3.352 of title 38, CFR, provides criteria for determining the need for regular aid and attendance, which include inability to perform ADLs such as dressing, eating, and continence, or requiring supervision or protection on a regular basis, for purposes of determining eligibility for SMC and special monthly pension.

While the eligibility requirements for SMC referenced by the commenter may seem similar, they are not synonymous with VA’s definition of “inability to perform an ADL.” The regulatory criteria for aid and attendance under 38 CFR 3.352(a) provide that inability to perform certain specified ADLs “will be accorded consideration in determining the need for regular aid and attendance.” Further, whether an

individual is “substantially confined as a direct result of service-connected disabilities to his or her dwelling and the immediate premises” for purposes of housebound status, see 38 CFR 3.350(i)(2), does not correlate directly with the more objective ADL criteria we proposed for PCAFC eligibility. Consequently, the part 3 criteria fail to provide the level of objectivity VA seeks in order to ensure that its caregiver program is administered in a fair and consistent manner for all participants, and we do not believe criteria for those benefits should be a substitute for a clinical evaluation of whether a veteran or servicemember is eligible for PCAFC due to an inability to perform an ADL as set forth in § 71.15. We believe that in order to ensure that PCAFC is implemented in a standardized and uniform manner across VHA, each veteran or servicemember must be evaluated based on the eligibility criteria in § 71.20. To that end, VA will utilize standardized assessments to evaluate both the veteran or servicemember and his or her identified caregiver when determining eligibility for PCAFC. It is our goal to provide a program that has clear and transparent eligibility criteria that is applied to each and every applicant. Additionally, we do not believe it would be appropriate to consider certain disability ratings as a substitute for a clinical evaluation of whether a veteran or servicemember has an inability to perform an ADL, as not all veterans and servicemembers applying for or participating in PCAFC will have been evaluated by VA for such ratings, and because VA has not considered whether additional VA disability ratings or other benefits determinations other than those recommended by the commenters may be appropriate for establishing that a veteran or servicemember has an inability to perform an ADL for purposes of PCAFC. We are not making any changes based on this comment.

#### *Institutionalization*

Several commenters opposed the inclusion of jail or prison in the proposed definition of institutionalization. Specifically, commenters stated this definition conflicts with the common use of the term by health care providers and other VHA and federal programs. Furthermore, commenters raised concerns about the application of this definition in 38 CFR 71.45(b)(1) and (2) (related to discharge of the Family Caregiver due to the eligible veteran or Family Caregiver, respectively). We note that this definition will only be used in the context of § 71.45, Revocation and

Discharge of Family Caregivers, and refer the commenters to the discussion below regarding discharge due to incarceration under section § 71.45.

#### *Joint Application*

One commenter raised concerns about the definition of joint application, in particular that an application is considered incomplete when all mandatory sections are not completed, since many veterans may not be able to easily access information due to the passage of time or may have health issues that make it difficult or impossible to complete the application without assistance. This commenter also opined that delays will still result as VA will need to inform applicants that their applications are incomplete. While this commenter noted that, pursuant to 38 CFR 21.1032, VA has a duty to assist veterans in obtaining evidence in claims for other VA benefits, they suggested VA adopt a less punitive approach by instituting a process that includes notifying the applicant as promptly as possible that their application is incomplete. By defining the joint application to mean an application that has all fields within the application completed, including signature and date by all applicants, and providing for certain exceptions within the definition, it was not VA’s intent to create a burden on veterans and caregivers; rather we are establishing the date on which VA can begin evaluating the applicants’ eligibility for PCAFC. As stated in the proposed rule, the required fields are necessary for VA to begin evaluating the eligibility of veterans and servicemembers and their family members for PCAFC. The date the joint application received by VA is also the date on which certain PCAFC benefits are effective (unless another date applies under § 71.40(d)). It would not be reasonable to provide PCAFC benefits back to the date an incomplete application is received by VA; we need a complete application. This is a common requirement for the administration of benefits and services. We further note that the information required within the application (*i.e.*, names, address of veteran’s or servicemember’s residence, dates of birth, certifications, and signatures) is specific to the veteran and caregiver and is information they would have readily available. They are not required to further submit other supporting documentation that they may not have readily available, such as a DD-214 or medical records, as part of the application. As mentioned, the mandatory information should be readily available to them and the



application should be relatively easy to complete. However, if assistance with the application is needed, caregivers and veterans can ask VA staff for help, guidance, and support, and we will assist applicants as needed. In the application, we will include instructions that will provide information on requesting assistance with filling out the form, and various VA touchpoints including the National Caregiver Support line, VA's website, and a link to VA's Caregiver Support Coordinator (CSC) locator. We also note that it has been our practice to contact the caregiver and veteran when applications are incomplete, and we will continue to do so. Additionally, we will consider inclusion in policy of requirements for prompt notification in instances of incomplete applications. While we understand the commenter's concerns and appreciate the suggested changes, we make no changes to the regulations based on this comment.

#### Legal Services

One commenter asserted that VA's proposed definition of legal services is inconsistent with 38 U.S.C. 1720G and the VA MISSION Act of 2018. This commenter specifically stated that "instead of creating a program which would provide free, broadly accessible legal services to PCAFC veterans and their caregivers that covers a broad range of civil legal issues, including full representation matters where warranted, the proposed regulations impose a set of arbitrary limits on the types of matters to be covered." While this commenter acknowledged that there are existing programs that provide legal services to veterans, servicemembers, and their families, the commenter asserted that such programs are insufficient; and inclusion of legal services in the VA MISSION Act of 2018 recognized the need for legal services by PCAFC veterans and their caregivers. This commenter praised VA for including preparation and execution of wills and other advance directives, but recommended VA expand the definition to include free legal services, and full representation as warranted, in areas of law where veterans and caregivers commonly face issues, including affordable housing, eviction and foreclosure, consumer debt, access to and maintaining local and federal government benefits, and family law.

We do not agree that the definition of legal services is inconsistent with our statutory authority, as 38 U.S.C. 1720G, as amended by the VA MISSION Act of 2018, did not define this term further than to state that legal services included legal advice and consultation, relating to

the needs of injured veterans and their caregivers. We have the authority to further define this term, and did so in the proposed rule. Through a **Federal Register** Notice published on November 27, 2018, we solicited feedback from the public in order to develop this definition, and we also held meetings and listening sessions to obtain input from stakeholders. The responses received were varied, as we explained in the proposed rule. See 85 FR 13362 (March 6, 2020). For example, some feedback acknowledged the potential for conflicts of interest between the eligible veteran and Family Caregiver regarding certain legal issues, including divorce or child custody, while other feedback specified that legal services should include advanced directives, power of attorney, wills, and guardianship. *Id.* We considered the feedback received and, consistent with that feedback, we defined legal services to include assistance with advanced directives, power of attorney, simple wills, and guardianship; education on legal topics relevant to caregiving; and a referral service for other legal services. *Id.* We determined this would be the most appropriate way to define legal services, as this would allow us to provide assistance with the most common matters that Family Caregivers face in providing personal care services to eligible veterans (*i.e.*, advanced directives, power of attorney, simple wills, and guardianship), providing education on legal topics relevant to caregiving, and a referral service for other legal services. As explained in the proposed rule, this definition would address these important needs, while also being mindful of VA resources. *Id.* Paying for legal services for matters other than those described in the definition would be cost prohibitive and may limit our ability to provide the same level of services to as many Family Caregivers as possible, and would not be focused on those matters that Family Caregivers most commonly face in providing personal care services to eligible veterans. Providing limited legal assistance, education, and referrals would ensure we consistently provide an equitable level of legal services to all Primary Family Caregivers. As we explained in the proposed rule and reiterate here, we will provide as legal services assistance with advanced directives, power of attorney, simple wills, and guardianship; education on legal topics relevant to caregiving; and a referral service for other legal services. These services would be provided only in relation to the personal legal needs of the eligible veteran and the Primary

Family Caregiver. This definition of legal services excludes assistance with matters in which the eligible veteran or Primary Family Caregiver is taking or has taken any adversarial legal action against the United States government, and disputes between the eligible veteran and Primary Family Caregiver.

We make no changes to the definition based on this comment, but will continue to assess the need for legal services by Family Caregivers to determine if VA should propose changes to the definition in the future.

Another commenter similarly praised VA for the inclusion of assistance with advanced directives, power of attorney, simple wills, and guardianship; educational opportunities on legal topics relevant to caregiving; and referrals to community resources and attorneys for legal assistance or representation in other legal matters. We appreciate the comment and are not making any changes based on this comment.

One commenter asked for clarification on whether legal services would be available regarding family members of the Family Caregiver and eligible veteran, such as children. While the benefit is for the Primary Family Caregiver, a family member of the Primary Family Caregiver and the eligible veteran may indirectly benefit from the legal services. However, they are not directly eligible for the benefit if they are not approved and designated as the Primary Family Caregiver. We make no changes based on this comment.

Another commenter questioned why legal services will be available to caregivers, whether it is indicative of a deeper problem, and asked what precautions and safety nets will be put in place to ensure veterans are not exploited or abused. As stated in the proposed rule, we are adding this term to address changes made to 38 U.S.C. 1720G by the VA MISSION Act of 2018. Specifically, the VA MISSION Act of 2018 added legal services as a benefit for Primary Family Caregivers. Accordingly, legal services will be added to the benefits available to Primary Family Caregivers under § 71.40(c)(6). Similar to financial planning services, we will include in any contracts requirements such as minimum degree attainment and certifications for individuals providing legal services, as well as mechanisms that would prohibit exploitation or abuse of caregivers and veterans (*e.g.*, prohibit any form of compensation from the eligible veteran or Family Caregiver for the services provided) and that allow us to take any appropriate actions

necessary to address related breach of contracts. We note that the contractors would be responsible for any liability arising from legal services provided. Further, contractors are not VA employees and therefore not covered by the Federal Tort Claims Act. We also plan to provide resources to the Family Caregiver to report any concerns of abuse or exploitation that may arise in the course of receiving the legal services, such as links to State and local bar discipline reporting sites, as appropriate. We make no changes based on this comment.

#### *Monthly Stipend Rate*

Several commenters expressed concern about VA's definition of monthly stipend rate. Specifically, some commenters believe it is too high, some believe it is too low, and others disagree with using the Office of Personnel Management's (OPM) General Schedule (GS) scale. We note that this definition will only be applied in the context of 38 CFR 71.40(c), Primary Family Caregiver benefits. Therefore, we address the comments in the section below regarding § 71.40.

#### *Need for Supervision, Protection, or Instruction*

VA's proposed rule added "need for supervision, protection, or instruction" as a new term and basis upon which a veteran or servicemember can be deemed in need of personal care services under § 71.20(a)(3). This term and its definition serve to implement the statutory phrases "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" in clauses (ii) and (iii) of section 1720G(a)(2)(C) of title 38, U.S.C. VA received numerous comments about this proposed definition. Some commenters supported the definition, while others believed it is too restrictive or disagreed with VA's interpretation of the statutory requirements, and others requested VA provide clarification.

Commenters stated that quantifying the amount of time for supervision needed under this definition is difficult, and that some veterans may need constant supervision because of their health conditions. Commenters also requested VA clarify the frequency with which a veteran would need supervision, protection, or instruction for purposes of PCAFC eligibility. One commenter opined that the definition is extremely narrow in scope. Another

commenter stated that the "daily basis" requirement will place an undue hurdle on veterans otherwise eligible for PCAFC. Another commenter opined that the definition is too restrictive, particularly as a veteran with "severe TBI may have symptoms that affect their function in a major way, but does not require assistance with functioning every day," which does not diminish their need for caregiving on a regular basis. Additionally, commenters questioned how we would operationalize this definition, as individuals may have daily a potential need for supervision, protection, or instruction but intervention may only be required a few times a week.

As indicated in the proposed rule, we would define 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. 85 FR 13363 (March 6, 2020). We revised the definition because we found the term "need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury" and its definition unduly restricted our ability to consider all functional impairments that may impact a veteran's or servicemember's ability to maintain his or her personal safety on a daily basis. Id. Contrary to some of the comments, it was not our intent to narrow and restrict eligibility with this change, and we believe that these revisions will broaden the current criteria since it will no longer be limited to a predetermined list of impairments. Additionally, the revised definition will be consistent with our goal of focusing PCAFC on eligible veterans with moderate and severe needs. Id. at 13364.

As we indicated in the proposed rule, "[w]hether a veteran or servicemember would qualify for PCAFC on this basis would depend on whether his or her functional impairment directly impacts the individual's ability to maintain his or her personal safety on a daily basis." Id.

Some commenters raised concerns about the reference to "daily" in this definition, and we agree that additional clarification is needed. While "daily basis" in the definition refers to the individual's ability to maintain personal safety, most individuals determined to qualify on this basis will also require personal care services from a caregiver on a daily basis. The proposed rule was not clear in this regard, but it did allude to such individuals requiring personal care services on a daily basis. For example, we explained that a veteran or servicemember meeting this definition

may not need supervision, protection, or instruction continuously during the day, but would need such personal care services on a daily basis, even if just intermittently each day. See 85 FR 13364 (March 6, 2020). This requirement for daily personal care services under the definition of "need for supervision, protection, or instruction" was also referenced in the context of explaining the definition of inability to perform an ADL, which does not require the veteran or servicemember need daily personal care services. See id. at 13361.

By focusing the definition of need for supervision, protection, or instruction on individuals who require personal care services on a daily basis, we will help ensure that PCAFC targets eligible veterans with moderate and severe needs. While we acknowledge that veterans with needs at a lower level may also benefit from the assistance of another individual, we believe PCAFC was intended to support those with moderate and severe needs. For applicants that apply to PCAFC and do not qualify, VA will assist the applicant in identifying and making referrals to other available resources that may meet their needs. Thus, we do not believe that the "daily basis" requirement in the definition creates an "undue hurdle". Also, as we explained above, we are broadening the definition beyond a predetermined list of impairments, which will remove an existing barrier for many veterans and servicemembers who would meet the definition of need for supervision, protection, or instruction but do not have one of the listed impairments in the current regulation.

As part of this discussion, we would like to further correct and clarify the meanings of daily and continuous for purposes of the terms need for supervision, protection, or instruction, and unable to self-sustain in the community, respectively. We note that those who have a need for supervision, protection, or instruction on a continuous basis would meet the definition of unable to self-sustain in the community for purposes of the monthly stipend payment.

The terms daily and continuous relate to the frequency with which intervention is required in order to maintain an individual's personal safety that is directly impacted by his or her functional impairment. PCAFC is a clinical program and as such the determination of whether the frequency of intervention is daily or continuous is a clinical decision. Clinical decision making is highly individualized based on the specific needs of the individual

veteran or servicemember. As previously stated, it is important to note that when we evaluate veterans and servicemembers for PCAFC, we make a clinical determination that is comprehensive and holistic, and based on the whole picture of the individual. Factors VA will consider when evaluating the frequency of intervention required, specifically daily or continuous, include the factors set forth in 38 U.S.C. 1720G(a)(3)(C)(iii)(II) and (III), that is, the “extent to which the veteran [or servicemember] can function safely and independently in the absence of such supervision, protection, or instruction,” and the “amount of time required for the family caregiver to provide such supervision, protection, or instruction to the veteran [or servicemember].”

In addition to frequency, VA determinations of whether a veteran or servicemember is in need of supervision, protection, or instruction, and whether such need is on a continuous basis for purposes of the higher-level stipend, which are clinical determinations, also account for the degree of intervention required to support the safety of the veteran or servicemember. Individuals whose functional impairment directly impacts their personal safety on a daily basis generally require at least one active intervention each day. In contrast to passive interventions that may include the mere proximity of a caregiver, active intervention requires the caregiver to be actively involved and engaged in providing supervision, protection, or instruction. Whether the need is daily or continuous will also depend on the individual’s demonstrated pattern of need.

For example, an eligible veteran with moderate cognitive impairment may need a Family Caregiver to provide step-by-step instruction when dressing in the morning and in the evening. Such active intervention is required on a daily basis, takes a finite amount of time, and the veteran can maintain their personal safety without additional active interventions from a caregiver for the remainder of the day. This veteran may be found to meet the definition of “need for supervision, protection, or instruction.” In contrast, an eligible veteran with advanced cognitive impairment may require supervision, protection, or instruction on a daily basis due to the need for step-by-step instruction in dressing each morning and because of a demonstrated pattern of wandering outside the home at various times throughout the day. In this example, the Family Caregiver would provide step-by-step instruction

for dressing each morning, which is a planned intervention. In addition, because of the demonstrated pattern of wandering outside the home at various and unpredictable times, the veteran cannot function safely and independently in the absence of a caregiver. The Family Caregiver actively intervenes through verbal and physical redirection multiple times during the day. This veteran would have a continuous need for an active intervention to ensure his or her daily safety is maintained. Such veteran may meet the definition of unable to self-sustain in the community because of a need for supervision, protection, or instruction on a continuous basis.

We make no changes based on these comments.

One commenter expressed concern that the proposed definition would exclude from PCAFC veterans who require minimal assistance with supervision and provided an example of a veteran who can be alone, but would need to call his or her caregiver to be talked down when they begin to spiral or have an episode. As previously explained, we are standardizing PCAFC to focus on eligible veterans with moderate and severe needs. If a veteran or servicemember does not have a functional impairment that directly impacts the individual’s ability to maintain his or her personal safety on a daily basis (or have an inability to perform an ADL), they would not qualify for PCAFC. In addition, the definition of in need of personal care services specifies that the eligible veteran requires in-person personal care services, among other requirements. We note that PCAFC is intended to focus on veterans with moderate and severe needs who need the assistance of a Family Caregiver, and is not intended to be a program for individuals who may only need a minimal amount of assistance. Further, this definition is not intended to cover the potentiality that someone may have a need for supervision, protection, or instruction at some point in the future, but rather instead is meant to cover those servicemembers and veterans who have a demonstrated pattern of having a need for supervision, protection, or instruction.

For individuals who do not meet these requirements, including an individual who does not require in-person personal care services but instead requires only minimal assistance through an occasional or even daily phone call, there may be other VA health care programs and services that would help meet their needs and those of their caregivers. VA offers a menu of

supports and services that supports caregivers caring for veterans such as homemaker and home health aides, home based primary care, Veteran-Directed care, and adult day care health care to name a few. In addition, VA offers supports and services provided directly to caregivers of eligible veterans through PGCSS including access to CSCs located at every VA medical center, a caregiver website, training and education offered online and in person on topics such as self-care, peer support, and telephone support by licensed social workers through VA’s Caregiver Support Line.

We are not making any changes based on this comment.

Several commenters raised concerns about how this definition incorporates mental health conditions, cognitive impairments, and “invisible injuries” (e.g., TBI, PTSD, mental illness), particularly related to veterans with conditions that may not meet the definition of inability to perform an ADL. As we stated in the proposed rule, determining eligibility on the basis of this definition would not focus on the individual’s specific diagnosis or conditions, but rather whether the veteran or servicemember has impairment in functioning that directly impacts the individual’s ability to maintain his or her personal safety on a daily basis and thus requires supervision, protection, or instruction from another individual. 85 FR 13364 (March 6, 2020). We further provided examples to include an individual with schizophrenia who has active delusional thoughts that lead to unsafe behavior, and an individual with dementia who may be unable to use the appropriate water temperature when taking a bath and may thus require step-by-step instruction or sequencing to maintain his or her personal safety on a daily basis. Individuals with TBI or mental health conditions may also qualify for PCAFC on this basis. For example, a veteran or servicemember with TBI who has cognitive impairment resulting in difficulty initiating and completing complex tasks, such as a grooming routine, may require step-by-step instruction in order to maintain his or her personal safety on a daily basis. Additionally, eligibility on the basis of this definition may result from multiple conditions or diagnoses. Therefore, we believe this definition incorporates mental health conditions, cognitive impairments, and “invisible injuries” (e.g., TBI, PTSD, mental illness). We are not making any changes based on these comments.

One commenter was specifically concerned that an individual with

dementia who is forgetful or misplaces items but can adapt and manage successfully without compromising his or her personal safety on a daily basis may not qualify for PCAFC under this definition. Another commenter inquired into whether an individual who is 100 percent service-connected disabled due to PTSD will qualify under this definition if the individual does not meet the inability to perform an ADL definition. Relatedly, this commenter stated that this definition needs to be better defined for mental health conditions or cognitive impairments when that person does not have a specific ADL deficit. As explained above, eligibility on this basis is focused on whether the veteran or servicemember has an impairment in functioning that directly impacts the individual's ability to maintain his or her personal safety on a daily basis and thus requires supervision, protection, or instruction from another individual, rather than a specific diagnosis or condition. The definition of "need for supervision, protection, or instruction" is consistent with our goal of focusing PCAFC on eligible veterans with moderate and severe needs. Thus, for an individual who is forgetful or misplaces items but does not have a functional impairment that directly impacts his or her ability to maintain personal safety on a daily basis (and who is not determined to be in need of personal care services based on an inability to perform an ADL), there may be other VA programs and resources available to meet the individual's needs. An individual with 100 percent service-connected disability due to PTSD may be eligible under this definition if the individual has a functional impairment that directly impacts his or her ability to maintain his or her personal safety on a daily basis. We are not making any changes based on these comments.

Several commenters requested VA provide clarification about this definition, including a commenter who noted that this definition is vague. One commenter suggested that VA define the terms "on a daily basis, even if just intermittently each day" and "ability to maintain his or her personal safety" to ensure consistent implementation. One commenter asserted that VA proposed no objective criteria for supervision, protection, or instruction, and another commenter suggested that VA failed to provide an objective operational definition of need for supervision, protection, or instruction. One commenter indicated that while the supervision, protection, and instruction standards need to be more inclusive,

they set up a point of confusion in what elements are to be considered and not considered. This commenter further asserted that any assessment tool used to determine PCAFC eligibility would have to define the elements considered for supervision, protection, and instruction, and asked why VA did not define those elements in the regulation. Another commenter asserted that although the characterization of being unable to self-sustain in the community is relatively clear, it appears likely that eligibility for the lower tier stipend will be contentious for both VA and veterans' families, and the definition of need for supervision, protection, or instruction should be clarified further if the program is to serve its targeted population. Furthermore, the commenter asserted that VA's explanation that a veteran or servicemember meeting this criterion may only need such personal care services intermittently each day opens the door to a variety of interpretations and increases the potential for complex and time-consuming eligibility decisions. The commenter also questioned if a caregiver reminding one's spouse that he or she has an upcoming appointment constitutes instruction and if it should be considered indicative of a severe impairment in functioning, in the absence of any objective cognitive deficits.

First, we disagree with the commenters who believe that this definition is vague. While we broadened this definition to remove the predetermined list of functional impairments associated with "need for supervision or protection based on symptoms or residuals of neurological or other impairment of injury," so that "need for supervision, protection, or instruction" can cover more diagnoses and conditions, we believe the revised definition is specific enough to allow us to make objective determinations about whether a veteran or servicemember has a need for supervision, protection, or instruction, consistent with the authorizing statute and intent of PCAFC. When assessing personal care needs, VA will assess and document the support the veteran or servicemember needs to maintain personal safety, if such needs exist, and the frequency with which he or she requires interventions by the caregiver. This will include consideration of, among other factors, the veteran's or servicemember's functional ability as it relates to such things as: Medication management, self-preservation, safety, and self-direction. We recognize this is not a

comprehensive list of functions in which a veteran or servicemember may experience impairment. We also note that the reasons a functional impairment will directly impact an individual's ability to maintain his or her personal safety on a daily basis will vary (*e.g.*, due to memory loss, delusion, uncontrolled seizure disorder). How an individual's ability to maintain his or her personal safety is impacted by his or her functional impairments will vary based on those impairments and diagnoses. In the regulation, we would not list the elements to be considered as doing so could potentially be more restrictive than intended. These are clinical decisions that are dependent on each individual's unique situation and it would be impractical for the regulation to list and account for every functional impairment that may directly impact an individual's ability to maintain his or her personal safety on a daily basis. As explained above, we would require that a veteran or servicemember have a functional impairment that directly impacts his or her ability to maintain personal safety on a daily basis, but the type, degree, and frequency of intervention may vary.

We would not define the terms "on a daily basis, even if just intermittently each day" and "ability to maintain his or her personal safety" because this a clinical program, and how these criteria are met will vary based on each veteran's or servicemember's unique situation. The phrase "on a daily basis, even if intermittently each day" in the proposed rule was used to clarify that a veteran or servicemember may require supervision, protection, or instruction when completing certain tasks but may not require a caregiver to be present the remainder of the day. We further refer the commenters to the earlier discussion in this section regarding VA's clinical assessment of whether a veteran or servicemember has a need for supervision, protection, or instruction, and whether such need is continuous for purposes of the definition of "unable to self-sustain in the community."

We provided many examples in the proposed rule to explain the phrase "ability to maintain his or her personal safety," and added a further example above regarding an individual with TBI. These examples were provided to illustrate situations in which a veteran or servicemember may require another individual to provide supervision, protection, or instruction to ensure the veteran or servicemember is able to maintain his or her personal safety on a daily basis.

Furthermore, we provided examples of when an individual may not be in

need of supervision, protection, or instruction, to include “an individual with dementia who is forgetful or misplaces items but can adapt and manage successfully without compromising his or her personal safety on a daily basis (e.g., by relying on lists or visual cues for prompting).” 85 FR 13364 (March 6, 2020). We also note that a veteran whose only need from a caregiver is to be reminded of appointments or to take medications, would likely not be determined to be in need of personal care services based on a need for supervision, protection, or instruction, as that alone would not demonstrate that the veteran or servicemember requires in-person personal care services from another person, and without such personal care services, alternative in-person caregiving arrangements would be required, based on a functional impairment that directly impacts the individual’s ability to maintain his or her personal safety on a daily basis.

We make no changes based on these comments.

One commenter took issue with VA combining 38 U.S.C. 1720G(a)(2)(C)(ii) and (iii) under one term and asserted that retaining the previous basis of “need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury” and its associated definition and adding a new definition for “need for regular or extensive instruction or supervision without which the ability of the veteran to function in daily life would be seriously impaired” would better align with Congressional intent. Relatedly, one commenter stated that VA did not provide data, or sufficient information and analysis to justify combining clauses (ii) and (iii) of 38 U.S.C. 1720G(a)(2)(C). This commenter asserted that this definition is incongruent with the plain reading of the law and Congressional intent, which the commenter stated requires VA utilize at least three separate eligibility criteria to serve as the bases upon which a veteran or servicemember can be deemed in need of personal care services.

As indicated in the proposed rule, we believe that the current definition for “need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury” unduly restricts VA’s ability to consider all functional impairments that may impact a veteran’s or servicemember’s ability to maintain his or her personal safety on a daily basis. Additionally, it is VA’s intent to broaden the current criteria by removing the predetermined list of impairments,

such that veterans and servicemembers with impairments not listed in the current definition who may otherwise meet the definition of need for supervision, protection, or instruction may be eligible for PCAFC. This change will allow us to consider additional impairments that are not listed in the current definition. Additionally, as we explained in the discussion on the definition of inability to perform an ADL, it may be the assistance needed for an ADL that results in a need for supervision, protection, or instruction.

We disagree with the commenters that combining clauses (ii) and (iii) of 38 U.S.C. 1720G(a)(2)(C) is not consistent with the statute and Congressional intent. As we explained in the proposed rule, we combined these two bases for PCAFC eligibility because we believe these two bases capture the personal care service needs of veterans and servicemembers with a significant cognitive, neurological, or mental health impairment, as opposed to an inability to perform an ADL, which covers physical impairments. 85 FR 13363 (March 6, 2020). We sought input from the public on how to differentiate and define these two bases in a **Federal Register** Notice that was published on November 27, 2018. See 83 FR 60966 (November 27, 2018). We also held meetings with various stakeholders from February through May of 2019. We appreciate the feedback we received from these efforts. However, we did not receive any meaningful recommendations in addition to what we had identified and considered internally for defining these bases. We were unable to distinguish them in a meaningful way and determined that the most logical approach was to broaden the current definition of “need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury” under a new term that would also capture veterans and servicemembers who have “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.” We further note that in response to this proposed rule, while some commenters objected to combining these two bases, no specific recommendations or suggestions on how to define and distinguish these two bases were submitted. We make no changes based on these comments.

#### *Primary Care Team*

In the proposed rule, we proposed to revise the definition of “primary care team” to mean one or more VA medical professionals who care for a patient

based on the clinical needs of the patient. We also proposed to remove the reference to the primary care team in various sections, including current §§ 71.20(c) and (d), 71.20(g), 71.25(c)(1)–(2), 71.25(f), and 71.40(b)(2). Instead, we would reference primary care team in one section, § 71.25(a)(2)(i), to state that PCAFC eligibility evaluations being performed in collaboration with the primary care team to the maximum extent practicable.

We received comments on the definition of primary care team, the role of the primary care team in PCAFC processes, and the centralized eligibility and appeals teams, which are addressed below.

#### *Primary Care Team Definition*

We received multiple comments stating that the proposed definition of “primary care team” is too broad and requested that the definition remain the same or be more specific with regard to which type of VA medical professional would serve on the primary care team for a veteran or servicemember. Specifically, the commenters raised concerns that the proposed definition would not require the primary care team to include a physician, nurse practitioner, or physician assistant to oversee the care of the veteran or servicemember but rather would allow any medical professional who is licensed or certified to provide health care services such as nurses, hospice workers, emergency medical technicians, optometrists, social workers, clinical dietitians, occupational or physical therapists, and other trained caregivers. Commenters asserted that the lack of specificity would result in no requirement for any type of medical evaluation encounter to determine if personal care services are medically necessary during the evaluation of the joint application, and referred to evaluation and management guidelines that require services to be rendered by a physician or other qualified health care professional who may report evaluation and management services. We address these comments below.

We appreciate the comments and agree that the proposed definition was not specific enough. As indicated in the proposed rule, our intent was to expand the definition to account for veterans and servicemembers who “receive their primary care in the community and may only utilize VA for a portion of their care, such as mental health or specialty services.” 85 FR 13365 (March 6, 2020). However, it was not our intent to imply that the primary care team may be

comprised of any medical professional (e.g., nurses, hospice workers, emergency medical technicians) in the absence of a physician, advanced practice nurse, or a physician assistant. Additionally, after reviewing the comments, we agree with their concerns that we should maintain the reference to a primary care provider. Therefore, we are revising the definition of primary care team to mean “one or more medical professionals who care for a patient based on the clinical needs of the patient. Primary care teams must include a VA primary care provider who is a physician, advanced practice nurse, or a physician assistant.” We make no further changes based on these comments.

Multiple commenters asserted that the removal of the phrase “provider who coordinates the care” is contradictory and is not aligned with existing VA national policy. One commenter asserted that “responsibility for coordination of care must reside with a primary care provider or team of providers,” and suggested that one mechanism to facilitate this coordination is through the establishment of an information system that can be accessed by providers in the same or different locations that provides a record on each enrollee to include his or her socio-demographic characteristics, a minimum data set on all clinical encounters and an identifier that permits linkage of the individual’s encounter data over time. Commenters further expounded that primary care is the day-to-day health care given by a health care provider and that the provider typically acts as the first contact and principal point of continuing care for patients within a health care system and coordinates other specialty care.

As we explained in the proposed rule, we would remove this phrase, “provider who coordinates the care,” because it can lead to misinterpretation, and it does not specify whether the care coordinated is specific care to PCAFC or all of the eligible veteran’s care coordination needs. 85 FR 13365 (March 6, 2020). Additionally, because of the role that the primary care team plays in coordinating an eligible veteran’s care, we believe continuing to include this language would be unnecessary and redundant. Additionally, as explained above, we are revising the definition to include a requirement that a VA primary care provider who is a physician, advanced practice nurse or physician assistant must be on the team; thus the commenters’ concerns regarding the removal of the phrase “provider who coordinates the care”

because a primary care provider is responsible for care coordination is moot. Furthermore, VA has an electronic medical record system that allows VA providers from multiple locations to access a patient’s medical record. To the extent the commenter is suggesting we build a medical record system specific for PCAFC, we believe this is beyond the scope of this rulemaking. We are not making any changes based on these comments.

Multiple commenters asserted that the proposed definition does not align with industry standards such as the American Medical Associations (AMA) Code of Medical Ethics and the American Academy of Family Physicians, particularly as it does not clearly define the prescribing authority for a VA medical professional. We appreciate the commenters concerns; however, the definition of primary care team is only used for purposes of part 71, and not for the general provision of health care at VA. Additionally, there are multiple definitions for primary care teams in health care. Therefore, we do not believe VA has a requirement to align the definition of primary care team with industry or other federal or non-federal programs. We make no changes based on these comments.

Several commenters expressed concern that the proposed definition is inconsistent with VA’s provision of care in the community. One commenter asserted that the definition does not align with VA’s statutory requirements to accommodate veterans and servicemembers who may receive care in the community. One commenter asserted that VA has not consulted with non-VA treating physicians when making eligibility determinations and that given pending legislation that is likely to expand fee-for-service programs and third-party providers, it is imperative that VA primary care teams consult these doctors and utilize their assessments. The same commenter noted that they do not believe non-VA providers should determine eligibility; but rather PCAFC must consult with clinicians who are actually treating the veteran or servicemember.

First, we note that, as explained above, we are revising the definition to require that a VA primary care provider must be on the team; however, we removed “VA” from the phrase “one or more medical professionals” which we believe allows other medical professionals (including non-VA medical professionals) who care for the patient based on the clinical needs of the patient, to be part of the team. We believe this definition is inclusive of veterans or servicemembers who receive

care in the community, and thus is consistent with our statutory authority.

We further note that neither the veteran’s VA primary care provider nor his or her non-VA provider would determine PCAFC eligibility; CEATs will determine eligibility for PCAFC, including whether the veteran is determined to be unable to self-sustain in the community. Clinical staff at local VA medical centers will conduct evaluations of PCAFC applicants with input provided by the primary care team to the maximum extent practicable. This information will be provided to the CEATs for use in making eligibility determinations, including whether the veteran is determined to be unable to self-sustain in the community for purposes of PCAFC. The CEAT will be composed of a standardized group of inter-professional, licensed practitioners, with specific expertise and training in the determinations of eligibility and the criteria for the higher-level stipend. We believe the use of CEATs will improve standardization in eligibility determinations across VA. While primary care teams will not collaborate directly with the CEAT on determining eligibility, documentation of their input in the local staff evaluation of PCAFC applicants will be available in the medical record for review. This documentation will be used by the CEAT to help inform eligibility determinations for PCAFC, including whether the veteran is determined to be unable to self-sustain in the community for the purposes of PCAFC. Any documentation from a non-VA provider that the veteran or servicemember provides will be available to VA for purposes of PCAFC evaluation and eligibility determinations. We are not making any changes based on these comments.

#### *Role of Primary Care Team in PCAFC Processes*

Many commenters raised concerns that these changes relating to the primary care team will reduce or eliminate the important role of a veteran’s team of medical professionals in PCAFC processes, and instead rely on a single medical provider who may not have full knowledge of a veteran’s medical needs, medical history, or involvement in a veteran’s treatment, especially as this can lead to inconsistencies in PCAFC determinations. Some commenters allege this would be inconsistent with and exceed VA’s authority under 38 U.S.C. 1720G. Commenters were also concerned that a veteran’s medical evaluation will be performed by a professional who is ill-equipped to

correctly assess the veteran, especially when determining when a veteran has an inability to perform ADLs.

Some commenters raised concerns about the removal of primary care team specifically from various paragraphs in §§ 71.20 and 71.25. These concerns included a fear that it will give VA too much flexibility in determining who will conduct eligibility assessments, it will provide too much deference to non-medical personnel who do not have the qualifications of the medical practitioners on the primary care team, will result in medical professionals making eligibility determinations outside the scope of their practice, will provide the CSCs and uninvolved parties who do not treat the veteran or servicemember with too much discretion, and will create inconsistencies. Additionally, one commenter asserted that VA did not provide justification for why it would be more appropriate to remove the primary care team from the eligibility assessment process. Relatedly, several commenters disagreed with VA's claim that current references to the primary care team are unclear. However, one of those commenters agreed that authorizations by the primary care team have not been applied consistently between facilities.

We address these comments below.

As we explained directly above and based on the comments received, we are revising the primary care team definition to mean "one or more medical professionals who care for a patient based on the clinical needs of the patient. Primary care teams must include a VA primary care provider who is a physician, advanced practice nurse, or a physician assistant." As Congress did not provide a definition for primary care team in 38 U.S.C. 1720G, we define the term as previously described, which we believe is rational and reasonable for purposes of PCAFC. This definition, as revised in this final rule, will ensure that those medical professionals, including a VA primary care provider, who care for the veteran and have knowledge of the veteran's needs and treatments, are part of the primary care team and have the opportunity to provide input into determinations of whether the veteran or servicemember is eligible for PCAFC.

As explained previously in this section, clinical staff at local VA medical centers will conduct evaluations of PCAFC applicants with input provided by the primary care team to the maximum extent practicable. The CEAT, composed of a standardized group of inter-professional, licensed practitioners, with specific expertise and training in the eligibility

requirements for PCAFC and the criteria for the higher-level stipend, will use those evaluations to inform PCAFC eligibility determinations, including whether the veteran is determined to be unable to self-sustain in the community. While primary care teams will not collaborate directly with the CEAT on determining eligibility, including whether the veteran is determined to be unable to self-sustain in the community, documentation of their input with the local staff evaluation of PCAFC applicants will be available in the medical record for review. This documentation will be used by the CEAT to help inform eligibility determinations for PCAFC, including whether the veteran is determined to be unable to self-sustain in the community. We believe the use of CEATs will improve standardization in eligibility determinations across VA. These teams will have access to the documentation of the evaluations conducted in order to inform eligibility determinations, including whether the veteran is determined to be unable to self-sustain in the community for the purposes of PCAFC. We also note that we will provide robust training and education to those staff conducting evaluations, and CEAT members who are determining eligibility. We further refer the commenters to our discussion on "Staff training on eligibility determinations" in the miscellaneous comments section of this rule.

We disagree with the commenters' assertion that we are eliminating the primary care team from PCAFC processes, which some allege is inconsistent with and exceeds our authority under 38 U.S.C. 1720G. The primary care team has not been entirely removed from eligibility determinations; rather as indicated in the proposed rule, instead of referencing the primary care team in various paragraphs of §§ 71.20 and 71.25, we will reference the primary care team in § 71.25(a)(2)(i) to indicate that PCAFC eligibility evaluations will be performed in collaboration with the primary care team to the maximum extent practicable. 85 FR 13364 (March 6, 2020).

We proposed to reference primary care team in § 71.25(a)(2)(i), to be consistent with 38 U.S.C. 1720G(a)(5), which requires that PCAFC applications be evaluated by VA in collaboration with the primary care team for the eligible veteran to the maximum extent practicable. As we explained in the proposed rule, this would ensure collaboration with the VA medical professionals involved in the patient's care during VA's evaluation of the joint application. *Id.* However, it may be

appropriate to consider care requirements prescribed by providers other than the veteran's or servicemember's primary care team, such as a non-VA provider, or other appropriate individual or individuals in VA. We reiterate here that these changes would give us more flexibility in how we evaluate PCAFC eligibility and approve and designate Family Caregivers while also ensuring that joint applications are evaluated in collaboration with the primary care team of the veteran or servicemember to the maximum extent practicable, consistent with the authorizing statute. We make no changes based on these comments.

Several commenters also expressed general disagreement with the removal of primary care team from § 71.40(b)(2). Specifically, one commenter asserted PCAFC is proposing to fundamentally alter accepted medical standards for provision of primary care services, clinical staff conducting home visits have an ethical and legal responsibility to communicate directly the functional status and well-being of the eligible veteran directly to the eligible veteran's primary care team, and that such staff do not have the same qualifications as medical professionals in order to make medical determinations about the eligible veteran. The same commenter opined that VA must recognize that collaboration among providers which includes clinical staff conducting home visits is a desirable characteristic of primary care.

We disagree with the assertion that the removal of primary care team from § 71.40(b)(2) conflicts with accepted medical standards. As indicated in the proposed rule, it may not always be appropriate for the clinical staff conducting home visits to collaborate directly with the primary care team; however, collaboration will still occur with the primary care team either directly with the provider conducting wellness contacts or through intermediaries such as the CSC. We make no changes based on these comments.

Several commenters were critical of our implied belief that primary care teams are "too close" to veterans and their caregivers to provide unbiased eligibility determinations, while several commenters agreed with the removal of the primary care team from eligibility determinations because the primary care team may not oversee the eligible veteran's care and may not have a relationship with the eligible veteran. One commenter specifically opined that there is a conflict and danger of involving the primary care team in a

decision that has a financial consequence. The same commenter asserted that VA has historically separated VHA from VBA to ensure health care and benefits are not enmeshed with a provider's ability to provide quality care. We agree that requiring a primary care provider to make eligibility determinations that have a financial impact on a veteran or servicemember and his or her Family Caregiver, places them in an undesirable situation, and may have a negative impact on the provider-patient relationship. Thus, we believe that the use of CEATs to make eligibility determinations, as described above, will help preserve the veteran-provider relationship. We make no changes based on this comment.

One commenter generally disagreed with removing the reference to the primary care team maintaining the eligible veteran's treatment plan and opined that it does not align with the American Medical Association Code of Medical Ethics. We note that CSP does not have responsibility for the totality of the veteran's medical treatment plan, as that would still be maintained by the primary care team consistent with what we stated in the proposed rule. See 85 FR 13365 (March 6, 2020). We make no changes based on this comment.

#### *Centralized Eligibility and Appeals Team (CEAT)*

Several commenters opposed the use of CEATs and expressed concerns that it will be composed of individuals who are not medically qualified or providers not familiar with the veteran's history. Two commenters asserted that the use of CEATs is similar to a disability benefits review board. One commenter asserted that use of CEATs is contrary to health care standards for delivering medical care and standards for authorizing and certifying that personal care services are medically necessary. This same commenter referenced the requirements for an independent medical examination (IME) and explained that the goal of an IME may be to poke holes in a patient's story for purposes of evaluating a workers' compensation claim or disability benefits.

As previously discussed, the CEATs will be composed of a standardized group of inter-professional, licensed practitioners with specific expertise and training in the eligibility requirements for PCAFC and the criteria for the higher-level stipend. We note that the CEATs will receive training to conduct eligibility determinations, including whether the veteran is determined to be unable to self-sustain in the community

for the purposes of PCAFC; and we further refer the commenters to our discussion on staff training on eligibility determinations within the miscellaneous comments section of this rule. We believe the use of CEATs to determine eligibility for PCAFC will improve standardization in these determinations across VA. We make no changes based on these comments.

#### *Serious Injury*

VA received many comments on its proposed definition of serious injury, including VA's inclusion of any service-connected disability, regardless of whether it resulted from an injury, illness, or disease, and removal of the requirement that the serious injury renders the eligible veteran in need of personal care services. Most comments on VA's proposed definition, however, concerned VA's proposed requirement that the eligible veteran have a singular or combined service-connected disability rating of 70 percent or more, and suggested other potential measures for establishing a serious injury. These comments have been grouped accordingly and addressed in turn.

Many commenters supported VA's expansion of the term "serious injury" to include any service-connected disabilities, including illnesses and diseases, and we thank them for their comments. One commenter raised concerns that the definition does not address illnesses (e.g., cancers, hypertension, hypothyroidism, parkinsonism, multiple sclerosis, amyotrophic lateral sclerosis (ALS)) that may prevent a veteran from carrying out ADLs or impede on their safety and welfare. This commenter urged VA to revise the definition to include such illnesses. Another commenter requested VA include service-connected diseases. We believe these commenters misunderstood VA's proposed definition, and we are not making any changes based on these comments. As indicated in the proposed rule, this definition will now include any service-connected disability regardless of whether it resulted from an injury or disease. Therefore, a veteran or servicemember with illnesses incurred or aggravated in the line of duty (e.g., cancers, hypertension, hypothyroidism, parkinsonism, multiple sclerosis, ALS) may be eligible for PCAFC if he or she has a single or combined service-connected rating of 70 percent or more and meets the other applicable PCAFC eligibility criteria, including being in need of personal care services for a minimum of six continuous months based on an inability to perform an

activity of daily living, or a need for supervision, protection, or instruction.

Several commenters opposed the change to the definition to include illnesses and diseases and asserted that doing so is improper and unfair. Commenters noted that many of these conditions will not be from injuries and may have occurred before service, were not in the line of duty, or may have been due to the veteran's own fault or misconduct. One commenter stated that only those who suffer true injuries should be eligible and that those should only be those injuries that were incurred in the line of duty. VA's proposed rule sets forth VA's rationale for deviating from the plain meaning of "injury" to include illnesses and diseases. Among other reasons set forth in the proposed rule, VA explained that this change is necessary to reduce subjective clinical judgement and improve consistency in PCAFC eligibility determinations and ensure that eligible veterans who served both before and after September 11, 2001 have equitable access to PCAFC. While Congress may have originally intended to focus PCAFC on the signature disabilities of veterans and servicemembers who served after September 11, 2001, the VA MISSION Act of 2018 expanded this program to veterans and servicemembers of earlier eras, and the signature disabilities of earlier conflicts include illnesses and diseases such as diseases presumed to be the result of herbicide exposure in Vietnam and other places, and chronic multi-symptom illness experienced by Persian Gulf veterans. VA believes caregivers of veterans and servicemembers with illnesses and diseases incurred or aggravated in the line of duty should benefit from PCAFC in the same manner as caregivers of veterans with injuries such as TBI or spinal cord injury. Thus, we believe the definition of serious injury for purposes of PCAFC should be as inclusive as possible by recognizing any service-connected disability. Additionally, this change will help to reduce inequities between veterans and servicemembers from different eras. To the extent commenters are concerned that a veteran could meet the serious injury requirement based on a disability not incurred or aggravated in line of duty or that resulted from the veteran's willful misconduct, we note that VA's definition of serious injury requires the veteran have a service-connected disability rated by VA. See 38 CFR 3.1(k) (defining "[s]ervice-connected") and 3.301 (addressing line of duty and misconduct). To the extent commenters opposed including service-connected



disabilities in the serious injury definition, we note that having an injury or disease incurred or aggravated in the line of duty in the active military, naval, or air service means the injury or disease is service-connected. See 38 U.S.C. 101(16) and 38 CFR 3.2(k). For purposes of PCAFC, service-connected disability ratings are the primary method we use to determine whether an injury was incurred or aggravated in the line of duty. We are not making any changes based on these comments.

Several commenters supported the removal of the language that required a connection between the need for personal care services and the serious injury and we thank them for their comments. One commenter disagreed with removing the language that “couples” the serious injury with the need for personal care services, as the “particular injury should be the exact reason the [v]eteran requires a caregiver.” This commenter expressed concern that this change will result in overburdening the program with false or undeserving cases and would be contrary to Congressional intent. Similarly, another commenter expressed concern that decoupling would greatly increase the number of veterans that will be eligible for this program.

As indicated in the proposed rule, many veterans have complex needs as a result of multiple medical conditions, and we find this even more true among older veterans. The complexity of assessing each specific medical condition and whether it renders the veteran or servicemember in need of personal care services has resulted in inconsistency in how “serious injury” is interpreted. We believe this inconsistency would be exacerbated as PCAFC expands to the pre-9/11 population. For example:

[A]n individual may have leg pain due to a service-connected spinal cord injury but be able to manage his or her symptoms. After a number of years, the individual is diagnosed with diabetes unrelated to his or her military service. Over time, the individual develops neuropathy in his or her lower extremities, which results in the individual being unable to complete his or her ADLs independently. The onset of neuropathy could be related to either the spinal cord injury or diabetes. This example illustrates the difficulty of these clinical decisions because the determination of whether the onset of neuropathy is related to the qualifying serious injury or the illness unrelated to military service would be a subjective clinical determination. 85 FR 13369 (March 6, 2020). Therefore, we believe it is necessary to decouple serious

injury from the need for personal care services. We also recognize that this “decoupling” will expand PCAFC eligibility, thus increasing participation in PCAFC.

Furthermore, we disagree with the commenter’s assertion that this decoupling would be contrary to Congressional intent as the “serious injury” criterion and “need for personal care services” requirement are separate under 38 U.S.C. 1720G(a)(2)(B) and (C), as VA articulated in its 2011 Interim Final Rule. 76 FR 26150 (May 5, 2011) (“the statute does not clearly state that the need for personal care services must relate to the ‘serious injury’ required under section 1720G(a)(2)(B)”). Rather serious injury was coupled with the need for personal services through VA’s regulations based on VA’s interpretation of the overall purpose and language of the statute as it was originally enacted. *Id.* However, as explained above, we no longer believe the coupling of serious injury and the need for personal care services is reasonable. This is especially true as we expand to older veterans from earlier service eras whose clinical needs are even more complex. Moreover, expanding this definition will not exclude veterans and servicemembers whose needs for personal care services stem from an injury incurred or aggravated in the line of duty in the active military, naval, or air service. We are not making any changes based on these comments.

VA received numerous comments about its proposed reliance on a single or combined service-connected disability rating of 70 percent or more in establishing whether an eligible veteran has a serious injury. In the discussion that follows, we have grouped comments that opposed VA’s use of a service-connection rating in general or expressed concern about the different purposes of PCAFC and VA disability compensation, and those that opposed the use of the 70 percent threshold specifically or suggested other alternatives.

Several commenters opposed use of a service-connected rating to determine PCAFC eligibility by asserting that doing so is contrary to Congressional intent, particularly as the statutory authority does not require a minimum rating, or contending that a service-connected rating is not an appropriate consideration for determining whether a veteran or servicemember requires personal care services from a Family Caregiver. One commenter requested VA eliminate this requirement because the statute does not provide VA with authority to curtail specified eligibility. Two commenters asserted that

eligibility was intended to be based on a clinical determination of a veteran’s need, which is not a rating decision adjudicated by a non-health care professional at the Veterans Benefits Administration, and this should not be left to an administrative process entirely separate from VHA. Relatedly, another commenter stated that VA should not suggest to the public that the 70 percent rating is an objective “clinical standard” associated with an applicant’s potential need for personal care services. Another commenter was similarly concerned about use of a disability rating since disability compensation is intended to compensate for loss of ability of veteran to earn income by working which is different than the intent of PCAFC. Relatedly one commenter noted that service connection and injury are two separate things and urged VA to keep the definition as it currently is. Another commenter noted that the veteran should be looked at “on the whole” by a clinician.

VA acknowledges that 38 U.S.C. 1720G does not set forth a specific service-connected disability rating as a minimum requirement to establish PCAFC eligibility, and that imposing one through this rulemaking is a departure from the position taken by VA in its January 9, 2015 Final Rule. However, VA’s proposed definition is a reasonable interpretation of the statutory requirement that an eligible veteran has an injury that is serious, particularly in the context of other changes VA is making to the definition of serious injury.

Heretofore, the only meaning applied to establish whether an injury was serious was that the injury render the eligible veteran in need of personal care services. VA’s proposed rule explained why it is necessary to “decouple” these requirements as PCAFC expands to veterans of earlier eras (as discussed above), but doing so removed the only guidance informing the meaning of whether the eligible veteran’s injury was serious. Therefore, VA must replace the definition with some standard that distinguishes a “serious injury” from an “injury” to give effect to the statutory requirement. *Williams v. Taylor*, 529 U.S. 362, 404, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

In considering how to define “serious injury” for purposes of PCAFC, VA sought to impose a definition that would be easily understood by veterans and caregivers and consistently applied by VA. A specific service-connected disability rating threshold serves those purposes. As noted by one commenter in support of VA’s proposed definition, “disability ratings are a more common

standard used for eligibility across other VA programs.” Establishing an objective baseline for PCAFC eligibility will increase transparency and assist the program in adjudicating applications efficiently.

VA agrees that the purpose of disability compensation is quite different than the purpose of providing benefits to Family Caregivers under PCAFC, and it was not VA’s intent to suggest that a single or combined 70 percent service-connected disability rating establishes or suggests a need for personal care services from a Family Caregiver. On the contrary, many veterans with disability ratings of 70 percent or higher are fully independent and able to function in the absence of support from a caregiver. Instead, a single or combined service-connected disability rating of 70 percent or more serves as an objective standard to determine whether an eligible veteran has a “serious injury . . . incurred or aggravated in the line of duty in the active, military, naval, or air service” and thereby demonstrates that a veteran’s or servicemember’s disability or disabilities rise to the level of serious. Other criteria in part 71 will establish a veteran’s or servicemember’s need for personal care services (*i.e.*, whether the veteran or servicemember is “in need of personal care services . . . based on [a]n inability to perform an activity of daily living; or . . . [a] need for supervision, protection, or instruction”). We note that approximately 98 percent of the current PCAFC population across all three tiers have a 70 percent or higher service-connected disability rating, and would meet this definition of serious injury. VA agrees that applicants should be looked at holistically by clinicians considering PCAFC eligibility, and will work to ensure that practitioners determining PCAFC eligibility are trained to understand that “serious injury” is only one component of the PCAFC eligibility criteria. We are not making any changes based on these comments.

Several commenters expressed concerns about the ability of veterans and servicemembers without VA disability ratings or with VA disability ratings less than 70 percent to obtain an expedited review of their claims and appeals in order to qualify for PCAFC. Several commenters were particularly concerned about how delays in processing claims and appeals will impact veterans applying for PCAFC, and how this rating requirement will impact the processing of claims and appeals, particularly in light of backlogs and delays in processing such claims and appeals. One such commenter

suggested that without a plan to expedite claims for individuals applying to PCAFC, VA would be imposing a roadblock to timely admission into PCAFC, and that bureaucracy and red tape should never be a barrier to a veteran’s ability to receive needed in-home care. One commenter expressed concern that the proposed rule did not provide any data or analysis about how the claims and appeals process will impact the administration of this requirement, and urged VA to establish an expedited VBA claims and appeals process for veterans submitting a joint application for PCAFC.

VA agrees with the commenters and acknowledges that this requirement may result in some delays in adjudicating PCAFC eligibility; however, we do not believe these concerns outweigh the advantages of this approach that are outlined above and in VA’s proposed rule. Furthermore, compensation claims processing time has continued to decrease over the years. Specifically, the average number of days to process a claim, as of March 2, 2020, was 78.5 days, compared to 91.8 days on October 1, 2018. We acknowledge that, as of July 4, 2020, the average number of days to process a claim has increased to 114.4 days. This increase was due to the COVID–19 national emergency and the inability to conduct in-person medical exams. However, we note that in-person medical exams have begun again. In addition, VA currently prioritizes certain compensation claims from any claimant who is: Experiencing extreme financial hardship; homeless; terminally ill; a former prisoner of war; more than 85 years old; became very seriously ill or injured/seriously ill or injured during service as determined by the Department of Defense; diagnosed with ALS or Lou Gehrig’s Disease; or in receipt of a Purple Heart or Medal of Honor. In addition, VA has modernized its appeals process since February 19, 2019 to create different claims lanes (higher level reviews, supplemental claims, and appeals to the Board of Veterans’ Appeals) that help ensure that claimants receive a timely decision on review when they disagree with a VA claims adjudication. We note that VA currently does not provide priority processing of disability compensation benefits for aid and attendance and other ancillary benefits such as a housebound benefit. As to whether claims can be expedited for PCAFC program applicants, VA does not have an already available method for collecting data on veterans to know whether or not they are also applying for PCAFC. Therefore, VA cannot

currently prioritize disability compensation claims for PCAFC claimants, as doing so would be administratively challenging.

We also note that VA offers a menu of supports and services that supports veterans and their caregivers that may be available PCAFC applicants who are awaiting a VA disability rating decision. Such services include PGCSS, homemaker and home health aides, home based primary care, veteran directed care, and adult day care health care to name a few. We appreciate the commenters’ concerns; however, we are not making any changes based on these comments.

One commenter expressed concern that many veterans from earlier eras of military service were not treated right by this country and the government, so they have not had interactions with VA and do not have a VA disability rating. We agree that veterans from earlier eras of military service have encountered challenging experiences with our government and VA. We believe expansion of PCAFC to eligible veterans who served before September 11, 2001 is one step to help remedy the challenges veterans from those eras have faced. Other changes to the definition of serious injury were designed to ensure PCAFC is inclusive of veterans from all eras by including all service-connected disabilities, regardless of whether they resulted from an injury, illness or disease, and removing the link between the serious injury and the individual’s need for personal care services. We encourage veterans who do not yet have an existing relationship with VA to contact VA, through [www.va.gov](http://www.va.gov), your local VA location using the Find a VA Location on [www.va.gov](http://www.va.gov), or 844–698–2311, to find out about the services and benefits that may be available to them, including VA disability compensation, pension, and health care benefits. This is especially important for veterans and servicemembers seeking to qualify for PCAFC because in addition to requiring that an eligible veteran have a single or combined service-connected disability rating of 70 percent or more, the PCAFC eligibility criteria under § 71.20 also require the eligible veteran to receive ongoing care from a primary care team, which includes a VA primary care provider, or to do so if VA approves and designates a Family Caregiver. Thus, veterans and servicemembers would need to establish a relationship with VA (by obtaining a service-connected disability rating and receiving ongoing care from a primary care team) to qualify for PCAFC. We appreciate the commenter’s concern; however, we are

not making any changes based on this comment.

Other commenters raised concerns about use of the 70 percent service-connected disability threshold specifically, as being either too high or too low, or suggested alternative bases for establishing whether an eligible veteran has a serious injury.

Numerous commenters were concerned that using a singular or combined service-connected disability rating of 70 percent was too high and arbitrary, and those with lower ratings may need assistance. Several commenters suggested VA lower the minimum rating requirement to 50 percent for consistency with the requirements for priority group one eligibility for purposes of enrollment in VA health care. One commenter asserted that Congress believed these veterans were of highest concern by assigning them to priority group one, and utilizing a threshold of 50 percent or more would allow more veterans with sustained serious service-connected disabilities to have access to PCAFC. A few commenters suggested revising the criterion to include any disabled veteran with a 50 percent or more service-connected disability rating that served prior to 1975. Relatedly, one commenter suggested using a rating of 60 percent based on the commenter's belief that this is the threshold for qualifying for no cost VA medical care and VA disability pension.

Other commenters asserted that using a 70 percent rating would expand the program beyond what Congress intended. Likewise, another commenter noted that a 70 percent rating is not difficult to achieve, and the need for a caregiver is not hard to prove, as these are normally granted because they are subjective.

In determining how to revise the definition of serious injury, VA considered other service-connected disability rating levels to establish whether an eligible veteran has a serious injury, but found a single or combined rating of 70 percent or more to be the best approach, as approximately 98 percent of current participants meet this requirement. Similarly, we note that one commenter that represents a veterans service organization conducted a survey of their "warriors" (*i.e.*, veteran members) and concluded that "over 96 percent—2,333 out of 2,410 applicable warriors—of survey respondents enrolled in the PCAFC reported a service-connected disability rating of 70 percent or higher."

We believe that a single or combined rating of 70 percent or more would demonstrate that a veteran's or

servicemember's injuries rise to the level of serious, at least for purposes of establishing eligibility for PCAFC. While we understand that lower ratings are used to determine eligibility for various other VA services (*i.e.*, Priority Group 1 eligibility for VA health care), we reiterate that PCAFC is one of many services offered to veterans and servicemembers, as applicable, that are complementary but are not required to be identical in terms of eligibility requirements. VA considered applying a minimum service-connection rating lower than 70 percent, such as 50 percent or 60 percent, but determined, based on reviewing the rating criteria in 38 CFR part 4, that not every 50 or 60 percent rating may be indicative of a serious injury. Additionally, for the reasons set forth in the proposed rule and this final rule, we believe the threshold of 70 percent is a reasonable and appropriate interpretation of the "serious injury" requirement in 38 U.S.C. 1720G(a)(2)(B). Moreover,

[a]s the Supreme Court has noted, "[t]he 'task of classifying persons for . . . benefits . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line.'" *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (quoting *Mathews v. Diaz*, 426 U.S. 67, 83–84 (1976)). Provided there is a legitimate basis for the general classification established by Congress or the agency, it is not arbitrary or capricious simply because it may be overinclusive or underinclusive on some applications. See *Weinberger v. Salfi*, 422 U.S. 749, 776 (1975) ("[g]eneral rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases").

Brief for Respondent-Appellant at 15–16, *Haas v. Peake*, 525 F.3d 1168 (2008) (No. 2007–7037), 2007 U.S. Fed. Cir. Briefs LEXIS 1048, at 21–22.

VA also considered applying a minimum service-connected rating higher than 70 percent, such as 100 percent, but determined that would be too narrow and restrictive. For instance, a 70 percent rating for PTSD would require: Occupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood, due to such symptoms as: Suicidal ideation; obsessional rituals which interfere with routine activities; speech intermittently illogical, obscure, or irrelevant; near-continuous panic or depression affecting the ability to function independently, appropriately and effectively; impaired impulse control (such as unprovoked irritability with periods of violence); spatial

disorientation; neglect of personal appearance and hygiene; difficulty in adapting to stressful circumstances (including work or a worklike setting); inability to establish and maintain effective relationships. 38 CFR 4.130 DC 9411. We believe that veterans who have symptomology that manifest to that level should not be denied admittance to the program on the basis that their injury or disease would not be considered "serious," which would result if we used a service-connected disability rating higher than 70 percent. Furthermore, applying a 100 percent rating would result in approximately 40 percent of the current participants no longer being eligible because they would not meet that higher threshold.

VA elected not to apply different criteria to veterans and servicemembers depending on the date their serious injury was incurred or aggravated in the line of duty because this would be inequitable and would lead to treating eligible veterans differently based on their era of service. We are not making any changes based on these comments.

Another commenter noted that 70 percent is the rating required for nursing home care, but asserted that Congress considered and rejected limiting PCAFC to only those who would otherwise require nursing home care. We would like to clarify that although having a single or combined service-connection rating of 70 percent or more is one basis upon which eligibility can be established for VA nursing home care under 38 U.S.C. 1710A, we are not suggesting that the eligibility criteria for PCAFC and nursing home care are identical. As we noted in the proposed rule, there may be instances when nursing home care would be more appropriate for a veteran or servicemember than PCAFC. 85 FR 13369 (March 6, 2020). We are requiring a 70 percent or more service-connected disability rating because of the reasons stated in the proposed rule and additionally outlined above and note that it is the minimum threshold that must be met for PCAFC eligibility. As explained in the proposed rule and reiterated in this final rule, additional criteria must also be met before an individual is determined to be eligible for PCAFC. We are not making any changes based on this comment.

Several commenters raised concerns about potential abuse of the program by individuals who may not really need it but qualify, nonetheless. Similarly, one commenter asserted that the amount of service connection should not be considered because there are veterans with 100 percent service-connection ratings but do not need a caregiver. A

separate commenter who asserted that a 70 percent rating is not difficult to achieve, also indicated that the need for a caregiver is not hard to prove, and because eligibility determinations are subjective, benefits are normally granted. However, this commenter also raised concerns about how staff may review these determinations later and decide to remove participants from PCAFC.

First, we note that many of the changes we are making in this final rule are aimed at improving standardization and reducing subjectivity in PCAFC eligibility determinations. We agree that an eligible veteran's service-connection rating does not establish a need for personal care services from a Family Caregiver, and it was not VA's intent to suggest that it does. As indicated above, a single or combined 70 percent or more service-connected rating is just one component of the PCAFC eligibility determination. Separate eligibility criteria in § 71.20 would establish whether a veteran or servicemember is in need of personal care services (based on an inability to perform an activity of daily living or a need for supervision, protection, or instruction) and whether participation in PCAFC is in the veteran's or servicemember's best interest, among other criteria. Therefore, a veteran or servicemember would not be eligible for PCAFC solely for having a service-connected disability rating. Instead, the definition of serious injury will provide a transparent and objective standard for determining whether a veteran's or servicemember's injury is serious. Also, as indicated in the proposed rule, any changes to a veteran's or servicemember's service-connected rating that results in a rating less than 70 percent for a single or combined service-connected disability will result in the veteran or servicemember no longer being eligible for PCAFC. In such instance, the veteran or servicemember would be discharged in accordance with § 71.45(b)(1)(i)(A) for no longer meeting the requirements of § 71.20 because of improvement in the eligible veteran's condition or otherwise (e.g., no longer meeting the definition of serious injury). To the extent that commenters raised concerns about how staff may review these determinations later and decide to remove participants from PCAFC, we note that we will provide training to VA staff who are making eligibility determinations to ensure that the same criteria that are used to determine eligibility at the time of application are the same as those used during

reassessments. We are not making any changes based on these comments.

One commenter was concerned about how VA would fund this program as a result of using this criterion, suggesting there must be millions of veterans with a 70 percent service-connected rating, and believed this funding could be better spent elsewhere (e.g., on aging families affected by the COVID-19 national emergency). This same commenter was concerned that this criterion is excessive and would create dependency on VA. Thus, this commenter suggested limiting this program to 12 months per one's lifetime or conditioning PCAFC participation on the veteran subsequently participating in one of the other VA in-home care programs.

We thank the commenter for their concerns and refer them to the regulatory impact analysis accompanying this rulemaking for a detailed analysis of the estimated costs for this program. As noted previously, the serious injury requirement is only one criterion that must be met under § 71.20 for a veteran or servicemember to qualify for PCAFC. To the extent that this commenter is concerned that the criteria set forth in § 71.20 are too broad, we disagree. VA has tailored the eligibility criteria to target veterans and servicemembers with moderate and severe needs through new definitions for the terms "in need of personal care services," "inability to perform an activity of daily living," and "need for supervision, protection, or instruction," in particular. PCAFC is a clinical program that addresses the unique needs of each eligible veteran and his or her caregiver which may change over time. Also, the potential for rehabilitation or independence among PCAFC eligible veterans will likely decrease as the program expands to veterans and servicemembers from earlier eras of military service who have more progressive illness and injuries, such as dementia or Parkinson's disease. Therefore, we do not believe limiting this program to a specific time period or mandating the use of other VA in-home care programs is appropriate. Furthermore, PCAFC is one of many in-home services that are complementary but not necessarily exclusive to one another. As a result, an eligible veteran and his or her caregiver may also participate in other home-based VA programs, such as home based primary care, respite care, and adult day health care, as applicable.

To the extent that this commenter is concerned that the criteria will create dependency, we note that we proposed, and make final, § 71.30 which

establishes the requirement for reassessments of eligible veterans and Family Caregivers to determine their continued eligibility for participation in PCAFC under part 71. The reassessment includes consideration of the PCAFC eligibility criteria, including whether PCAFC participation is in the best interest of the veteran or servicemember. As proposed and explained previously in this rulemaking, "in the best interest" is a clinical determination that includes consideration of whether PCAFC participation supports the veteran's or servicemember's potential progress in rehabilitation, if such potential exists, and increases the veteran's or servicemember's potential independence, if such potential exists, among other factors. We believe that this reassessment process, which will occur annually (unless a determination is made and documented by VA that more of less frequent reassessment is appropriate), will reduce the risk of dependency in instances where the eligible veteran may have the potential for improvement. We are not making any changes based on this comment.

One commenter was supportive of including consideration of any service-connected disability and VA no longer requiring a connection between the need for personal care services and the qualifying serious injury, but recommended VA consider including in the definition of serious injury service-connected veterans in receipt of individual unemployability (IU), which the commenter described as a benefit reserved for veterans whose service-connected condition(s) is so severe as to render them unable to obtain and maintain "substantially gainful" employment. Section 4.16(a) of 38 CFR, establishes the requirements for IU (referred therein as schedular IU), which includes that the veteran have at least one service-connected disability rated at least 60 percent disabling, or have two or more service-connected disabilities, with at least one rated at least 40 percent disabling and a combined rating of at least 70 percent. According to the commenter, "[t]here are numerous disabilities warranting IU that would require a [F]amily [C]aregiver to provide personal services to maintain the veteran's independence in his or her community." IU allows VA to pay certain veterans compensation at the 100 percent rate, even though VA has not rated his or her service-connected disabilities at that level. To qualify, a veteran must, in addition to meeting the service-connection rating requirements identified by the commenter, be unable

to secure or follow a substantially gainful occupation as a result of service-connected disabilities. We note that veterans who are unemployable by reason of service-connected disabilities but who fail to meet the requirements of § 4.16(a), may still qualify for IU based on additional consideration under § 4.16(b). Simply put, a veteran can be in receipt of an IU rating irrespective of a specific service-connected rating.

We do not find it appropriate to use IU as a substitute for the single or combined 70 percent rating as not all veterans and servicemembers applying for or participating in PCAFC will have been evaluated by VA for such ratings, and if VA were to create an exception to the “serious injury” requirement for individuals with an IU rating, VA would also need to consider whether other exceptions (based on disability rating criteria or otherwise) should also satisfy the “serious injury” requirement. In addition, IU has proven to be a very difficult concept to apply consistently in the context of disability compensation and has been the source of considerable dissatisfaction with VA adjudications and of litigation. Consequently, we choose not to import this rather subjective standard and its potential for inconsistency into the PCAFC program. As stated above, we believe the requirement that a veteran or servicemember have a single or combined service-connected disability rating of 70 percent or more is a reasonable and appropriate interpretation of the “serious injury” requirement in 38 U.S.C. 1720G(a)(2)(B). See Brief for Respondent-Appellant at 15–16, Haas, 525 F.3d 1168 (2008) (No. 2007–7037) (citing *Fritz*, 449 U.S. at 179 (concerning regulatory line drawing); *Weinberger*, 422 U.S. at 776).

One commenter recommended that VA add specific injuries and disabilities to the list of requirements for PCAFC which is similarly done for Special Home Adaptation (SHA) or Specially Adapted Housing (SAH) grants (*e.g.*, loss or loss of use of more than one limb, blindness, severe burns, loss or loss of use of certain extremities). The commenter further opined that a clear requirement could be that a veteran have a Purple Heart, an award of combat related special compensation, concurrent retirement and disability pay, a medical retirement/discharge, be a TSGLI recipient, or have a line of duty investigation for the injury. Relatedly, one commenter requested VA tie eligibility to award of the Purple Heart, as there are other programs available to veterans. As previously explained, having a serious injury is only one component of the PCAFC eligibility

criteria, and the serious injury will no longer be tied to the veteran’s or servicemember’s need for personal care services. Therefore, we respectfully decline to include a specific list of injuries, disabilities, awards, or compensations that may suggest a need of personal care services. Moreover, because VA is expanding the definition of serious injury to include any singular or combined service-connected disability rated 70 percent or higher, regardless of whether it resulted from an injury, illness, or disease, it is not necessary to provide examples of potentially qualifying conditions. Doing so could cause unnecessary confusion by suggesting that listed conditions are somehow more applicable. Additionally, we believe limiting PCAFC eligibility to recipients of the Military Order of the Purple Heart would be too restrictive as it is associated only with combat injuries, such awards have historically discriminated against minorities and women, and recordkeeping on these awards has been inconsistent. Further, as indicated in the proposed rule, we considered the TSGLI definition of “traumatic injury” in defining serious injury; however, we determined it would be too restrictive and result in additional inequities, and noted the inherent differences between the two programs—TSGLI is modeled after Accidental Death and Dismemberment insurance coverage, whereas PCAFC is a clinical benefit program designed to provide assistance to Family Caregivers that provide personal care services to eligible veterans. We are not making any changes based on these comments.

One commenter recommended VA consider defining serious injury consistent with the definition of serious injury or illness contained in 29 CFR 825.127(c). We note this commenter is referring to the Department of Labor’s (DOL) regulations for the Family and Medical Leave Act (FMLA). This definition is defined, in part, to mean: a physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or a physical or mental condition that substantially impairs the covered veteran’s ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or an injury, including a psychological injury, on the

basis of which the covered veteran has been enrolled in PCAFC.

FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. The section and definition referenced by this commenter relate specifically to when a military caregiver may use FMLA leave to care for a covered servicemember with a serious injury or illness. We note that FMLA is entirely different from PCAFC as FMLA protects workers when they need to take leave to care for certain family and medical reasons, while PCAFC is a clinical program that provides benefits to Family Caregivers. While DOL’s definition of serious injury or illness includes veterans participating in PCAFC, we do not believe that requires us to adopt DOL’s definition for purposes of defining serious injury in PCAFC. We note that the authorizing statutes (*i.e.*, 38 U.S.C. 1720G and 29 U.S.C. 2611) vary in how they define serious injury and serious injury or illness, respectively. We make no changes based on this comment.

One commenter recommended that in order to remain consistent with the definition of serious injury, VA must improve its education and communication about two of the most common conditions affecting veterans, specifically mild traumatic brain injury (mTBI or concussion) and PTSD. This commenter noted that a service-connected rating for a mTBI will not automatically confer a need for supervision, and that PTSD symptoms can be managed and even resolved completely; and explained that family care is a complement to, not a substitute for professional treatment and expertise. The commenter asserted that while a spouse can help a veteran work toward his or her mental health goals, and may be involved in treatment planning, relying on a spouse to manage a veteran’s mental health symptoms is clinically inappropriate and cannot be the basis for acceptance into PCAFC.

First, we would like to clarify that participation in PCAFC is not meant to replace medical or mental health treatment and agree with the commenter that a Family Caregiver is not expected to provide such treatment, but rather required personal care services, for mTBI or PTSD. Further, part of the eligibility criteria for the program require the eligible veteran to receive ongoing care from a primary care team, which will help ensure the eligible veteran is engaged in appropriate care based on his or her clinical needs.

Second, as discussed above, the veteran's or servicemember's serious injury does not need to be related to his or her need of personal care services, which is separately considered (*i.e.*, whether the veteran or servicemember is "in need of personal care services for a minimum of six continuous months based on . . . [a]n inability to perform an activity of daily living; or . . . [a] need for supervision, protection, or instruction"). Finally, we agree with the commenter that education and training is important for staff, eligible veterans and their Family Caregivers, and we note that we currently provide such training on many conditions, such as TBI, PTSD, and dementia. We will continue to provide a robust training plan for staff and PCAFC participants. Specifically, we will ensure that training on conditions, such as TBI, PTSD, and dementia will continue to be provided. We make no changes based on this comment.

#### *Unable To Self-Sustain in the Community*

Several commenters expressed confusion and concern about this definition and how it will be used to determine whether a Primary Family Caregiver will receive the lower- or higher-level stipend. We note that this definition will only be used in the context of § 71.40(c), Primary Family Caregiver benefits, and refer to the discussion of that section below regarding unable to self-sustain in the community.

#### **§ 71.20 Eligible veterans and servicemembers**

##### *Two-Phase Eligibility Expansion*

Multiple commenters disagreed with the phased eligibility expansion. They also opined that this phased eligibility expansion discriminated against pre-9/11 veterans, that pre-9/11 veterans should not be treated differently than post-9/11 veterans, that veterans from all eras require assistance from caregivers, and that PCAFC expansion for all pre-9/11 veterans should not be delayed and should be immediate to veterans from all eras. Many commenters expressed that they felt that veterans who served between May 8, 1975 and September 10, 2001 should not have to wait another two years to be part of the PCAFC expansion. One commenter asked if there was any way the two-year time frame for this group of veterans could be changed to a year or less. Also, commenters expressed that they would like to see veterans with a terminal illness or 100 percent disability rating be eligible for PCAFC

immediately, irrespective of their service date, while another commenter suggested that immediate eligibility for PCAFC should be viewed on a case-by-case basis instead of service dates.

In response to the above comments, the initial eligibility distinction between pre- and post-9/11 veterans and servicemembers in the current program was mandated by Congress by the Caregivers Act, as established by 38 U.S.C. 1720G. Furthermore, as previously stated, the VA MISSION Act of 2018 further modified section 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. However, Congress mandated that this expansion occur in two phases. The first phase of expansion will include eligible veterans who have a serious injury (including traumatic brain injury, psychological trauma, or other mental disorder) incurred or aggravated in the line of duty in the active military, naval, or air service on or before May 7, 1975, and will begin on the date the Secretary submits a certification to Congress that VA has fully implemented a required IT system that fully supports PCAFC and allows for data assessment and comprehensive monitoring of PCAFC. The second phase will occur two years after the date the Secretary submits certification to Congress that VA has fully implemented the required IT system, and will expand PCAFC to all eligible veterans who have a serious injury (including traumatic brain injury, psychological trauma, or other mental disorder) incurred or aggravated in the line of duty in the active military, naval, or air service, regardless of the period of service in which the serious injury was incurred or aggravated in the line of duty in the active military, naval, or air service. Therefore, we lack authority to eliminate the two-phase eligibility expansion and make the changes suggested by these comments. See 38 U.S.C 1720G(a)(2)(B).

Multiple commenters also expressed confusion as to when Vietnam veterans would be eligible for PCAFC and asked for clarification. Other commenters expressed confusion about when other pre-9/11 era veterans would be eligible for PCAFC and asked for clarification. One commenter asked if VA will use "the same standard as the [Veterans Benefits Administration (VBA)] of having to serve at least one day during the time period." While the commenter did not provide any further detail as to this standard, we note that in the VBA context, similar language is found in various parts of VA's Adjudication

Procedures Manual, M21-1, to include parts regarding eligibility determinations for pension, consideration of presumptive service-connection based on active duty for training and inactive duty for training, and jurisdiction of Camp Lejeune claims.

As previously explained, the authorizing statute, 38 U.S.C. 1720G, as amended by section 161 of the VA MISSION Act of 2018, bases eligibility for PCAFC, in part, on the date the serious injury was incurred or aggravated in the line of duty in the active military, naval, or air service. 38 U.S.C. 1720G(a)(2)(B). In this regard, eligibility is not based only on the dates of active military, naval, or air service. Instead, it is focused on when the veteran or servicemember incurred or aggravated a serious injury in the line of duty while in the active military, naval, or air service. Currently, only those whose serious injury was incurred or aggravated in the line of duty in the active military, naval or air service on or after September 11, 2001, are eligible for PCAFC. 38 U.S.C. 1720G(a)(2)(B)(i). In the first phase of expansion (that will begin on the date the Secretary submits to Congress certification that VA has fully implemented the required IT system), those veterans and servicemembers will continue to be eligible for PCAFC, and additionally, those veterans and servicemembers who incurred or aggravated a serious injury in the line of duty in the active military, naval or air service on or before May 7, 1975 will also become eligible (subject to the other applicable eligibility criteria). 38 U.S.C. 1720G(a)(2)(B)(ii). Two years after the date the Secretary submits to Congress certification that VA has fully implemented the required IT system, all veterans and servicemembers, that otherwise meet eligibility criteria, including those who have a serious injury incurred or aggravated in the line of duty in the active military, naval, or air service after May 7, 1975 but before September 11, 2001, will be eligible for PCAFC (*i.e.*, May 8, 1975 to September 10, 2001). See 38 U.S.C. 1720G(a)(2)(B)(iii). We also note that because eligibility under 38 U.S.C. 1720G(a)(2)(B) is based on the date the serious injury was incurred or aggravated, and not merely on the dates of a veteran's or servicemember's service, we would not, nor would there be a need, to apply language that the veteran or servicemember serve "at least one day" during the time periods outlined above for eligibility for the first phase of the PCAFC expansion. We

make no changes based on these comments.

Multiple commenters asked how VA will determine eligibility for veterans with service dates that overlap the time periods set forth in 38 U.S.C. 1720G(a)(2)(B)(i)–(iii), and specifically, those who served both before and after May 7, 1975; and commenters asked how VA will determine eligibility for veterans who have presumptions of service-connection for conditions that are not diagnosed until years after their service. Commenters provided specific scenarios and asked under which phase of expansion veterans would qualify for PCAFC. One commenter asked if a veteran with a 100 percent service rating who served from 1974 to 1994 could be eligible for PCAFC in the first phase of expansion or in the second phase of expansion. Another commenter asked which phase of expansion would apply for a veteran with active military service from 1972 to 1992, who has a combined rating from several service-connected disabilities of 70 percent or greater with one disability at 30 percent due to service in Vietnam and the other disabilities incurred in active service during the Lebanon conflict and the Persian Gulf War. Another commenter asked which phase of expansion would apply for a veteran who served from prior to May 7, 1975, until April 30, 1980, developed ALS and was awarded presumptive service connection for ALS last year. A different commenter asked whether a veteran would be included under phase one of expansion if the veteran served in Vietnam prior to May 7, 1975, was exposed to Agent Orange, left the military in August 1975, was diagnosed with ALS several years later, is service-connected at 100 percent, and meets all additional eligibility criteria.

As previously explained in this section, the authorizing statute, 38 U.S.C. 1720G, as amended by section 161 of the VA MISSION Act of 2018, bases eligibility for PCAFC, in part, on the date the serious injury was incurred or aggravated in the line of duty in the active military, naval, or air service. Thus, while there may be veterans and servicemembers who have service dates that cover more than one of the time periods set forth in 38 U.S.C. 1720G(a)(2)(B)(i)–(iii), their eligibility under section 1720G(a)(2)(B) is dependent on the date the serious injury was incurred or aggravated. In this rulemaking, the term “serious injury” means “any service-connected disability that: (1) Is rated at 70 percent or more by VA; or (2) Is combined with any other service-connected disability or disabilities, and a combined rating of 70 percent or more is assigned by VA.”

This means a veteran with a service-connected disability incurred or aggravated in the line of duty before May 7, 1975, would qualify for the first phase of expansion so long as the veteran’s service-connected disability is rated at 70 percent or more by VA or is combined with any other service-connected disability or disabilities, and a combined rating of 70 percent or more is assigned by VA, and the veteran meets all the other PCAFC eligibility criteria. If a veteran has a serious injury, as defined in this rulemaking, that was incurred or aggravated after May 7, 1975, but before September 11, 2001, and meets all other eligibility criteria for PCAFC, then he or she would be eligible for PCAFC in the second phase of expansion.

Additionally, there may be instances in which a veteran’s or servicemember’s condition is not diagnosed until years after they served and years after the condition was actually incurred or aggravated, such that it may be difficult to identify when the serious injury was incurred or aggravated. We note that there may be a lack of documentation identifying the date on which an applicant’s serious injury was incurred or aggravated. For example, a veteran may have served before and after May 7, 1975, and been diagnosed with ALS several years after the veteran was discharged from active military, naval, or air service. If that veteran has received a presumption of service-connection for ALS, but the rating decision does not specify the dates of service to which the ALS is attributable, VA would determine on a case-by-case basis whether the veteran could qualify for PCAFC under the first or second phase of expansion. The dates of service, along with other documentation such as rating decisions, service treatment records, VBA claims files, and review of medical records will help inform VA of when the serious injury was incurred or aggravated. It is important to note that such issues regarding the date the serious injury was incurred or aggravated will arise only during the first phase of expansion, only when the veteran has dates of service before and after May 7, 1975, and only in instances in which the date of the serious injury is not documented. We make no changes based on these comments.

#### *Implementation Delay*

Commenters asked why it is taking so long to get the eligibility expansion started, to include implementation of an IT system, and expressed dissatisfaction that the expansion was not being implemented now or in a more timely

manner. Commenters urged that the expansion be sped up, especially before most pre-9/11 veterans pass away. Multiple commenters asserted that VA has missed its statutory deadline to expand. In this regard, commenters explained that the VA MISSION Act of 2018 required VA to certify implementation of the required IT system no later than October 1, 2019, and as such, VA was required to implement phase one by October 1, 2019 and phase two by October 1, 2021. Accordingly, one commenter requested VA implement phase one no later than September 2020. Another commenter asked VA to clarify why an additional two years is needed for evaluating phase two applicants and recommended that VA commit to a shorter timeline for phase two expansion. Other commenters asserted that VA must implement phase two by October 1, 2021, to be consistent with Congressional intent. Furthermore, one commenter specifically asked, given the delays to the IT system, that VA publish monthly updates on the progress towards implementation of the required IT system and on the progress towards publishing a final rule.

We acknowledge that the full implementation of the new IT system has been delayed. This is due to VA’s pivot from developing a home grown IT system to configuration of a commercial platform (Salesforce) which, among other things, has required migration of data from the legacy web-based application to the new Salesforce platform, development of new functionality to automate monthly stipend calculations, as well as integration with other VA systems. However, as required by law, the phases of expansion are explicitly tied to the date VA submits to Congress a certification that the Department has fully implemented the required IT system, and VA has not yet submitted to Congress that certification. The phases of expansion are not tied to the October 1, 2019 due date for such certification in section 162(d)(3)(A) of the VA MISSION Act of 2018. See 38 U.S.C. 1720G(a)(2)(B). Accordingly, the first phase of expansion will begin when VA submits to Congress certification that it has fully implemented the required IT system, and the second phase will begin two years after the date VA submits that certification to Congress. Therefore, we are unable to expand immediately or expedite the second phase of expansion once VA submits its certification to Congress.

Further, we will not provide the requested monthly updates on the progress towards implementation of the

required IT system and on the progress of the final rule, as these are actions we typically do not take, and it would divert our energy and resources in making progress towards fully implementing the required IT system and the final rule. We note that we will provide the public with notification upon certification of the required IT system and the publication of the final rule. We make no changes based on these comments.

#### *Legacy Participants*

VA received multiple comments concerning eligibility for legacy participants, as that term will be defined in § 71.15. We will address the comments below.

One commenter inquired into the reasons VA was providing a transition period for legacy participants who the commenter believes will not be reassessed for a year and will receive an additional five months to transition out of PCAFC even though they may no longer be eligible for PCAFC. The commenter suggested this is a misuse of taxpayer dollars and recommended current PCAFC participants be reassessed immediately to determine their continued eligibility, and if found ineligible, only be allowed two to three months to transition out of PCAFC.

We believe the transition period set forth in the proposed rule for legacy participants and legacy applicants who do not meet the requirements of § 71.20(a), and their Family Caregivers is a fair and reasonable amount of time. To clarify, VA will not wait one year after the effective date of the rule to evaluate the eligibility of legacy participants and legacy applicants. VA will begin the reassessments of such individuals when this final rule becomes effective, but VA estimates that it will need a full year to ensure all such reassessments are completed. The one-year period beginning on the effective date of the rule (set forth in § 71.20(b) and (c)) will allow VA to conduct reassessments of legacy participants and legacy applicants, while also adjudicating an influx of applications as a result of the first phase of expansion. VA would allow legacy participants and legacy applicants to remain in the program for a full year after the effective date of the final rule so that they all have the same transition period, regardless of when during the one-year transition period the reassessment is completed. As VA cannot assess all legacy participants at the same time, this ensures equitable treatment for everyone.

As to the commenter's suggestion that there only be a two- or three-month

transition compared to the five-month transition, we believe that the transition period proposed by VA is appropriate and not a misuse of taxpayer dollars. The five-month period referenced by the commenter consists of a 60-day advanced notice followed by a 90-day extension of benefits for discharge based on the legacy participant or legacy applicant no longer qualifying for PCAFC as set forth in § 71.45(b)(1). The 60-day advanced notice requirement provides an opportunity for PCAFC participants to contest VA's findings before a stipend decrease takes effect, and in certain instances of revocation or discharge which we believe would benefit both VA and eligible veterans and Family Caregivers. 85 FR 13394 (March 6, 2020). The 90-day extension of benefits pursuant to § 71.45(b)(1)(iii) would permit the eligible veteran and his or her Family Caregiver a reasonable adjustment time to adapt and plan for discharge from PCAFC. Further, while continuing benefits for 90 days after discharge is not contemplated under the authorizing statute, we believe it is an appropriate and compassionate way to interpret and enforce our authorizing statute. See 85 FR 13399 (March 6, 2020).

VA believes that the transition period is both fair and reasonable and also an appropriate use of taxpayer dollars. As indicated in the proposed rule, the Primary Family Caregivers of legacy participants, in particular, may have come to rely on the benefits of PCAFC, to include the monthly stipend payments based on the combined rate authorized under current § 71.40(c)(4). Our proposed transition period would allow time for VA to communicate potential changes to affected individuals and assist them in preparing for any potential discharge from PCAFC or reduction in their stipend payment before such changes take effect. We are not making any changes based on this comment.

Several commenters suggested VA "grandfather" in current PCAFC participants, such that they not be subject to the new requirements in § 71.20(a). Two commenters suggested that the new criteria in § 71.20(a) should only apply to new applicants and VA establish a separate program for these individuals. Relatedly, one commenter suggested that if current participants are only subjected to existing criteria, the proposed sections on legacy participants will not be needed. Another commenter stated that VA should retain the current standard for legacy participants and use the new standard for new applicants. This commenter noted that this would be permissible under law and would

protect the interest of severely disabled veterans and their Family Caregivers that are current PCAFC participants. Similarly, many commenters expressed concern about the negative impact of losing the PCAFC benefits that they have come to rely on. Additionally, other commenters suggested that legacy participants should not be reassessed. In particular, two commenters referred to the often-long-term nature of veterans' disabilities, including veterans whose clinical conditions are not expected to improve over time. Another commenter suggested that instead of reassessments, VA should review the initial application of current PCAFC participants to determine if the participants meet the new criteria, especially given the challenges of seeking medical care during the COVID-19 national emergency.

As indicated in the proposed rule, we are shifting the focus of PCAFC to eligible veterans with moderate and severe needs and making other changes that will allow PCAFC to better address the needs of veterans of all eras and improve and standardize the program. However, we are mindful of the potential impact these changes may have on legacy participants and legacy applicants, as those terms are defined in § 71.15, and appreciate the commenters' recommendations. Specifically, we considered whether VA could continue applying the current criteria to legacy participants and legacy applicants, and apply the new criteria in § 71.20(a) only to new applicants, but decided against it. Doing so would require VA to run two separate PCAFC programs, which would be administratively prohibitive; would lead to confusion among veterans, caregivers, and staff; and would result in inequities between similarly situated veterans and caregivers. Instead, VA proposes to reassess legacy participants and legacy applicants under the new eligibility criteria in § 71.20(a) within the one-year period following the effective date of this final rule. As explained above, VA is providing a transition period that consists of one year for VA to complete reassessments, followed by a period of 60-day advanced notice, and 90-day extension of benefits. The purpose of this transition period is to reduce any negative impact these changes may have on current PCAFC participants. To the extent the commenters believe PCAFC should be a permanent program, we discuss similar comments further below.

As to the specific concerns about reassessments, consistent with other changes VA is making to improve PCAFC discussed above, we believe it is reasonable to reassess legacy



participants and legacy applicants to determine their continued eligibility under § 71.20(a). We understand that reassessments may cause anxiety for some individuals, but we are adding reassessment requirements to improve consistency and transparency in the program. We note that reassessments are not just for current participants but will be an ongoing part of PCAFC under § 71.30. Moreover, as the personal care needs for current participants and their Family Caregiver(s) continue to evolve, we believe it is prudent to reassess legacy participants and legacy applicants, as opposed to only reviewing the initial application for PCAFC, for continued eligibility as well as to identify changes in their condition that may impact the monthly stipend payment amount. We note that the initial application includes basic information, primarily demographic in nature and does not capture clinical information related to the needs of the veteran or servicemember. Additionally, eligibility determinations are complex, and we are establishing consistent processes and practices which include the CEATs to review evaluations conducted at the local medical centers and make eligibility determinations under § 71.20(a). For the foregoing reasons, we believe it is necessary for legacy participants and legacy applicants to participate in reassessments to determine their continued eligibility under § 71.20(a). We are not making any changes based on these comments.

One commenter opposed requiring legacy participants to reapply for PCAFC based on the assertion that recipients of VA disability compensation and social security benefits do not have to reapply for those programs after they have been approved. As indicated in the proposed rule and reiterated above, VA will not require legacy participants or legacy applicants to reapply to PCAFC, rather they will be reassessed within the one-year transition period beginning on the effective date of the final rule to determine continued eligibility under the new eligibility criteria in § 71.20(a). We are not making any changes based on this comment.

Several commenters raised concerns that a number of current PCAFC participants would not meet the definition of serious injury specifically and would be deemed ineligible for the program. VA assessed the service-connected disability rating of eligible veterans currently participating in PCAFC and found that approximately 98 percent have a single or combined service-connected disability rating of 70

percent or more and would therefore meet the definition of “serious injury.” As explained above, VA will provide a transition period for those who would not qualify under the new PCAFC eligibility criteria, including those who do not have a single or combined service-connected disability rating of 70 percent or more. Furthermore, PCAFC is just one of many services offered to veterans and servicemembers, as VA offers a menu of supports and services that supports caregivers caring for veterans such as PGCSS, homemaker and home health aides, home based primary care, Veteran-Directed care, and adult day care health care to name a few. We will assist legacy participants and legacy applicants who are transitioning out of PCAFC by identifying and making referrals to additional supports and services, as applicable. We are not making any changes based on these comments.

One commenter asked why the proposed rule did not provide equitable relief to current participants who will be adversely affected by the changes to eligibility. Similarly, another commenter recommended VA provide equitable relief for current PCAFC participants whose eligibility would be adversely affected by the new definition of serious injury. The Secretary of Veterans Affairs is authorized to grant equitable relief when the Secretary determines that: (a) Benefits administered by VA have not been provided by reason of administrative error; or (b) a person has suffered loss as a consequence of reliance upon a determination by VA of eligibility or entitlements to benefits, without knowledge that it was erroneously made. See 38 U.S.C. 503. It is unlikely the Secretary would consider VA’s lawful implementation of new regulatory requirements in 38 CFR part 71 to constitute an administrative error on the part of VA or application of new regulatory criteria to constitute erroneous eligibility determinations. Therefore, equitable relief would likely not be appropriate as recommended by the commenters because the changes to PCAFC eligibility would not be the result of an error but rather a deliberate decision to change the eligibility requirements for this program. Furthermore, we note that the regulations provide a period of transition for legacy participants and legacy applicants, as those terms are defined in § 71.15, who may no longer be eligible or whose Primary Family Caregivers will have their monthly stipends decreased as a result of changes to PCAFC in this rulemaking, as

discussed further above. We are not making any changes based on these comments.

#### *Unclear Eligibility Requirements*

Several commenters suggested VA better clarify eligibility by having clear and defined standards, and by providing examples of qualifying conditions, such as spinal cord injury and paralysis. Commenters stated the eligibility requirements were confusing, vague, and contained discrepancies. Commenters also stated that there is too much subjectivity and inconsistency across VA and asserted that who does the eligibility determination varies, as does what they consider. One commenter raised concerns that the proposed eligibility criteria was more general than the current criteria which would turn PCAFC into a “free for all.” Similarly, another commenter indicated fraud is prevalent in the program and recommended VA ensure the requirements are clear. VA recognizes that improvements to PCAFC are required and this recognition was the catalyst for the changes in the proposed rule to improve consistency and transparency in how the program is administered. As indicated in the proposed rule, we are standardizing PCAFC to focus on veterans and servicemembers with moderate and severe needs while at the same time revising the eligibility criteria to encompass the care needs for veterans and servicemembers of all eras rather than only post-9/11 veterans and servicemembers. Also, it is VA’s intent to broaden the current criteria so as not to limit eligibility to a predetermined list of injuries or impairments. Thus, changes to the eligibility criteria include revising definitions such as serious injury, in the best interest, and inability to complete an ADL; creating a new definition for in need of personal care services and need for supervision, protection, or instruction; and establishing a transition period for legacy participants and legacy applicants who no longer qualify or whose stipends would be reduced by these regulatory changes. VA will further address subjectivity and inconsistency across VA by creating a centralized infrastructure for eligibility determinations, standardizing eligibility determinations and appeals processes, and implementing uniform and national outcome-based measures to identify successes, best practices, and opportunities for improvement. Furthermore, in addition to standardizing the eligibility determination process, VA is revising the criteria for revocation to hold an

eligible veteran and his or her Family Caregiver(s) accountable for instances of fraud or abuse under §§ 71.45(a) and 71.47, as applicable. We thank these commenters for their input; however, we are not making any changes based on these comments.

One commenter described PCAFC as an alternative to the Homemaker and Home Health Aide (H/HHA) program, H/HHA as an alternative to nursing home care, and PCAFC as VHA's version of two Center for Medicare and Medicaid (CMS) programs: Home and Community-Based Services (HCBS) and Self-Directed Personal Assistance Services. To the extent that this commenter believes that PCAFC should operate similar to VA's H/HHA program, and CMS's Home and Community-Based Services and Self-Directed Personal Assistance Services, we note that these are programs distinct from PCAFC, as explained directly below.

VA's H/HHA program provides community-based services through public and private agencies under a system of case management by VA staff. H/HHA services enable frail or functionally impaired persons to remain in the home. An H/HHA is a trained person who can come to a veteran's home and help the veteran take care of themselves and their daily activities. The H/HHA program is for veterans who need assistance with activities of daily living, and who meet other criteria such as those who live alone.

The Veteran-Directed Home and Community Based Services (VD-HCBS) is a type of H/HHA that provides veterans of all ages the opportunity to receive home and community-based services in lieu of nursing home care and continue to live in their homes and communities. In VD-HCBS, the veteran and veteran's caregiver will: Manage a flexible budget; decide for themselves what mix of services will best meet their personal care needs; hire their own personal care aides, including family or neighbors; and purchase items or services to live independently in the community. VD-HCBS is offered as a special component to the Administration for Community Living's (ACL) Community Living Program (CLP). The ACL-VA joint partnership combines the expertise of ACL's national network of aging and disability service providers with the resources of VA to provide veterans and their caregivers with more access, choices and control over their long-term services and supports.

While there may be some veterans that are eligible for PCAFC as well as H/HHA and/or VD-HCBS, these programs

are distinct as they are intended to provide different services to different groups. For example, PCAFC provides benefits directly to Family Caregivers whereas H/HHA and VD-HCBS provide services directly to veterans.

Additionally, as described above, these benefits and services differ, as PCAFC provides such benefits as a monthly stipend to Primary Family Caregivers and access to healthcare benefits through the CHAMPVA for those who otherwise are eligible.

As further described below, H/HHA and VD-HCBS are more aligned with CMS's HCBS and Self-Directed Personal Assistance Services programs, and vice versa, than with PCAFC.

CMS' HCBS programs provide opportunities for Medicaid beneficiaries to receive services in their own home or community rather than institutions or other isolated settings. These programs serve a variety of targeted populations, such as people with intellectual or developmental disabilities, physical disabilities, and/or mental illnesses. While HCBS programs can address the needs of individuals who need assistance with ADLs (similar to certain eligible veterans in PCAFC), HCBS programs are intended to cover a broader population as they serve Medicaid beneficiaries and target a variety of populations groups, such as people with intellectual or developmental disabilities, physical disabilities, and/or mental illnesses. We note that HCBS eligibility varies by state, as these programs are part of a state's Medicaid program. Additionally, the health care and human services that may be provided to beneficiaries can vary based on each state, and may include such services as skilled nursing care; occupational, speech, and physical therapies; dietary management; caregiver and client training; pharmacy; durable medical equipment; case management; hospice care; adult day care; home-delivered meals; personal care; information and referral services; financial services; and legal services. The services are provided by lead agencies and other service providers and are much broader than those that we are authorized to provide pursuant to 38 U.S.C. 1720G for purposes of PCAFC. Whereas PCAFC provides benefits to the Family Caregiver of the eligible veteran (in support of the wellbeing of the eligible veteran), HCBS provides health care and human services directly to the Medicaid beneficiary (who is more similar to the eligible veteran than the Family Caregiver in terms of their needs). As explained previously, we consider HCBS to be more like other programs we

offer such as H/HHA and VD-HCBS than with PCAFC. Thus, because PCAFC and HCBS are distinct programs with different requirements and services, we make no changes based on this comment.

This commenter also referenced CMS's Self-Directed Personal Assistance Services program, which falls under the larger umbrella of CMS's HCBS program. We note that this is a self-directed Medicaid services program that permits participants, or their representatives if applicable, to have decision-making authority over certain services and take direct responsibility to manage their services with the assistance of a system of available supports, instead of relying on state agencies to provide these services. Services covered include those personal care and related services provided under the state's Medicaid plan and/or related waivers a state already has in place, and participants are afforded the decision-making authority to recruit, hire, train and supervise the individuals who furnish their services. As is the case with the overall HCBS program, eligibility and the services covered under the Self-Directed Personal Assistance Services program vary by state. We note that the Self-Directed Personal Assistance Services program operates similarly to VD-HCBS, in providing individuals with more autonomy over community-based services they receive. Because PCAFC and Self-Directed Personal Assistance Services are distinct programs with different requirements and services, we make no changes based on this comment.

Because this commenter provided no additional context or arguments related to this specific comment, which is otherwise unclear, we are unable to further respond. We are not making any changes based on this comment.

#### *Negative Impact on Post-9/11 Veterans*

Many commenters supported expansion of PCAFC to include veterans of all eras of military service, and ensuring that those with the greatest need are eligible for PCAFC, regardless of era served. We thank them for their comments. On the other hand, several commenters opposed the proposed eligibility criteria because they believe it focuses on pre-9/11 and geriatric veterans at the expense of post-9/11 and younger veterans. Commenters stated that this is unfair, punitive, and inconsistent with Congressional intent, and would result in current participants being ineligible for PCAFC. Some commenters specifically asserted that the VA MISSION Act of 2018 only

expanded PCAFC eligibility, and that making changes that restrict eligibility are not in line with Congress's intent in enacting the VA MISSION Act of 2018. One of the commenters also noted that the proposed changes to the regulations have affected their own health. One commenter opposed the new criteria and asserted that it would result in current participants who receive stipends at tier one no longer being eligible for PCAFC, which they allege was VA's intention. This commenter asserts that because Congress did not provide the necessary funds for expansion, VA found it necessary to revise the eligibility criteria, and this commenter requests VA be transparent about that rationale. Relatedly, one commenter requested additional funding be provided to support expansion of the program.

We acknowledge the commenters' concerns and thank veterans and caregivers for sharing their personal stories and experiences with PCAFC. We also note that commenters raised concerns about their mental health. We encourage such veterans and caregivers to seek assistance through their health care provider. If you are a veteran in crisis or you are concerned about one, free and confidential support is available 24/7 by calling the Veterans Crisis Line at 1-800-273-8255 and Press 1 or by sending a text message to 838255.

As indicated in the proposed rule, VA recognizes that improvements to PCAFC are needed to improve consistency and transparency in decision making. We note that many of the changes we proposed were made in response to complaints that VA has received about the administration of the program and these changes are designed to ensure improvement in the program for all eligible veterans—to include current and future participants, from all eras of service. Further, we are standardizing PCAFC to focus on veterans and servicemembers with moderate and severe needs while at the same time revising the eligibility criteria to encompass the care needs for veterans and servicemembers of all eras rather than only post-9/11 veterans and servicemembers.

We note that we are not expanding PCAFC to pre-9/11 veterans at the expense of post-9/11 veterans and servicemembers; rather, the changes to PCAFC's eligibility criteria are intended to ensure that PCAFC is inclusive of veterans and servicemembers of all eras, consistent with the VA MISSION Act of 2018.

Additionally, we disagree with the assertion that Congress did not provide

the necessary funds for expansion. The 2020 President's Budget included estimated funding to meet the caregiver population expansion from the MISSION Act. The Further Consolidated Appropriations Act, 2020 (Pub. L. 116-94) included sufficient funding to meet the Caregiver Program cost estimates. The 2021 President's Budget included a funding request for the Caregiver Program based on the same updated projection model as used to formulate the regulatory impact analysis budget impact for this rulemaking. Future President's Budget requests will incorporate new data and updated cost projections as they become available. For a detailed analysis of the costs of this program, please refer to the regulatory impact analysis accompanying this rulemaking.

We are not making any changes based on these comments.

One commenter suggested that if budgetary concerns are the basis for the changes in eligibility requirements, then VA should start by excluding those veterans who can work and still get VA benefits, salary, and caregiver benefits. As stated above, budgetary concerns did not form the basis for changing the eligibility criteria; rather, VA's proposed changes recognized and addressed opportunities for improvement and the need to make PCAFC more inclusive to veterans and servicemembers of all eras. Further, we note that the authorizing statute does not condition eligibility for PCAFC on whether a veteran or servicemember cannot work or is not in receipt of other VA benefits; instead, it is based on specific criteria such as whether the veteran or servicemember has a serious injury and is in need of personal care services. Thus, we do not believe that it is reasonable to regulate PCAFC eligibility based on employment status, individual financial situations, or eligibility for other programs; but rather PCAFC eligibility focuses on the need for personal care services, among other factors, consistent with 38 U.S.C. 1720G.

To the extent this commenter believes that veterans who can work should not be eligible for PCAFC, we refer the commenter to the section on the definition of "in need of personal care services" in which we discuss employment of eligibility veterans and Family Caregivers.

We also do not believe PCAFC eligibility should be conditioned on whether a veteran or servicemember is not in receipt of other VA benefits as eligibility for PCAFC is, in part, conditioned upon the veteran or servicemember having a serious injury, which we define in this rulemaking as

a single or combined service-connected disability rating of 70 percent or more. This level of service-connected disability means that a veteran is in receipt of VA disability compensation. Thus, we do not find it appropriate to exclude those in receipt of other VA benefits since that would exclude the population of eligible veterans on which we are focusing PCAFC. We are not making any changes based on this comment.

Another commenter requested VA elaborate on the number of post-9/11 veterans who will still be eligible for PCAFC under the new requirements. We note that the regulatory impact analysis for the final rule includes information on current participants who may no longer be eligible for PCAFC, based on specific assumptions we have made. We make no changes based on this comment.

#### *Physical Disabilities Versus Mental Health and Cognitive Disabilities*

Multiple commenters expressed concern that the eligibility requirements focus more on physical disabilities rather than mental health and cognitive disabilities, and requested the eligibility criteria account for non-physical disabilities (including mental, emotional, and cognitive disabilities), such as TBI, PTSD, and other mental health conditions, as the commenters asserted that veterans with these conditions often need as much, if not more, caregiver assistance as those with physical disabilities. Other commenters opposed removal of the phrase "including traumatic brain injury, psychological trauma, or other mental disorder" from current § 71.20 because they believe doing so would be contrary to the authorizing statute and Congressional intent. One commenter raised concerns that veterans may not be eligible for PCAFC despite being 100 percent disabled for conditions such as PTSD, particularly as ADLs do not take into account flash backs, dissociation, panic attacks, or other PTSD-related issues. One commenter opined that veterans with mental health conditions should not have to show they are physically unable to do something particularly if they do not mentally know how to do so. However, one commenter noted that if VA wants to elaborate on the specific injuries that would qualify for PCAFC, that would be appropriate.

We are not seeking to restrict PCAFC to veterans and servicemembers with only physical disabilities. Section 1720G(a)(2)(B) of title 38, U.S.C. is clear that the term "serious injury" includes TBI, psychological trauma, and other

mental disorders for purposes of PCAFC. Consistent with the statutory authority, the current and new PCAFC regulations are inclusive of the caregiving needs of veterans with cognitive, neurological and mental health disabilities, including those who suffer from PTSD and TBI. While we are removing the phrase “including traumatic brain injury, psychological trauma, or other mental disorder” from § 71.20, we are doing so because such conditions would be captured by our proposed definition of serious injury (*i.e.*, requiring a single or combined percent service-connected disability rating of 70 percent or more). Under the new regulations, we will still consider cognitive, neurological, and mental health disabilities as part of the definition of serious injury, and veterans who have such disabilities will still be eligible to apply for PCAFC. We further note that mental health care is among VA’s top priorities in providing health care to veterans.

Additionally, VA’s regulations, as revised through this rule, make clear that a veteran or servicemember can be deemed to be in need of personal care services based on either: (1) An inability to perform an ADL, or (2) a need for supervision, protection, or instruction. The term “need for supervision, protection, or instruction” means the individual has a functional impairment that impacts the individual’s ability to maintain his or her personal safety on a daily basis. This term “would represent and combine two of the statutory bases upon which a veteran or servicemember can be deemed in need of personal care services—‘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.’ See 38 U.S.C. 1720G(a)(2)(C)(ii) and (iii), as amended by Public Law 115–182, section 161(a)(2).” 85 FR 13363 (March 6, 2020). We believe these two bases of eligibility are inclusive of the personal care service needs of veterans and servicemembers with a cognitive, neurological, or mental health impairment, to include TBI or PTSD. Furthermore, we do not believe elaborating or listing specific injuries that would qualify a veteran or servicemember for PCAFC would serve to broaden the bases upon which an individual may meet criteria for PCAFC, as doing so could suggest that PCAFC is limited to only those listed conditions. In defining “need for supervision,

protection, or instruction,” it was VA’s intent to broaden the current criteria so as not to limit eligibility to veterans and servicemembers with a predetermined list of impairments. *Id.* Instead of focusing on specific injuries, symptoms, or diagnoses, this term allows us to consider all functional impairments that may impact the veteran’s or servicemember’s ability to maintain his or her personal safety on a daily basis, among other applicable eligibility criteria. We are not making any changes based on these comments.

One commenter viewed the program as intended for older veterans, and felt that because the commenter is younger, he or she is viewed as being able to do things themselves when that is not the case. The commenter questioned how a veteran can have a 100 percent service-connected disability rating, but “barely qualify” for PCAFC. This commenter suggested the eligibility determinations should consider a list of diagnoses, including those listed in the DSM–5, instead of blanket questions that do not apply to each diagnosis. As previously discussed, we are standardizing the program to focus on veterans and servicemembers with moderate and severe needs based on their need for personal care services, not on their specific diagnoses. Further, as explained in the preceding paragraph, the definition need for supervision, protection, or instruction, allows VA to focus on the veteran’s level of impairment and functional status as opposed to specific injuries, symptoms, or diagnoses, which could be too restrictive and limiting, and fail to focus on the specific needs of the eligible veteran. For example, two veterans have similar service-connected disability ratings for PTSD. One veteran has been engaged in treatment, has progressed in his or her level of independence such that he or she no longer requires a Family Caregiver, and thus is not in need of personal care services at this time. The other veteran has recently been diagnosed with PTSD, with symptoms that negatively impact his or her cognitive function such that personal care services are needed to maintain his or her safety on a daily basis. In this example, two veterans have similar service-connected disability ratings and diagnoses; however, they have vastly different levels of independence and needs for personal care services. Thus, we do not believe considering a list of specific diagnoses that would qualify a veteran or servicemember for PCAFC would be appropriate, as it would not account for the eligible veteran’s need for personal

care services. We make no changes based on this comment.

One commenter noted that PTSD is often accompanied by other health conditions that can exacerbate the underlying health condition (for example, PTSD with blindness, hearing problems, and diabetes), and suggested that we “raise the percentage for additional handicaps compounded by PTSD.” To the extent that this commenter is stating that veterans and servicemembers may have comorbid conditions that exacerbate one another and that such individuals may be in need of a caregiver, we agree. We encourage these individuals and their caregivers to contact their local VA treatment team and/or the local CSC to learn more about supports and services available to provide assistance, including PCAFC. If this commenter is requesting an increase to VA disability ratings for purposes of other VA benefit programs, such comment is outside the scope of this rulemaking. We make no changes based on this comment.

One commenter noted that VA should have better training and tools to assess dementia. To the extent the commenter believes VA should provide better training and tools to VA providers who assess dementia in general, unrelated to PCAFC, we believe this comment is beyond the scope of this rulemaking. To the extent the commenter believes such training and tools are necessary for purposes of determining PCAFC eligibility, we note that the PCAFC eligibility criteria do not focus on veterans’ or servicemembers’ specific diagnoses, but we believe an individual with dementia could qualify for PCAFC if the individual is determined to be in need of personal care services based on a need for supervision, protection, or instruction, for example, among other applicable eligibility criteria. Additionally, as we explain throughout this discussion, eligibility determinations for PCAFC will be based upon evaluations of both the veteran and caregiver applicant(s) conducted by clinical staff at the local VA medical center based upon input from the primary care team to the maximum extent practicable. These evaluations include assessments of the veteran’s functional status and the caregiver’s ability to perform personal care services. Additional specialty assessments may also be included based on the individual needs of the veteran or servicemember. When all evaluations are completed, the CEAT will review the evaluations and pertinent medical records, in order to render a determination. We note that we will provide in depth training and education

to clinical staff at local VA medical centers and CEATs to perform PCAFC assessments and evaluations, and eligibility determinations, including whether the veteran is determined to be unable to self-sustain in the community for the purposes of PCAFC, respectively.

We make no changes based on this comment.

#### *Removal of Current § 71.20(c)(4)*

Several commenters expressed concern over the removal of current § 71.20(c)(4) (*i.e.*, a veteran rated 100 percent disabled for a serious injury and awarded SMC that includes an aid and attendance (A&A) allowance) as an eligibility criterion. Specifically, commenters were concerned that these veterans would be wrongly removed from PCAFC by CSP staff at medical centers or at the VISNs, and one commenter questioned why VA would not keep this as a criterion that meets eligibility and asserted that it serves as a safety net for those at most risk. Also, commenters asserted that an A&A allowance is paid to the veteran while the monthly stipend is paid to the caregiver so it would not be a duplication of benefits. Additionally, commenters incorrectly asserted that this criterion is a statutory requirement.

We agree that an A&A allowance and the monthly stipend rate would not be a duplication of benefits; however, to ensure that PCAFC is implemented in a standardized and uniform manner across VHA, we believe each veteran or servicemember must be evaluated based on whether he or she has an inability to perform an ADL or a need for supervision, protection, or instruction pursuant to § 71.20(a)(3)(i) and (ii). As discussed above regarding the definition for an inability to perform an ADL, VA will utilize standardized assessments to evaluate both the veteran or servicemember and his or her identified caregiver when determining eligibility for PCAFC. It is our goal to provide a program that has clear and transparent eligibility criteria that is applied to each and every applicant, and not all veterans and servicemembers applying for or participating in PCAFC will have been evaluated by VA for the ratings described in current § 71.20(c)(4). Thus, while we believe any veteran or servicemember who would qualify for PCAFC based on current § 71.20(c)(4) would likely be eligible under the other criteria in § 71.20(a)(3)(i) and (ii) (see 85 FR 13372 (March 6, 2020)), VA will still require a reassessment pursuant to § 71.30 to determine continued eligibility under § 71.20(a).—Also, as explained above regarding legacy participants and legacy applicants, VA

will provide a transition period for those who do not meet the new eligibility criteria under § 71.20(a). Additionally, we are standardizing eligibility determinations and appeals to include the use of a CEAT to reduce the possibility of errors in PCAFC eligibility determinations, revocations, and discharges.

Finally, this criterion has never been a requirement under 38 U.S.C. 1720G, rather it is authorized by 38 U.S.C. 1720G(a)(2)(C)(iv) as a possible basis upon which an individual can be deemed in need of personal care services. As explained above and in VA's proposed rule, the Part 3 regulatory criteria governing award of SMC fail to provide the level of objectivity VA seeks in order to ensure that PCAFC is administered in a fair and consistent manner for all participants, and, we no longer believe this criterion is necessary or appropriate. We are not making any changes based on these comments.

#### *Alternative Eligibility Requirements*

One commenter suggested that all veterans have caregivers so all should qualify and be paid based on the percentage of their service-connected disability rating such that a caregiver for a veteran with a 10 percent service-connected rating would receive 10 percent of the monthly stipend rate. VA disability compensation provides monthly benefits to veterans in recognition of the effects of disabilities, disease, or injuries incurred or aggravated during active military service and the eligibility criteria are specific to determining a disability compensation. This is different from a clinical evaluation for determining whether a veteran or servicemember is eligible for PCAFC. PCAFC is a clinical program that requires a veteran or servicemember to have a serious injury and be in need of personal care services based on an inability to perform an ADL or a need for supervision, protection, or instruction. A veteran with a service-connected disability rating may or may not have a serious injury and be in need of personal care services from a caregiver for purposes of PCAFC. While a service-connected disability rating is part of the definition of serious injury, it is not used to determine a veteran's or servicemember's need for personal care services for purposes of PCAFC eligibility. Instead, we assess the clinical needs of the individual to determine whether he or she is in need for personal care services. Service-connected disability ratings are not commensurate with a need for personal care services. For example, a veteran

may be 100 percent service-connected for PTSD however through consistent, ongoing treatments, has developed the tools to effectively manage symptoms associated with PTSD to the level of not requiring personal care services from another individual. Furthermore, the stipend rate for Primary Family Caregivers is based upon the amount and degree of personal care services provided. See 38 U.S.C. 1720G(a)(3)(C)(i). Therefore, it would not be appropriate for VA to pay a caregiver using the service-connected disability rating percentage as the percentage of the monthly stipend rate. In addition, we have separately addressed the commenter's recommendation for the stipend amount in the section discussing the monthly stipend rate and 38 CFR 71.40(c)(4). We are not making any changes based on this comment.

One commenter suggested veterans and servicemembers should apply on a case-by-case basis. Every application is reviewed individually; however, we believe standard eligibility criteria are necessary to increase transparency and ensure consistency nationwide. We are not making any changes based on this comment.

#### *Permanent Program*

Multiple commenters suggested that this should be a permanent program and requested we add language to the regulation to automatically determine those who are permanently and totally disabled as eligible for PCAFC. One commenter favored a permanent eligibility designation but inquired what that would be, while several others suggested that those with 100 percent permanent and total (P&T) disability ratings should receive automatic and/or permanent eligibility for PCAFC and that PCAFC eligibility should be treated similar to disability compensation ratings in which VA provides payment but otherwise leaves veterans alone, such that they are not further monitored, evaluated, or reassessed. Relatedly, one commenter suggested that those with 100 percent P&T disability rating, in addition to being enrolled in PCAFC for more than five years, should be permanently admitted to PCAFC. A 100 percent P&T disability rating applies to disabilities that are total (*i.e.*, any impairment of mind or body which is sufficient to render it impossible for the average person to follow a substantially gainful occupation) and permanent (*i.e.*, impairment is reasonably certain to continue throughout the life of the disabled person). See 38 CFR 3.340. However, we reiterate that PCAFC is a

clinical program that requires a veteran or servicemember to have a serious injury incurred or aggravated in the line of duty, and be in need of personal care services based on an inability to perform an ADL or a need for supervision, protection, or instruction, and is designed to support the health and well-being of such veterans, enhance their ability to live safely in a home setting, and support their potential progress in rehabilitation, if such potential exists. See 85 FR 13367 (March 6, 2020). Thus, PCAFC is intended to be a program under which the eligible veteran's eligibility may shift depending on the changing needs of the eligible veteran. We do acknowledge that while some eligible veterans may improve over time, others may not, and PCAFC and other VHA services are available to ensure the needs of those veterans continue to be met. We note that participation in PCAFC may not always be appropriate to meet the needs of a veteran who has a 100 P&T disability rating. We conduct ongoing wellness contacts and reassessments to ensure the needs of the eligible veteran and Family Caregiver are met over time, and other care needs may be addressed through referrals to other VA and non-VA services, as appropriate. For example, over time, personal care services from a Family Caregiver at home may not be appropriate because nursing home care or other institutional placement may be more appropriate. Furthermore, it is also important to note that 38 U.S.C. 1720G(c)(2)(B) clearly articulates that the assistance or support provided under PCAFC and PGCSS do not create any entitlements. We are not making any changes based on these comments.

Another commenter supported having a permanent designation for PCAFC as caregivers often give up their careers to care for a veteran. As explained above, PCAFC is a clinical program that requires a veteran or servicemember to be in need of personal care services based on an inability to perform an ADL or a need for supervision, protection, or instruction. Furthermore, the monthly stipend payment provided under PCAFC is meant to be an acknowledgement of the sacrifices that Primary Family Caregivers make to care for eligible veterans. 76 FR 26155 (May 5, 2011). Thus, PCAFC is not intended to replace or supplement a caregiver's loss of income by giving up their careers. While we understand that some veterans and servicemembers may remain in PCAFC indefinitely, eligibility for PCAFC is based on the level of personal care needs of the

eligible veteran, among other criteria, and not based on whether a caregiver has given up their career to care for the eligible veteran. We are not making any changes based on this comment.

#### *Paying People To Not Get Better*

Commenters raised concerns that PCAFC incentivizes veterans to not "get better" and remain sick and debilitated, when it should focus instead on improving health. Commenters were concerned that PCAFC benefits, such as the stipend, are too generous, cause dependency and discourage participants from working or contributing to society, resulting in depression and low self-esteem. We note that PCAFC is a clinical program and as such, the safety, health and wellbeing of those served by the program is a core objective. The potential for rehabilitation or increased independency occurs on a spectrum. While some eligible veterans have the ability to rehabilitate or gain independence from his or her caregiver, which we do support if there is such potential, we recognize that some eligible veterans may remain eligible for PCAFC on a long-term basis. This is particularly true as we expand to veterans and servicemembers of earlier eras. Thus, while we understand the commenters' concerns, we must be cognizant of the reality that not all eligible veterans will improve to the point of no longer being in need of personal care services. We note that our definition of in the best interest requires a consideration of whether participation in the program supports the veteran's or servicemember's potential progress in rehabilitation or potential independence, if such potential exists. Therefore, we will continue to evaluate whether PCAFC is in the best interest of eligible veterans and support those who have the potential for improvement, when such potential exists. Further, eligible veterans and Family Caregivers participating in PCAFC will engage in wellness contacts, which focus on supporting the health and wellbeing of both the eligible veteran and his or her Family Caregivers. During wellness contacts, VA clinical staff will engage with eligible veterans and their Family Caregivers to identify any current needs. For example, during a wellness contact, a clinician may recognize an eligible veteran struggling with depression or low self-esteem and intervene accordingly. Such intervention may include referrals to support groups or other services to address the specific needs of the eligible veteran. We also note that PCAFC is just one way VA supports eligible veterans and Family Caregivers and that PCAFC is not meant

to replace an eligible veteran's ongoing engagement with his or her treatment team. We are not making any changes based on these comments.

#### *PCAFC Should Operate Similar to Welfare Type Programs*

One commenter suggested that PCAFC operate similar to welfare type programs, in which individuals are required to apply every time they have a need and have a responsibility to check-in with the agency. As indicated in the proposed rule, we will require both the eligible veteran and Family Caregiver(s) to participate in periodic reassessments for continued eligibility as well as to participate in wellness contacts, which focus on supporting the health and wellbeing of eligible veterans and his or her Family Caregivers. We note that failure to participate in either may lead to revocation from the program under § 71.45 Revocation and Discharge of Family Caregivers. We believe these requirements are sufficient to ensure continued eligibility and maintain open communication with VA. We are not making any changes based on this comment.

#### *Technical Question*

One commenter was confused about our reference to proposed § 71.20(a)(4) when explaining in the best interest under current § 71.20(d), and asserted that there is no § 71.20(a)(3) which would make (a)(4) impossible. As indicated in the proposed rule, we are restructuring current § 71.20 to accommodate temporary eligibility for legacy participants (§ 71.20(b)) and legacy applicants (§ 71.20(c)). As such, the current eligibility criteria under current § 71.20 have been revised and redesignated under § 71.20(a). Thus, current § 71.20(a) has been redesignated as § 71.20(a)(1); current § 71.20(b) has been revised and redesignated as § 71.20(a)(2); § 71.20(c) has been revised and redesignated as § 71.20(a)(3); and current § 71.20(d) has been revised as redesignated as § 71.20(a)(4). We make no changes based on this comment.

#### **§ 71.25 Approval and Designation of Primary and Secondary Family Caregivers**

Several commenters questioned how VA will conduct eligibility assessments, including who will conduct these assessments and requested additional information. Specifically, commenters asserted VA needs to identify who will conduct eligibility assessments and have limitations on who this may be. One commenter questioned how VA will ensure standardization for eligibility assessments and

reassessments. One commenter opined that VA has no consistent protocols for evaluating PCAFC applicants. Another commenter asked how VA will hold employees accountable for errors and asserted the need for independent reviews. We address these comments below.

Eligibility determinations for PCAFC will be based upon evaluations of both the veteran and caregiver applicant(s) conducted by clinical staff at the local VA medical center. These evaluations include assessments of the veteran's or servicemember's functional status and the caregiver's ability to perform personal care services. Additional specialty assessments may also be included based on the individual needs of the veteran or servicemember. When all evaluations are completed, the CEAT will review the evaluations and pertinent medical records, in order to render a determination on eligibility for PCAFC, including whether the veteran is determined to be unable to self-sustain in the community for the purposes of PCAFC.

The CEATs are comprised of a standardized group of inter-professional, licensed practitioners with specific expertise and training in the eligibility requirements for PCAFC. Furthermore, we will provide in depth training and education to clinical staff at local VA medical centers and CEATs, and conduct vigorous oversight to ensure consistency across VA in implementing this regulation including conducting regular audits of eligibility determinations. We make no changes based on these comments.

One commenter incorrectly asserted that neither the Caregivers Act nor VA's current regulations impose a time limit for completion by the Family Caregiver of such instruction, preparation, and training. Current § 71.40(d) provides a 45-day timeline to "complete all necessary education, instruction, and training so that VA can complete the designation process no later than 45 days after the date that the joint application was submitted." Furthermore, VA may provide an extension for up to 90 days after the date the joint application was submitted. Additionally, current § 71.25(a)(3) permits an application to be put on hold for no more than 90 days, from the date the application was received, for a veteran or servicemember seeking to qualify through a GAF test score of 30 or less but who does not have a continuous GAF score available. As indicated in the proposed rule, we are proposing to eliminate use of the GAF score as a basis for eligibility under current § 71.20(c)(3). Therefore, we

remove the language in current § 71.25(a)(3) referencing that an application may be put on hold for no more than 90 days. Additionally, while we already have the authority in § 71.40(d)(1) to extend the designation timeline for up to 90 days, we remove the 45-day designation timeline in current paragraph (d)(1) and add the 90-day designation timeline in § 71.25(a)(2)(ii), as we proposed and now make final. We are not making any changes based on this comment.

Several commenters took issue with the use of the word "may" in proposed § 71.25(a)(2)(ii). Specifically, one commenter stated it is clearly arbitrary to allow VA to reserve the right to deny an application even where the failure to meet the 90-day timeline is due to VA's own fault. Another commenter asserted it contradicts the preamble which states VA would not penalize an applicant if he or she cannot meet the 90-day timeline as a result of VA's delay in completing eligibility evaluations. While we would not penalize an applicant if he or she cannot meet the 90-day timeline as a result of VA's delay in completing eligibility evaluations, providing necessary education and training, or conducting the initial home-care assessment, we believe it is prudent to make this determination on a case-by-case basis. For example, we do not believe an applicant who is non-responsive to repeated attempts to conduct an initial in-home assessment through day 89 and then responds to VA on day 90 that he or she is available should receive an extension. However, an applicant who is responsive and agrees to an initial in-home assessment but VA cancels or reschedules the initial in-home assessment beyond the 90-day timeline, would receive an extension. We are not making any changes based on these comments.

One commenter expressed disappointment by the lack of description on the process by which current participants will be evaluated. We direct the commenter to our previous description of the eligibility process in this section. As indicated in the proposed rule, legacy participants and legacy applicants will be reassessed under § 71.30(e) for continued eligibility under § 71.20(a) within the one-year period beginning on the effective date of this rule. Further, § 71.40(c) provides a transition plan for Primary Family Caregivers who may experience a reduction in the monthly stipend or discharge from PCAFC as a result of the eligibility criteria in § 71.20(a). We make no changes based on this comment.

One commenter applauded VA for including assessment of the caregiver's

wellbeing and we appreciate the comment. Another commenter questioned how VA will determine the competence of a caregiver to provide personal care services. The same commenter questioned whether VA will assess competence by demonstration and whether it will be a verbal or physical demonstration of the required personal care services. The determination that a caregiver is competent to provide personal care services is a clinical judgement which may include verbal or physical demonstration as necessary based on the individual circumstances of the veteran or servicemember and his or her caregiver. We make no changes based on this comment.

One commenter suggested we revise the regulation text to allow VA the flexibility to sub-contract a provider or providers to complete the initial home-care assessment to ensure that the 90-day period for application review is met by stating, "VA, or designee, will visit the eligible veteran's home . . ." in § 71.25(e). The same commenter further noted that the designee language can also be added to the reassessments and the wellness contacts sections. As previously discussed, VA does not believe the use of contracted services would provide standardized care for participants and would hinder VA's ability to provide appropriate oversight and monitoring. We make no changes based on this comment.

One commenter disagreed with the language "the Family Caregiver(s) providing the personal care services required by the eligible veteran" in § 71.25(f). Specifically, this commenter noted that insufficient justification was provided for this requirement, and it would be impossible based on the "continuous" requirement in the definition of unable to self-sustain in the community. This commenter asserted that there are numerous situations where excellent care is provided to the veteran where the designated "caregiver" acts like a caregiving manager by monitoring the quality of the care given by third parties with whom the designated caregiver may contract and pay for using the stipend provided. The same commenter further opined that nothing in Congressional deliberations and the proposed rule included a discussion of how caregivers who manage and monitor caregiving provided by others have been providing inadequate quality of care. Further, the same commenter stated that VA has been unable to provide a response to this issue during various meetings and follow-up requests

for information. We respond to this comment below.

As indicated in the proposed rule, part of the eligibility requirements for veterans and servicemembers is that they are in need of personal care services; thus, we believe it is reasonable to require that a Family Caregiver actually provides personal care services to an eligible veteran. 85 FR 13378 (March 6, 2020). Further, current § 71.20(e), which we are redesignating as § 71.20(a)(5), requires that personal care services that would be provided by the Family Caregiver will not be simultaneously and regularly provided by or through another individual or entity. This requirement is to ensure that the designation of a Primary Family Caregiver is authorized for those who do not simultaneously and regularly use other means to obtain personal care services. 76 FR 26151 (May 5, 2011). Additionally, 38 U.S.C. 1720G(a)(3)(A)(ii) specifically uses the phrase “the primary provider of personal care services for an eligible veteran . . .” Further, it is our intent to ensure that a Family Caregiver is not dependent on VA or another agency to provide personal care services that the Family Caregiver is expected to provide. 76 FR 26151 (May 5, 2011). If there is a desire by a veteran or servicemember and his or her caregiver to manage personal care services provided through other services, such as H/HHA, then we will refer applicants to other VA or non-VA services available to them. We make no changes based on this comment.

One commenter stated that it makes sense to require that the Primary Caregiver provide the personal care services to the veteran, but was concerned about the inclusion of the language that the Family Caregiver only be absent for “brief” periods of time. This commenter requested VA remove language that the Family Caregiver only be absent for “brief” periods of time or clearly define “continuous” and “brief absences” to ensure caregivers are not penalized for seeking employment or respite care. This commenter asserted that caregiving takes a significant toll on caregivers. Commenters also expressed concerns about whether VA expects the caregiver to always be present, including those who work. We clarify that it is not our intent to prevent caregivers from working as we are cognizant that the monthly stipend is an acknowledgement of the sacrifices made by caregivers but may fall short of the income a caregiver could receive if they were employed. The situation for each veteran or servicemember and his or caregiver is unique, and we understand that caregivers may not be present all of

the time as long as they are available to provide the required personal care services. Furthermore, respite care is a benefit provided to Family Caregivers; thus, we would not penalize a Family Caregiver for the use of respite care. To the extent this commenter had concerns about the use of “continuous” in the definition of “unable to self-sustain in the community,” we further refer the commenter to the related discussions in the section on the definitions of “need for supervision, protection, or instruction,” and “unable to self-sustain in the community.” We are not making any changes based on these comments.

We received several comments that the proposed rule did not provide enough information to provide informed comments on the eligibility determination process and the initial assessment, and the lack of this information has forced commenters to accept a fundamentally flawed regulation because of the inability of VA to meet the legislative deadlines for PCAFC expansion. One commenter specifically stated that after the proposed rule was published, they requested additional information from VA about how the proposed eligibility evaluation/reassessment process will work, including any assessment instruments that VA staff will use. The same commenter stated that because VA did not adequately explain how the process will work, they still had questions and concerns about it and believe that VA should publish a supplemental notice of proposed rulemaking (NPRM) or an interim final rule (IFR) with this process explained to provide an opportunity for public comment. Additionally, commenters expressed concern that PCAFC has been marked by deep systemic structural defects which can only be resolved by placing these procedures into regulation as opposed to policy. We believe we provided sufficient information within the proposed rule and disagree with the assertion that VA should publish a supplemental NPRM or an IFR. Additionally, VA has the ability to determine certain aspects of PCAFC through policy and we believe it is necessary to have the flexibility to modify processes to address the changing needs of the program, which we are able to do more quickly through policy change than through rulemaking. We are not making any changes based on these comments.

Several commenters asserted that a Family Caregiver should live with the eligible veteran regardless of whether they are a family member. We appreciate the commenters’ concerns; however, the restrictions that a Family

Caregiver be a member of the eligible veteran’s family (*i.e.*, spouse, son, daughter, parent, step-family member, or extended family member), or if not a family member, live with the eligible veteran, or will do so if designated as a Family Caregiver, are set forth in 38 U.S.C. 1720G(d)(3). We make no changes based on these comments.

One commenter expressed concern that there are no rules regarding how many veterans a caregiver can care for and that seems to be more of a business model versus a family caregiving model as the caregiver will be at high risk for burn out. The commenter is correct that we do not have restrictions in place for how many eligible veterans a Family Caregiver may be assigned to as the individual circumstances for each eligible veteran and his or her Family Caregiver are unique. However, we believe that the criteria in part 71 to include a determination of in the best interest, wellness contacts, and revocation based on a Family Caregiver’s neglect, abuse, or exploitation of the eligible veteran, establish safeguards to protect both the eligible veteran and his or her Family Caregiver in circumstances where the Family Caregiver provides personal care services to more than one eligible veteran. We make no changes based on this comment.

One commenter emphasized the need for continued training for Family Caregivers, beyond the initial eligibility requirements. Another commenter asserted VA should partner with the National Alliance for Mental Illness (NAMI) to provide mandatory training to an eligible veteran’s care team and Family Caregiver. Although we do not have an explicit requirement for continued education, we do provide continuing instruction, preparation, training and technical support to caregivers; this includes training outside of the core curriculum. Also, we are establishing an explicit requirement for both the eligible veteran and his or her Family Caregiver to participate in reassessments and wellness contacts, pursuant to § 71.30 and § 71.40(b)(2) respectively. Additionally, these reassessments and wellness contacts will allow VA to assess whether a Family Caregiver requires any additional training to provide the personal care services required by the eligible veteran. We appreciate the suggestion to partner with NAMI and will consider it. We make no changes based on these comments.

Multiple commenters expressed concern over the vetting process for Family Caregivers and one suggested that VA verify the identity of a Family



Caregiver and conduct background checks (e.g., criminal, financial, legal). As part of VA Form 10–10CG, Application for the Program of Comprehensive Assistance, veterans and Family Caregivers are required to provide identifying information including name, and date of birth. Further, applicants are required to certify the information provided is true and sign the form. While we do not require a Social Security Number (SSN) or Tax Identification Number (TIN) for the application, an SSN or TIN is required in order for a stipend payment to be issued. These commenters were also concerned about the potential for abuse of the eligible veteran and asserted VA should do its due diligence prior to providing a stipend to Family Caregivers. We believe a veteran or their surrogate has the right to designate a caregiver of their choosing and that as long as we do not determine there is neglect, abuse, or exploitation of the eligible veteran, we will approve the caregiver the eligible veteran designates, if all other eligibility requirements are met. As part of PCAFC, we have mechanisms in place, and regulated in part 71, to ensure that there is no fraud, neglect, abuse, or exploitation. For example, when determining eligibility for PCAFC, a determination of no abuse or neglect is part of the clinical evaluation. Additionally, pursuant to § 71.45, we can revoke or discharge an eligible veteran or Family Caregiver in instances of fraud, or neglect, abuse, or exploitation. We note that background checks are typically conducted for purposes of determining suitability for employment and we note that participation in PCAFC is specifically not considered an employment relationship. We make no changes based on these comments.

### § 71.30 Reassessment of Eligible Veterans and Family Caregivers

Several commenters expressed general disagreement with VA's proposal to conduct reassessments and asserted that once a veteran or servicemember is admitted into the program, it should be permanent with no annual reassessments. Specifically, one commenter asserted VA is making the false comparison to the most severely and catastrophically disabled veterans, to whom the commenter asserts we believe this permanent designation should apply, and the entire population of veterans. Another commenter asserted that they do not accept the Department's contention that "we do not believe that Congress intended for PCAFC participants' eligibility to never be reassessed after

the initial assessment determination, particularly as an eligible veteran's and Family Caregiver's continued eligibility for the program can evolve." The same commenter asserted the closest the law comes to identifying any such requirement is 38 U.S.C. 1720G(a)(9) which only says "The Secretary shall monitor the well-being of each eligible veteran . . ." and "Visiting an eligible veteran in the eligible veteran's home to review directly the quality of personal care services provided . . ." The same commenter further stated that nowhere does it say there has to be any type of reevaluation or review, let alone of any particular periodicity. We address these comments below.

PCAFC is a clinical program, and similar to any other clinical program, a reassessment is appropriate to assess both the condition and needs of the eligible veteran and the Family Caregiver. This is particularly true given the unique circumstances for each eligible veteran and his or her Family Caregiver as we expand to include veterans and servicemembers from all eras. For example, an eligible veteran may be admitted into PCAFC at the lower-level stipend (i.e., 62.5 percent of the monthly stipend rate) and eventually be determined to be unable to self-sustain in the community and thus his or her Primary Family Caregiver would be eligible to receive the higher-level stipend (i.e., 100 percent of the monthly stipend rate). Also, an eligible veteran's condition may deteriorate to the point where it is no longer safe to maintain the eligible veteran in the home because he or she requires hospitalization or a higher level of care. Additionally, the condition of an eligible veteran who is initially determined to be unable to self-sustain in the community may improve to the point where he or she no longer meets this definition but is still in need of personal care services and thus his or her Primary Family Caregiver would receive a lower-level stipend (i.e., 62.5 percent of the monthly stipend rate). Furthermore, an eligible veteran's condition may improve such that he or she is no longer in need of personal care services and thus his or her Family Caregiver would be discharged from the program. Although we agree that some eligible veterans may not have the opportunity for improvement due to the nature of their condition/disease progression, we do not agree that VA has no obligation to continue to reassess the eligible veteran and Family Caregiver "as eligible veterans' needs for personal care services may change over time as may the needs and capabilities

of the designated Family Caregiver(s)." 85 FR 13378 (March 6, 2020). Additionally, 38 U.S.C. 1720G(c)(2)(A) clearly articulates that the assistance or support provided under PCAFC and PGCSS do not create any entitlements; thus, VA may conduct reassessments for PCAFC to determine continued eligibility under § 71.20(a). Further, we believe the VA MISSION Act of 2018 clearly articulated Congress's intent to ensure continued engagement between VA and PCAFC participants by requiring VA to "periodically evaluate the needs of the eligible veteran and the skills of the [F]amily [C]aregiver of such veteran to determine if additional instruction, preparation, training, or technical support . . . is necessary." 38 U.S.C. 1720G(a)(3)(D), as amended by Public Law 115–182, section 161(a)(5). For these reasons, we believe VA has the statutory authority to require reassessments for all PCAFC participants regardless of the condition of the eligible veteran. We are not making any changes based on these comments.

Several commenters stated that a yearly reassessment would be too burdensome, specifically for veterans or servicemembers who have a 100 percent P&T disability rating, and one commenter stated it would be insulting to require periodic assessments, even if annually. Another commenter stated that it would not be a good use of taxpayer resources or the precious time of caregivers and veterans to require those with certain conditions (e.g., ALS, MS) to be reassessed annually or even on a less frequent basis and that VA should develop a list of these serious injuries that do not warrant continued reassessment for purposes of eligibility. As explained above, VA believes it is necessary to conduct reassessments for all PCAFC participants regardless of the condition of the eligible veteran, and this same principle applies regardless of whether he or she has a 100 percent P&T disability rating or a specific health condition. However, as indicated in the proposed rule, we recognize that an annual reassessment may not be required for each eligible veteran (e.g., an eligible veteran whose condition is expected to remain unchanged long-term because he or she is bed-bound and ventilator dependent, and requires a Family Caregiver to perform tracheotomy care to ensure uninterrupted ventilator support). Therefore, § 71.30(b) states that reassessments may occur on a less than annual basis if a determination is made by VA that an annual reassessment is unnecessary. We note, that even if VA

is conducting a reassessment less frequently than annually, VA would continue to conduct ongoing wellness contacts pursuant to § 71.40(b)(2). We are not making any changes based on these comments.

One commenter asserted that VA should re-evaluate more often and increase stipends accordingly should the eligible veteran's personal care needs justify such an increase. As indicated in the proposed rule, VA will conduct annual reassessments, however such reassessments may occur more frequently if a determination is made and documented by VA that a more frequent reassessment is appropriate. Examples that may necessitate a more frequent assessment include treatment or clinical intervention that reduces an eligible veteran's level of dependency on his or her Family Caregiver, or instances in which there is a significant increase in the personal care needs of the eligible veteran due to a rapidly deteriorating condition or an intervening medical event, such as a stroke, that results in further clinical impairment. Additionally, VA would continue to conduct ongoing wellness contacts pursuant to § 71.40(b)(2) which may result in a reassessment. We are not making any changes based on these comments.

One commenter questioned why an annual reassessment would ever be found unnecessary when this program was designed to be a rehabilitative program. As previously explained, VA recognizes that not all eligible veterans have the potential for rehabilitation or independence, and this is particularly true as we expand to veterans and servicemembers of all eras. Therefore, we believe it is necessary to allow some flexibility in conducting reassessments to address the individual circumstances for each eligible veteran and his or her Family Caregiver(s). We are not making any changes based on this comment.

Another commenter stated it was not clear how many staff visits will be done and when. As previously explained, VA will conduct annual reassessments that may include a home visit, but reassessments may occur more or less frequently than annually as determined and documented by VA based on the individual circumstances of the eligible veteran and the Family Caregiver(s). We are not making any changes based on this comment.

Several commenters opined about how reassessments will be conducted, including suggestions to include specific guidelines about the process. Specifically, one commenter asserted that there needs to be a quantitative assessment and that decisions not be left

to staff's subjective opinions. Another commenter encouraged VA to develop specific guidelines around which veterans would not require an annual reassessment as their status will not change in the future. Also, one commenter suggested VA limit assessments to not more than annually since more frequent assessments would otherwise be left to local providers to determine. While we appreciate and understand the commenter's concerns with regard to establishing objective and specific guidelines, PCAFC is a clinical program and as a result, we will not be able to eliminate all subjectivity. However, we will standardize the process as much as possible to include the use of standardized assessments for both the eligible veteran and the Family Caregiver. Reassessments will be conducted by trained and licensed clinical providers. Additionally, reassessment determinations will be determined by the CEATs, that are specifically trained in the eligibility criteria for PCAFC. As previously explained, VA will conduct annual reassessments, but these reassessments may occur more or less frequently than annually as determined and documented by VA based on the individual circumstances of the eligible veteran and the Family Caregiver(s). VA's determination of the need for reassessment more or less frequently may stem from information gleaned during a routine medical appointment, through a planned or unplanned interaction with a CSC, or even at the request of the eligible veteran or Family Caregiver, if appropriate. As mentioned below, through policy we would require documentation of the clinical factors relied upon in concluding that a less than or more frequent reassessment is needed. As stated above more or less frequent annual reassessments can be conducted due to the changing needs of the eligible veteran in order to provide the necessary support and services. We are not making any changes based on these comments.

We received multiple comments regarding the inclusion of the primary care team during reassessments. Specifically, one commenter stated that collaboration among providers, which include clinical staff conducting home visits, is a desirable characteristic of primary care. Another commenter requested VA preserve the role of the veteran's or servicemember's treating clinician in the eligibility and reassessment process. While we note these comments were primarily focused on the use of primary care teams during the initial eligibility assessment, we

believe these comments are equally applicable to a reassessment, the results of which will determine an eligible veteran's continued eligibility for participation in PCAFC and whether an eligible veteran is unable to self-sustain in the community for purposes of the monthly stipend rate under § 71.40(c)(4)(i)(A). Thus, we believe it is necessary to collaborate with the primary care team during reassessments in addition to the initial evaluation of PCAFC applicants to the maximum extent possible. For these reasons, we are revising § 71.30(a) and (e) by replacing the phrase "the eligible veteran and Family Caregiver will be reassessed by VA" with "the eligible veteran and Family Caregiver will be reassessed by VA (in collaboration with the primary care team to the maximum extent practicable)". We make no other changes based on these comments.

One commenter stated that the lack of specificity in the proposed rule for extending that periodicity is very likely to introduce huge variance into assessment and re-eligibility decisions. Specifically, it could even introduce corruption if caregiver eligibility assessment officials decided they could exact benefits from veterans or caregivers in exchange for longer periods between reassessments. To the extent the commenter is concerned about the determination of how frequently reassessments will occur, we refer to the previous paragraphs that provide examples for when a reassessment may be conducted more or less frequently than on an annual basis. Also, PCAFC will refer all suspected fraudulent or illegal activities, including such situations that may involve VA employees, to VA's OIG and actively participate in VA OIG cases. We are not making any changes based on this comment.

One commenter suggested that VA have a well-defined process to monitor the documented changes by all entities who monitor the eligible veterans' health conditions to warrant a reassessment. VA is responsible for determining and documenting the frequency requirements for assessments that deviate from the annual schedule. Additionally, through policy we would require documentation of the clinical factors relied upon in concluding that a less than or more frequent reassessment is needed. Furthermore, clinical providers are subject to chart and peer reviews to ensure proper documentation in VA's electronic health care record. We are not making any changes based on this comment.

One commenter asked if the caregiver can be with the veteran when they are

reassessed since the caregiver has a better view of what the veteran needs and what the veteran can and cannot do. Relatedly, one commenter asserted that VA should pay attention to feedback from caregivers and their concerns. VA does and will continue to accept and consider feedback from Family Caregivers. Specifically, Family Caregiver(s) are required to participate in reassessments and wellness contacts pursuant to §§ 71.30 and 71.40(b)(2), respectively. VA will also incorporate the Family Caregiver(s) feedback both during the initial assessment and annual reassessment. We are not making any changes based on these comments.

Another commenter asserted that the rule is missing 38 U.S.C. 1720G(a)(3)(C)(iii)(I), *i.e.*, assessment by the Family Caregiver of the needs and limitations of the veteran; and requested that VA strike down the rule because VA ignored this requirement. First, we note that it is not a legal requirement to explicitly regulate the requirement of section 1720G(a)(3)(C)(iii)(I) in 38 CFR part 71; however, VA does have a legal duty to meet this requirement. Second, as indicated in the proposed rule, a “reassessment would provide another opportunity for Family Caregivers and eligible veterans to give feedback to VA about the health status and care needs of the eligible veteran. Such information is utilized by VA to provide additional services and support, as needed, as well as to ensure the appropriate stipend level is assigned.” 85 FR 13379 (March 6, 2020). We also note that we would take the information from the caregiver into account when determining whether a veteran or servicemember is unable to self-sustain in the community (as defined in § 71.15). We are not making any changes based on this comment.

One commenter requested clarification on the impact a reassessment will have on a legacy participant. Specifically, the commenter asked if a legacy participant will no longer be eligible for PCAFC and revoked if a reassessment determines that he or she does not meet the new eligibility requirements under § 71.20(a). As indicated in the proposed rule, all legacy participants and legacy applicants will be reassessed within one year of the effective date of the final rule to determine continued eligibility in PCAFC. Upon the completion of the one-year period, legacy participants and legacy applicants who are no longer eligible pursuant to § 71.20(a) will be provided a discharge notice of not less than 60 days and will receive a 90-day extension of benefits. We are not making any changes based on this comment.

### § 71.35 General Caregivers

One commenter opined that PGCSS is good but should only be contained to veterans enrolled in VA care and not any caregiver that exists because that is what community programs are for. PGCSS is only provided to a general caregiver providing personal care services to a covered veteran (*i.e.*, a veteran who is enrolled in the VA health care system). 38 U.S.C. 1720G(b)(1) and 38 CFR 71.30(b). Additionally, we did not propose any changes to this section other than to redesignate current § 71.30 as new § 71.35. We are not making any changes based on this comment.

Another commenter suggested that VA should not be overly restrictive with the eligibility requirements of PGCSS and provide training and education, selfcare courses, peer support, and the Caregiver Support Line to caregivers of covered veterans. The same commenter also asserted that there is no statutory or regulatory requirement that a general caregiver must provide personal care services in person. Further, the same commenter suggested VA consider allowing an enrolled veteran to participate in PGCSS if he or she is a caregiver to a non-veteran spouse, partner, friend, or relative and that this would increase the veteran’s wellbeing and health. We appreciate the commenter’s suggestions and note that the definition for personal care services as used by PGCSS does not require a general caregiver to provide in person personal care services. As indicated in the proposed rule, we believe the definition for “personal care services” is still appropriate for purposes of 38 U.S.C. 1720G(b) with respect to PGCSS and a new definition of “in need of personal care services” has been added to delineate whether such services must be provided in person for purposes of PCAFC.

Additionally, as explained above, PGCSS is only provided to a general caregiver providing personal care services to a covered veteran (*i.e.*, a veteran who is enrolled in the VA health care system). 38 U.S.C. 1720G(b)(1) and 38 CFR 71.30(b). Thus, we do not have the authority to provide PGCSS to veterans providing personal care services to a non-covered veteran. Furthermore, we did not propose any changes to § 71.30 other than to redesignate current § 71.30 as new § 71.35. We are not making any changes based on this comment.

### § 71.40 Caregiver Benefits

#### Wellness Contacts

One commenter suggested VA include language in the final rule to state that a wellness visit cannot result in reassessment of a veteran, unless it would result in being assigned to a higher tier. It is VA’s intent that the purpose of wellness contacts is to review both the eligible veteran’s and Family Caregiver’s wellbeing, and the adequacy of care and supervision being provided to the eligible veteran by the Family Caregiver. During a wellness contact, the clinical staff member conducting such contact may identify a change in the eligible veteran’s condition or other such change in circumstances whereby a need for a reassessment may be deemed necessary and arranged accordingly pursuant to § 71.30. We note that wellness contacts and reassessments are distinct and separate processes. As explained above in the discussion on § 71.30, a reassessment may occur more or less frequently than on an annual basis based on the individual care needs of the eligible veteran. Furthermore, 38 U.S.C. 1720G(c)(2)(A) clearly articulates that the assistance or support provided under PCAFC and PGCSS do not create any entitlements; thus, the monthly stipend rate may be decreased based on a reassessment and the determination of whether an eligible veteran is unable to self-sustain in the community or no longer meets the eligibility requirements under § 71.20(a). Therefore, we disagree with the commenter’s suggestion that a wellness visit cannot result in a reassessment, unless it would result in being assigned a higher tier. We make no changes based on this comment.

Several commenters opposed the change from 90 days to 180 days for monitoring (*i.e.*, wellness contacts) and encouraged VA to continue the 90-day requirement to ensure veterans and their caregivers needs are met. Specifically, commenters asserted that maintaining the 90-day monitoring requirement will provide effective oversight to ensure the well-being and safety of the eligible veteran and Family Caregiver, especially those veterans who are most vulnerable and susceptible to abuse. Relatedly, we note that one commenter stated that they do not find the 90-day requirement to be burdensome and do not wish for the visits to change because the commenter relies on the visits for support. The same commenter noted that prior to being part of PCAFC, they struggled with not being able to obtain caregiver support. Commenters also asserted that VA has provided no medically sound justification for this

change, and they believe it is an inadequate time period for monitoring veterans who are seriously ill or injured, especially those who are in the aging population with increased and evolving needs. These commenters note that more frequent wellness checks would ensure PCAFC participants have the support and resources needed to remain safe in their home setting. Commenters further noted that VA should retain the current 90-day monitoring requirements as this would be consistent with acceptable industry standards, including HHS and CMS, whereas the proposed wellness contacts of once every 180 days would not. We address these comments below.

We appreciate the comments received and agree with the commenters that increasing the frequency of these visits from 90 days to 180 days may not provide adequate monitoring of an eligible veteran and his or her caregiver, especially as we expand to an aging population. Therefore, we have revised the regulation to state that wellness contacts “will occur, in general, at a minimum of once every 120 days,” as we believe this is reasonable. We note that 120 days establishes a minimum baseline for the frequency of wellness contacts and that these contacts may occur more frequently, if needed, to address the individual needs of the eligible veteran and his or her Family Caregiver. Additionally, we have added the phrase “in general” to provide scheduling flexibility for both VA and the eligible veteran and his or her caregiver. As indicated in the proposed rule, eligible veterans and his or her Family Caregiver are required to participate in wellness contacts. Furthermore, we believe a 120-day frequency will accommodate those eligible veterans whose conditions are generally unchanged and would experience a significant disruption in the daily routine when having to make scheduling changes to accommodate a wellness contact. We make no additional changes based on these comments.

Another commenter encouraged VA to require wellness contacts on at least a quarterly basis, to ensure that wellness contacts include a full assessment of a veteran’s health needs based on the input of the primary care team providing treatment to the veteran, and adjust the eligible veteran’s and caregiver’s benefits without having to wait for an annual reassessment if warranted based on the wellness contact. This commenter believes that these changes would be consistent with the overall intent of PCAFC and will better serve the veteran, especially in

light of VA OIG’s findings that VA has not consistently monitored current veterans in PCAFC. As explained above, the purpose of a wellness contact is to review both the eligible veteran’s and Family Caregiver’s wellbeing, the adequacy of care and supervision being provided to the eligible veteran by the Family Caregiver, and provide the opportunity to offer additional support, services, or referrals for services needed by the eligible veteran or Family Caregiver. Additionally, as explained above, reassessments may occur on a more or less frequent basis than annually and a wellness contact may result in a reassessment pursuant to § 71.30, as necessary, which would include a determination of whether the eligible veteran is unable to self-sustain in the community for purposes of the monthly stipend rate. We are not making any changes based on this comment.

Commenters also opined that requiring a minimum of one annual in home/in person wellness contact is substandard for purposes of monitoring and evaluating the eligible veteran and Family Caregiver, and suggested VA provide the same level of staff monitoring as would be expected if VA needed to hire a professional home health aide for a veteran. Additional commenters noted that CSP does not know whether and to what extent personal care services are being provided, and thus it is impossible to assess the well-being of the eligible veteran and Family Caregiver without direct observation by a qualified medical professional. Commenters also asserted that VA will be unable to properly monitor veteran’s and caregiver’s well-being or determine whether personal care services are being provided appropriately if VA is conducting wellness contacts semi-annually via phone. Commenters noted that CMS requires onsite visits, by a registered nurse or other appropriate skilled professional, ranging from 14 days to 60 days in instances when home health aide services are provided to a patient. We appreciate the commenters’ concerns; however, we note that the regulation establishes a minimum baseline for how many visits must occur in the eligible veteran’s home on an annual basis and that additional or all of these contacts may occur in the eligible veteran’s home, if needed, to address the individual needs of the eligible veterans and his or her Family Caregiver. We are not making any changes based on these comments.

Commenters stated that these wellness contacts would contradict VHA policy for patients residing in a

community nursing home, which requires that a registered nurse or social worker from the contracting VA facility conduct follow-up visits on all patients at least every 30 days except in certain situations. As explained above, we are revising the frequency of contacts from 180 days to 120 days. Additionally, 120 days establishes a minimum baseline for the frequency of wellness contacts, and these contacts (including home visits) may occur more frequently, if needed, to address the individual needs of the eligible veteran and his or her Family Caregiver. Furthermore, PCAFC is a distinct program that provides benefits to Family Caregiver(s) for the provision of personal care services to an eligible veteran in his or her home; thus, we do not believe the frequency of wellness contacts must align with VHA policy for patients residing in a community nursing home, with which we contract. We are not making any changes based on this comment.

Commenters identified there has been a lack of monitoring and accountability with the administration of PCAFC, resulting in fraud, waste, and abuse (which has been documented by VA OIG), however, they opined that the wellness contacts will do little to address these issues, as VA has failed to effectively run PCAFC by not establishing a governance system to promote accountability. Some commenters noted that the program has become too large as a result of this lack of accountability, which they believe led to participants being kicked out of PCAFC in 2015. As indicated in the proposed rule, we acknowledge that we have experienced difficulty conducting monitoring due to limited resources. 85 FR 13380 (March 6, 2020). Transitioning the frequency of wellness contacts to generally every 120 days as well as increased staffing for the program is expected to mitigate resource limitations. In addition, we have developed an improved infrastructure at the VISN and medical center level to better oversee the delivery of PCAFC. Further, as explained previously in this rulemaking, we will provide robust training and education to our staff, implement an audit process to review eligibility determinations, and conduct vigorous oversight to ensure consistency across VA in implementing this regulation. We also anticipate that the regulations and additional training will create more consistency and standardization across VA, which believe will reduce any fraud, waste, and abuse within PCAFC. We thank the commenters for their concerns;

however, we make no changes based on these comments.

One commenter implied that the proposed rule stated that OIG found monitoring is resource intensive and burdensome. We correct this commenter's misunderstanding by stating that OIG did not determine that monitoring was resource intensive or burdensome, rather the proposed rule acknowledged that we have failed to meet the 90-day requirement due to limited resources, and we note that some PCAFC participants have informed VA that they find the 90-day requirement to be burdensome. As explained above, we will be conducting wellness contacts every 120 days, which we believe is a reasonable frequency for wellness contacts. We make no changes based on this comment.

One commenter opined that these proposed wellness contacts do not meet the requirements in 38 U.S.C. 1720G(a), as VA is required to monitor the well-being of eligible veterans by directly reviewing the quality of the personal care services in the veteran's homes and taking corrective action. This commenter also asserted that reassessments of veteran eligibility for PCAFC and monitoring the well-being of the eligible veteran are simply not analogous. First, 38 U.S.C. 1720G does not require VA conduct monitoring of the eligible veteran's wellbeing in the home or take related corrective action; instead, section 1720G(a)(9) requires VA establish procedures to ensure appropriate follow-up, which may include monitoring the wellbeing of the eligible veteran in the home and taking corrective action, including suspending or revoking the approval of a Family Caregiver. We note these latter provisions are discretionary. Second, we note that we currently perform periodic monitoring pursuant to 38 CFR 71.40(b)(2) and consistent with 38 U.S.C. 1720G(a)(9)(A). Section 161(a)(5) of the VA MISSION Act of 2018 amended 38 U.S.C. 1720G(a)(3)(D) to additionally require VA to periodically evaluate the needs of the eligible veteran and the skills of the Family Caregiver to determine if additional instruction, preparation, training, and technical support is necessary. Consistent with section 1720G, the purpose of wellness contacts is to review both the eligible veteran's and Family Caregiver's wellbeing, and the adequacy of care and supervision being provided to the eligible veteran by the Family Caregiver. We note that we would require at least one wellness contact occur in the eligible veteran's home on an annual basis. Reassessments will be conducted to evaluate the

eligible veteran's and Family Caregiver's eligibility, including the Family Caregiver's continued eligibility to perform the required personal care services, and whether the eligible veteran is unable to self-sustain in the community for purposes of the monthly stipend. As indicated in the proposed rule, we believe the combination of wellness contacts and reassessments meet the periodic evaluation requirement in 38 U.S.C. 1720G(a)(3)(D), as we would determine whether any additional instruction, preparation, training, and technical support is needed in order for the eligible veteran's needs to be met by the Family Caregiver. We further note that to the extent that we would need to take corrective action pursuant to section 1720G(a)(9), we may revoke or discharge a caregiver or veteran from PCAFC pursuant to 38 CFR 71.45, as appropriate. We are not making any changes based on this comment.

A commenter incorrectly stated that VA has never met the statutory requirement to complete monitoring assessments no less than every 90 days; however, that is not a requirement established in the statute, but rather in regulation by VA. We are not making any changes based on this comment.

Several commenters stated that the proposed 180-day requirement is too much and that these visits can be easily conducted by the phone rather than in person. Additionally, commenters asserted that these visits be waived for eligible veterans who have a 100 percent P&T service-connected disability rating or receive other VBA or SSA disability benefits. As previously explained, the purpose of wellness contacts is to review both the eligible veteran's and Family Caregiver's wellbeing, and the adequacy of care and supervision being provided to the eligible veteran by the Family Caregiver. Also, while we understand that the condition of some eligible veterans will remain unchanged, VA has a statutory requirement to periodically evaluate the needs of the eligible veteran and the skills of the Family Caregiver to determine if additional instruction, preparation, training, or technical support is necessary. See 38 U.S.C. 1720G(a)(3)(D). Additionally, as explained above, we are revising the requirement from 180 days to 120 days, which we believe will accommodate those eligible veterans whose condition is generally unchanged and would experience a significant disruption in the daily routine when having to make scheduling changes to accommodate a wellness contact. Further, while we agree that some visits can be conducted

by phone or other telehealth modalities, we believe that at least one wellness contact should occur in the eligible veteran's home to provide direct observation of the personal care services provided and assess the wellbeing of the veteran and Family Caregiver. We are not making any changes based on these comments.

Several commenters requested clarification on frequency of contacts and one commenter suggested that the frequency of these contacts be adjusted to accommodate individual circumstances for eligible veterans and Family Caregivers. As previously explained, 120 days establishes a minimum baseline for the frequency of wellness contacts and these contacts may occur more frequently if needed, to address the individual needs of the eligible veteran and Family Caregiver. We are not making any changes based on these comments.

One commenter stated that using the term "wellness contact" is inconsistent with the provision of Home and Community Based Services and standard medical terminology, specifically the annual wellness visit which is a yearly appointment with a primary care provider to create or update a personalized prevention plan. The commenter asserts that when all members of the healthcare team use the same terminology, they can understand what is on the patient's chart and provide them with the best possible care. As indicated in the proposed rule, we believe changing the terminology from "monitoring" to "wellness contacts" is a more accurate description of the purpose of these visits as it includes a review of the wellbeing for both the eligible veteran and Family Caregiver. Additionally, we have found that people find the term "monitoring" to be punitive. We are not making any changes based on this comment.

#### *Monthly Stipend Rate*

VA proposed several changes to the methodology and calculation of monthly stipend payments for Primary Family Caregivers. In particular, we proposed to use the OPM's GS Annual Rate for grade 4, step 1, based on the locality pay area in which the eligible veteran resides, divided by 12. We further proposed to discontinue the use of the combined rate, which is based on the Bureau of Labor Statistics (BLS) hourly wage rate for home health aides at the 75th percentile in the eligible veteran's geographic area of residence, multiplied by the Consumer Price Index for All Urban Consumers (CPI-U).

One commenter supported the use of the OPM GS Annual Rate for grade 4,

step 1, and stated that it will lend significant standardization and greatly increase the ease of program administration. Another commenter similarly supported this change and described the GS rate as more accurate and standardized. We appreciate these comments and do not make any changes based upon them.

Some commenters were concerned with VA using GS instead of BLS. In particular, commenters stated that the transition from BLS to GS is wholly inadequate, unreasonable, illogical, arbitrary, inconsistent with law, and an effort to reduce the amount of stipends that will be paid. Other commenters opposed transitioning from the combined rate (using BLS rates) to the monthly stipend rate (using GS rates), and one commenter urged VA to keep the current rate. Another commenter expressed concern that using the GS rate would treat caregivers like government employees.

We disagree with the commenters above and find that the use of the GS scale is not only reasonable and consistent with the law but will also result in an equal or increased payment for the majority of participants. As we explained in the proposed rule, we believe it is reasonable to use the GS rate instead of the combined rate because of challenges we had using the BLS rate. 85 FR 13382 (March 6, 2020). We tried to identify other publicly available rates that we could use for calculating the monthly stipend that would meet the statutory requirements in 38 U.S.C. 1720G(a)(3)(C)(ii) and (iv), but were unable to locate any. We found that the GS wage rates address some of the challenges we have had using the BLS rate. *Id.* We further found that the GS wage rates meet our needs for administering the stipend payment, as it is publicly available, easy to locate, is developed entirely outside of VA with a defined process for updating the rates, and provides geographic variation. However, after publication of the proposed rule and in considering public comments such as the reference to caregivers being treated like federal employees, VA examined the challenges associated with making retrospective pay corrections in instances when OPM announces retrospective changes to the GS scale tables later in the year. Such adjustments would complicate VA's goal, as stated in the proposed rule, of adopting the GS wage rates to "ensure more consistent, transparent, and predictable stipend payments," (85 FR 13382 (March 6, 2020)) and our proposal to pay stipends monthly by dividing the annual rate by 12 (rather than using the same pay period

structures that most federal employees are paid through). Such retrospective payments would increase the risk of improper payments, be administratively impracticable for VA, and would be anticipated to only represent a few percentage points' change in retrospective pay over a relatively short period of time. Thus, VA will not make retroactive stipend payments resulting from retrospective changes to GS wage rates by OPM and accordingly amends the regulation text to indicate that adjustments under § 71.40(c)(4)(ii)(A) take effect "prospectively following the date the update to such rate is made effective by OPM." This change only applies to § 71.40(c)(4)(ii)(A) and would not impact the retroactive adjustments in § 71.40(c)(4)(ii)(C)(2)(i) as a result of a reassessment conducted by VA under § 71.30.

In addition, we analyzed the GS and BLS wage rates to determine whether the GS wage rates tracked the private sector wages for home health aides, and we found that these closely tracked in the past both at a national level and for GS adjusted localities. *Id.* As we explained in the proposed rule, we determined the appropriate GS grade and step for stipend payments by comparing against BLS wage rates for commercial home health aides, and found that for 2020, the BLS national median wage for home health aides (adjusted for inflation) is equivalent to the base GS rate at grade 3, step 3 (without a locality pay adjustment). *Id.* We also found that in most U.S. geographic areas for 2020, the GS rate at grade 3, step 3 would be equal to or higher than the BLS median wage for home health aides in the same geographic areas. *Id.* at 13383. We considered using a unique GS grade and step based on the median home health aide wage rate in each of the geographic areas where the 2020 GS rate at grade 3, step 3 was less, but determined that would not be appropriate or practicable for the reasons previously explained in the proposed rule. *Id.* As a result, we proposed to use the slightly higher GS rate at grade 4, step 1 for all localities, which is consistent with the requirements of section 1720G(a)(3)(C)(ii), (iv) (*i.e.*, that to the extent practicable, the stipend rate is not less than the monthly amount a commercial home health care entity would pay an individual to provide equivalent personal care services in the eligible veteran's geographic area or geographic area with similar costs of living).

We note that we do not view Family Caregivers as government employees, and use of the monthly stipend rate (*i.e.*,

GS Annual Rate for grade 4, step 1, based on the locality pay area in which the eligible veteran resides, divided by 12) instead of the combined rate using the BLS rate does not change our view. The stipend payment is not intended to compensate Family Caregivers as if they were government employees, but rather acknowledge the sacrifices these Family Caregivers have made to care for eligible veterans. The benefits of using the GS Annual Rate, as explained in the proposed rule and further described herein, outweigh any potential concerns that use of this rate could result in caregivers being treated like government employees. Additionally, we expressly state in 38 CFR 71.40(c)(4)(iii), as made final within this rule, that nothing in this section shall be construed to create an employment relationship between VA and a Family Caregiver. We make no further changes based on these comments.

Other commenters were concerned that the monthly stipend rate would be too low. In particular, commenters were concerned that the rate will not properly compensate Primary Family Caregivers for the care they provide, does not reflect the actual rates of home health aides, and is less than the proposed minimum wage of \$15 per hour. Another commenter found the GS rate to be inadequate because the USA National Average for cost of in-home care is \$52,624 as reported in the AARP Genworth Study. Others emphasized sacrifices made by caregivers to take care of loved ones, including lost employment wages.

We reiterate from the proposed rule that the stipend rate is consistent with the statutory requirements of 38 U.S.C. 1720G(a)(3)(C)(ii) and (iv), which requires that to the extent practicable, the stipend rate be not less than the monthly amount a commercial home health care entity would pay an individual to provide equivalent personal care services in the eligible veteran's geographic area or geographic area with similar costs of living. See 85 FR 13382–13383 (March 6, 2020).

In response to the commenters who shared their personal stories and expressed concern that the stipend rate is too low, we understand and appreciate the many sacrifices these caregivers make on a daily basis to care for our nation's veterans. We are incredibly grateful for the care and valuable service they provide. These caregivers greatly impact veterans' ability to remain safely in their homes for as long as possible. We note that PCAFC is just one of the ways in which VA is able to recognize and thank these caregivers for their service and sacrifice.

In particular, the monthly stipend is an acknowledgement for the sacrifice Family Caregivers make to care for eligible veterans. See 76 FR 26155 (May 5, 2011). It was never intended to compensate Primary Family Caregivers for their services or lost wages.

In response to the commenter who was concerned that the monthly stipend rate may be less than the proposed minimum wage of \$15 per hour, we note that the stipend payment, to the extent practicable, must be no less than the annual salary paid to home health aides in the commercial sector. 38 U.S.C. 1720G(a)(3)(C)(ii), (iv). Thus, by law, we are required to look at the national median for home health aides. We reviewed 2018 data of the national median for home health aides (adjusted for inflation to 2020), and found that the national median was \$12.60 per hour. The higher monthly stipend rate of 100 percent of the GS Annual Rate at grade 4, step 1 would receive \$14.95 per hour in 2020. We note that that is the hourly rate for the Rest of the United States, and that Primary Family Caregivers may receive more based on their locality since the Rest of the United States would be the lowest rate possible for purposes of calculating the stipend rate based on locality. However, Primary Family Caregivers may receive a lower stipend payment if they receive the lower stipend rate (*i.e.*, 62.5 percent of the GS Annual Rate at grade 4, step 1.) It is also important to further note that the monthly stipend payment is a nontaxable benefit. We recognize that some Primary Family Caregivers will receive less than \$15 an hour however, we believe that the stipend rate meets the statutory requirement for payment and is appropriate given the intent of the benefit. As previously explained, the monthly stipend is intended to acknowledge the sacrifices Family Caregivers make and was never intended to compensate for their services.

In response to AARP Genworth Study, we note that this study reflects the cost of contracted in-home care (as the rate listed is the rate charged by a non-Medicare certified, licensed agency), and is not reflective of the actual wages of the home health aides who provide care. The cost of contracted in-home care also includes both overhead and profits for the agency, which are not passed on to home health aides. Second, we acknowledge that the cost of institutional or in-home care is more than the monthly stipend. Pursuant to 38 U.S.C. 1720G(a)(3)(C)(ii),(iv), we are required to look at the wages of home health aides to determine the stipend rate, and the stipend rate must be no

less than the monthly amount a commercial home health care entity would pay an individual. While the Primary Family Caregiver and the services he or she provides complement the clinical care provided by commercial home health care entities to eligible veterans, the Primary Family Caregiver is not intended to be a replacement or substitute for such care. We also note that the Primary Family Caregiver does not necessarily have the same specialized training and education as those providing clinical care, and that the cost of care billed by a licensed agency may include multiple caregivers. Thus, we do not believe it would be reasonable or consistent with the statute to pay Primary Family Caregivers the cost of care billed by licensed agencies. We make no changes based on these comments.

One commenter noted that the reduction in the stipend amount may result in the caregiver working outside the home which can hurt the veteran who cannot survive without the caregiver. While we recognize that some current participants may have a reduced stipend amount based on changes we are making to the stipend methodology, the transition from BLS to GS should result in the majority of current participants receiving an increase in their stipend amount. As we explained in the proposed rule and reiterate within this final rule, we will provide a period of transition for legacy participants to minimize any negative impact. We further note that as part of this rulemaking, we are providing financial planning services as an additional benefit available to Primary Family Caregivers. This new benefit can assist these Family Caregivers with managing their finances. To the extent an eligible veteran requires more care than the Primary Family Caregiver is able to provide, PCAFC is one of many programs that may be available to meet the needs of eligible veterans. In such instances, we recommend speaking with VA about other care options that may be available, such as home based primary care, and Veteran-Directed care. We make no changes based on this comment.

Other commenters asserted that VA's proposed changes will result in stipend amounts that are too high. In particular, one commenter expressed concern that the stipend payments are in some cases higher than disability compensation that veterans receive. Other commenters believe the stipend payments can result in the veteran or caregiver mismanaging the stipend, encourage individuals not to work, and are inconsistent with the purpose of the stipend to assist the

Family Caregiver rather than pay for mortgages and similar expenses.

Consistent with our explanation in the proposed rule and as explained directly above, we believe the monthly stipend rate will not result in stipend rates that are too high because the monthly stipend rate is consistent with the statutory requirements of 38 U.S.C. 1720G(a)(3)(C)(ii) and (iv), by being not less than the monthly amount a commercial home health care entity would pay an individual to provide equivalent personal care services in the eligible veteran's geographic area or geographic area with similar costs of living. See 85 FR 13382 (March 6, 2020). Additionally, as explained in the proposed rule and in this section, we determined that the monthly stipend rate tracks with the national median wage for home health aides. Id.

To the extent that commenters were concerned that monthly stipend payments can be higher than the disability compensation that veterans receive, we recognize that this may possibly occur. However, it is important to note that disability compensation and PCAFC are two distinct and separate programs with different purposes. In deciding the monthly stipend methodology, we considered whether disability compensation payments would be less than Primary Family Caregiver monthly stipend payment, but determined that the advantages of using the GS rate to calculate the monthly stipend payment outweigh any concerns with respect to the veteran's disability compensation payment compared to the monthly stipend payment.

To the extent that commenters asserted that the monthly stipend encourages individuals not to work, we respectfully disagree. We are aware that many Primary Family Caregivers have already given up employment so that they can care for eligible veterans. For those who are unable to afford to care for an eligible veteran without working, we recognize that this monthly stipend may provide Primary Family Caregivers with the flexibility to care for the eligible veteran. The monthly stipend is one of many benefits available to Primary Family Caregivers as a way to acknowledge their sacrifices in caring for eligible veterans and their valuable contributions to society. We also note that since the monthly stipend for Primary Family Caregivers is a benefit payment, and not based on an employment relationship, it does not involve employer contributions to old-age, survivors, and disability Insurance (commonly known as "Social Security") or participation in a defined-contribution or defined-benefit

retirement program. Given this and the fact that the stipend is nontaxable (and thus is not taxed at a higher tax bracket if there is other taxable income from employment or other sources), we do not believe there is an incentive for Primary Family Caregivers who would otherwise work outside of the caregiving role to leave the labor market because of their participation in PCAFC.

To the extent that commenters believe the stipend payment will lead to mismanagement and it can be used to pay a mortgage or other similar expenses, we do not impose any requirements or limitations on how a Primary Family Caregiver spends the monthly stipend he or she receives, and we decline to establish such requirements or limitations. However, we do note that as part of the improvements we are making to part 71 as part of this rulemaking, Primary Family Caregivers will be eligible to receive financial planning services, which can assist the Primary Family Caregiver with managing the stipend payment.

Other commenters recommended alternative approaches to determine the monthly stipend amount. Specifically, one commenter requested that the stipend be the rate of the salary the caregiver earned in their past occupation and commensurate with the caregiver's education, because many caregivers leave their jobs to become a caregiver, and many are healthcare providers providing high level of care that a home health aide is not trained or permitted to perform. This commenter also noted that this would be cost efficient for VA since they would not have to put the veteran in a skilled nursing home at VA's expense. Another commenter recommended the stipend more closely align to the pay of a VA registered nurse. This same commenter urged VA to compare the salary of a home health care worker (with a median pay in 2018 of \$24,060) to a live-in home health care worker (which can average \$4,800 per month for 40 hours per week of in-home care costs). Additionally, one commenter recommended that VA assign the GS-4, Step 10 rate to those with extreme disabilities that require 24/7, 365 care. Another commenter suggested caregivers should be paid as if enlisted in active duty. One commenter recommended the stipend be calculated by what it would cost to the government for institutionalization or inpatient care of the eligible veteran reduced by 10–20 percent. Finally, another commenter suggested the percentage of the GS rate at grade 4, step 1, be based on the veteran's service-connected disability

rating percentage, and further suggested that caregivers provide care full time and should be recognized more like a social worker or nurse.

We reiterate that the monthly stipend is an acknowledgement for the sacrifices Family Caregivers make to care for eligible veterans. See 76 FR 26155 (May 5, 2011). While we recognize that some individuals may give up their jobs to become a Family Caregiver, the monthly stipend is not meant to be commensurate with the income a Family Caregiver received from previous employment (including as a healthcare provider) or with their education. It is also not meant to transfer any savings VA may receive by not paying for a skilled nursing home or other institutionalization or inpatient care of the veteran to the Family Caregiver. The monthly stipend is also not meant to replace or substitute clinical care that eligible veterans receive. The care that Family Caregivers provide to eligible veterans is in addition to and supportive of the increased quality of life or maintenance of such. We note that services that Family Caregivers provide is not meant to replace institutional or inpatient care, and that, in addition to PCAFC, eligible veterans may be eligible for additional VHA services such as skilled nursing home care, home based primary care, and Veteran-Directed care. We acknowledge that there are commenters that believe their contributions exceed that of a home health aide. However, the reason that we use the wages of a home health aide for determining the stipend rate is based on the requirement in 38 U.S.C. 1720G(a)(3)(C)(ii), (iv) (to the extent practicable, the stipend is not less than the "amount a commercial home health care entity would pay an individual in the geographic area of the eligible veteran [or similar area]"). Additionally, as indicated in the proposed rule and reiterated in this section, we believe the GS rate for grade 4, step 1 is, to the extent practicable, not less than the annual salary paid to home health aides in the commercial sector, particularly after considering that the monthly personal caregiver stipend is a nontaxable benefit. 85 FR 13383 (March 6, 2020).

To the extent that commenters suggested VA base the stipend on other occupations, such as nurses (including registered nurses) and social workers, we decline to do so as 38 U.S.C. 1720G(a)(3)(C)(ii) is clear that the stipend be no less than the salary paid to a home health aide. Similarly, we decline to adopt the suggestion that we compare the salary of a home health care worker (with a median pay in 2018

of \$24,060) to a live-in home health care worker (which can average \$4,800 per month for 40 hours per week of in-home care costs). Section 1720G(a)(3)(C)(ii) is clear that the stipend be no less than the salary paid to a home health aide, not a live-in home health care worker. Thus, we used home health aide wages for determining the rate to use for the monthly stipend.

To the extent that a commenter suggested that we base the stipend on enlisted active duty, we are unclear as to this commenter's specific suggestion since they did not provide any additional information, and their comment was in the context of providing caregivers benefits similar to veterans. We note that active duty enlisted pay is based on military rank (*i.e.*, E-1 to E-9) and years of service. As the commenter did not suggest the level of active duty enlisted pay we should consider using for the stipend rate (or whether to include non-wage forms of compensation received by active duty enlisted personnel), we cannot further address their comment. Additionally, we did not consider the pay of active duty enlisted because the statute requires us to determine the stipend rate based on the salary paid to a home health aide.

With regards to the commenter that suggested we use the GS Annual Rate at grade 4, step 10 for the stipend payment for Primary Family Caregivers who care for eligible veterans with extreme disabilities that require 24/7, 365 days of care, we decline to do so as those with the highest level of need, which we believe would likely include an individual who needs around-the-clock care, would fall under the higher stipend level (*i.e.*, 100 percent of the monthly stipend rate) under 38 CFR 71.40(c)(4)(i)(A)(2). The intent of having higher and lower stipend levels was to distinguish between those who are determined to be unable to self-sustain in the community and those who are not, as these are different levels of need. We decided not to use multiple GS grades and steps as we wanted to ensure we had standardization and transparency about the rate that we were using. More levels of pay would result in more subjectivity in the assignment of rates. To the extent that this commenter believes that 24/7 care is required, we note that this is not the level of care we expect to be provided. We believe it is likely that an individual who needs 24/7 care would need additional clinical care from a skilled health care provider. We also note that this level of care would be beyond the scope of the level of personal care services that is intended under PCAFC,



particularly as that is not the level of training we provide to Family Caregivers for the purpose of PCAFC. If an individual needs 24/7 care, we are willing to provide referrals to other VHA services that may be appropriate.

Lastly, in response to the commenter that suggested the percentage of the GS rate at grade 4, step 1, be based on the veteran's service-connected disability rating percentage, we decline to do so. We note that as part of this final rule, and explained previously in this rulemaking, we are defining serious injury to mean any service-connected disability that (1) is rated at 70 percent or more by VA; or (2) is combined with any other service-connected disability or disabilities, and a combined rating of 70 percent or more is assigned by VA. If we adopted this suggestion, only Primary Family Caregivers of those veterans with a 70 percent or higher service-connected disability rating would be eligible for the stipend rate so veterans that do not meet the definition of serious injury would not qualify for PCAFC. We note that while service-connected disability rating is part of the definition of serious injury, it is not used to determine a veteran's or servicemember's need for personal care services for purposes of PCAFC eligibility. Instead, we assess the clinical needs of individuals to determine whether he or she has a need for personal care services. Service-connected disability rating is not commensurate with a need for personal care services, and to use the disability rating for that purpose would not be appropriate. We also note that we will have two levels for the stipend payment, with the higher level (*i.e.*, 100 percent) based on whether the eligible veteran is unable to self-sustain in the community. All other Primary Family Caregivers will receive the stipend payment at the lower rate (*i.e.*, 62.5 percent). These stipend levels are not based on service-connected disability rating, but rather whether the veteran is unable to self-sustain in the community. Having two levels for the stipend rate will ensure that those Primary Family Caregivers of eligible veterans with severe needs receive the higher stipend rate.

We make no changes to the regulation based on these comments.

Multiple commenters took issue with VA's statement that reliance on the combined rate has resulted in stipend rates well above the average hourly rate of a home health aide in certain geographic areas, including one commenter who suggested that this has been "solved by the current *BLS.gov/oes* contracting process which eliminated

outliers in the May 2019 Survey." We address these comments below.

We recognize that BLS data has been adjusted to account for outliers. However, as explained previously in this discussion on the monthly stipend rate, we have determined that OPM's GS rate will better address the needs of PCAFC. We note that the current combined rate uses the most recent data from the BLS on hourly wage rates for home health aides as well as the most recent CPI-U, unless using this most recent data for a geographic area would result in an overall BLS and CPI-U combined rate that is lower than that applied in the previous year for the same geographic area, in which case the BLS hourly wage rate and CPI-U that was applied in the previous year for that geographic area will be utilized to calculate the Primary Family Caregiver stipend. See 80 FR 1397 (January 9, 2015). This was put in place to ensure that Primary Family Caregivers would not unexpectedly lose monetary assistance upon which they had come to rely. *Id.* In contrast to the BLS rate, OPM's GS scale provides a more stable data set from year to year, drastically reducing the probability of geographic regions experiencing inflated stipend rates. A more detailed explanation is provided within the regulatory impact analysis.

We make no changes based on these comments.

#### *Consequences of Potential Decrease in Stipend*

One commenter asked that Primary Family Caregivers of legacy participants continue to be paid based on the BLS rate (*i.e.*, combined rate) while in the program. The commenter believes BLS to be more comprehensive in calculating living wages and indicated that the transition to the monthly stipend rate will cut their stipend in half and they use their current stipend to cover in home treatments and other treatments out-of-state that would otherwise be unavailable to them.

Initially, we note that PCAFC is complementary to other VHA health care services and we encourage PCAFC participants to learn about other health care benefits that may help meet the needs of the eligible veteran. Similar to our earlier discussion about grandfathering in PCAFC participants, we believe it would be inequitable to allow the Primary Family Caregivers of legacy participants to receive their previous stipend rate indefinitely while applying the monthly stipend rate for legacy applicants and new participants. Doing so would result in Primary Family Caregivers of post-9/11 veterans

and pre-9/11 veterans who are similarly situated in all respects receiving different stipend amounts, which would continue the inequity between different eras of service. It would also be administratively prohibitive to utilize two different stipend payment methodologies as we expand PCAFC to pre-9/11 veterans. As mentioned further above, the majority of Primary Family Caregivers of legacy participants will receive increases in the amount of their stipend as a result of the transition from BLS to GS. However, some may experience a decrease in their stipend amount, which is why we provide a period of transition (*i.e.*, to minimize the negative impact of changes to the stipend methodology). We note that the stipend amount for the Primary Family Caregivers of legacy participants will generally remain unchanged during the one-year period beginning on the effective date of this rule, unless it is to their benefit, and so long as the legacy participant does not relocate to a new address. We are not making any changes based on this comment.

Another commenter indicated that VA's changes will result in a decrease in the commenter's stipend amount. The commenter indicated an understanding of the transition period outlined in the proposed rule, but asked whether there will be a cost of living increase for those who "already make to [sic] much" under the previous stipend payment methodology. On the effective date of this rule, part 71 will no longer refer to the combined rate, and as explained in VA's proposed rule, VA will no longer make annual adjustments to the combined rate (85 FR 13358 (March 6, 2020)), including for Primary Family Caregivers of legacy participants who continue (for one year after the effective date) to receive the same stipend amount they were eligible to receive the day before the effective date of the final rule pursuant to the special rule in § 71.40(c)(4)(i)(D). To the extent the commenter is asking about adjustments to stipend payments under the new stipend payment methodology (based on the monthly stipend rate) that result from OPM's updates to the GS scale, this is addressed in § 71.40(c)(4)(ii)(B). As explained in VA's proposed rule, the GS pay schedule is usually adjusted annually each January based on nationwide changes in the cost of wages and salaries of private industry workers. 85 FR 13388 (March 6, 2020). Any adjustment to stipend payments that result from OPM's updates to the GS Annual Rate for grade 4, step 1 for the locality pay area in which the eligible veteran resides, will take effect

prospectively following the date the update to such rate is made effective by OPM. See § 71.40(c)(4)(ii)(A). We are not making any changes based on this comment.

#### *Periodic Assessments*

One commenter requested VA include a statement in the final rule that VA will post the findings of its assessments of the monthly stipend rates on a public website so that stakeholders are able to easily evaluate the impact of this change on Family Caregivers in the program. We proposed to add § 71.40(c)(4)(iv) which states that in consultation with other appropriate agencies of the Federal government, VA shall periodically assess whether the monthly stipend rate meets the requirements of 38 U.S.C. 1720G(a)(3)(ii) and (iv). We will consider making findings of these assessments publicly available in an effort to be as transparent as possible. We are not making any changes based on this comment.

#### *Unable To Self-Sustain in the Community*

VA proposed to add a new definition for the phrase “unable to self-sustain in the community,” for purposes of determining the monthly stipend level under § 71.40(c)(4)(i)(A). Unable to self-sustain in the community was proposed as the sole criterion to establish eligibility for the higher level stipend and would mean that an eligible veteran (1) requires personal care services each time he or she completes three or more of the seven activities of daily living (ADL) listed in the definition of an inability to perform an activity of daily living in § 71.15, and is fully dependent on a caregiver to complete such ADLs; or (2) has a need for supervision, protection, or instruction on a continuous basis. Commenters raised numerous concerns with the definition, including but not limited to the definition lacking clarity and objectivity, use of a double negative in the proposed rule discussion, that few veterans will be eligible for the higher stipend level and that it will promote total reliance on caregiver, that it is arbitrary and too strict, and that it is economically unfair. Commenters also provided suggested edits to parts of the definition and requested we continue to use the current three tiers instead of two levels for purposes of the monthly stipend rate. While we make no changes to the regulation based on these comments, we address them in the discussion below.

One commenter stated that the new definitions seem to be easier to understand, but is concerned the

requirements may still be left to interpretation. While the commenter did not specify which definitions were easier to understand, we believe the commenter to be referring to unable to self-sustain in the community, as the comment also referred to the new stipend levels. Another commenter stated that the proposed rule lacked adequate information on what being unable to self-sustain in the community means although it is a determining factor for which level a veteran is assigned. Relatedly, an additional commenter raised concerns about the definition of “unable to self-sustain in the community” as being meaningless and flawed, in part because there are no objective criteria for need for supervision, protection, or instruction. Another commenter, seeking clarification of the definition, said that “VA’s failure to provide an objective operational definition of supervision, protection or instruction . . . seems quite contradictory based on the examples offered,” and asked if VA has an objective clinical reference for this definition. One commenter noted that this definition is problematic because it is based on the definition of the “need for supervision, protection, or instruction” of which they believe there are no objective criteria. Lastly, one commenter also expressed concern that without clear protocols and definitions for determining whether a veteran or servicemember is unable to self-sustain in the community, inconsistency would persist across VA.

We appreciate the commenters’ concerns, but note that this definition is intended to distinguish between the level and amount of personal care services that an eligible veteran needs for purposes of determining the appropriate stipend level. We note that at least one commenter stated that they found the definition of “unable to self-sustain in the community” to be clear.

We believe the definition of “unable to self-sustain in the community” contains objective, clear, and standardized requirements that can be consistently implemented across PCAFC. We believe it is specific enough to allow us to make objective determinations about whether a veteran or servicemember has a higher level of need such that he or she meets the definition of unable to self-sustain in the community. The definition provides the frequency with which personal care services need to be provided by a Family Caregiver of an eligible veteran who is determined to be “unable to self-sustain in the community,” and can be distinguished, for purposes of determining the monthly stipend level,

from a Family Caregiver of an eligible veteran who does not meet this threshold. For example, an eligible veteran that qualifies for PCAFC under the definition of “inability to perform an ADL” would meet the definition of “unable to self-sustain in the community” if he or she requires personal care services each time he or she completes three or more ADLs, and is fully dependent on a caregiver to complete such ADLs. This is distinct from the definition of “inability to perform an ADL” which only requires assistance with at least one ADL each time the ADL is completed. This distinction between the definitions allows us to differentiate between those who have moderate needs versus those who have a higher level of need for purposes of determining the appropriate monthly stipend level, as we are required by 38 U.S.C. 1720G(a)(3)(C)(i) to base the stipend rate on the amount and degree of personal care services provided.

Additionally, an eligible veteran that qualifies for PCAFC under the definition of “need for supervision, protection, or instruction” would meet the definition of “unable to self-sustain in the community” if they have a need for supervision, protection, or instruction on a continuous basis. This is distinct from the definition of “need for supervision, protection, or instruction” as such definition does not require the same frequency of personal care services needed. As previously discussed, the terms daily and continuous relate to the frequency of intervention required in order to maintain an individual’s personal safety that is directly impacted by his or her functional impairment at the lower and higher stipend levels, respectively. Veterans and servicemembers who are eligible for PCAFC based on a need for supervision, protection, or instruction may only require intervention at specific and scheduled times during the day to maintain their personal safety on a daily basis. In contrast, a veteran or servicemember who is unable to self-sustain in the community, has a need for supervision, protection, or instruction on a continuous basis.

Distinguishing a daily versus a continuous need for supervision, protection, or instruction is a clinical decision, based upon an evaluation of the individual’s specific needs. This distinction is discussed in more detail above in the discussion of the definition of need for supervision, protection, or instruction in § 71.15.

As we explained in the proposed rule, in determining whether an eligible veteran is in need of supervision,

protection or instruction on a continuous basis, VA would consider the extent to which the eligible veteran can function safely and independently in the absence of such personal care services, and the amount of time required for the Family Caregiver to provide such services to the eligible veteran consistent with 38 U.S.C. 1720G(a)(3)(C)(iii)(II) and (III), as amended by section 161(a)(4)(B) of the VA MISSION Act of 2018. Id. For example, an individual with dementia would have a need for supervision, protection, or instruction on a continuous basis if such individual requires daily instruction for dressing, wanders outside the home when left unattended for more than a few hours, and has a demonstrated pattern of turning on the stove each time the individual enters the kitchen due to disorientation; however, an individual with dementia who only requires step-by-step instruction with dressing daily which includes some physical demonstration of the tasks, would not have a need for supervision, protection, or instruction on a continuous basis.

We also note that we will provide robust training and education to our staff, implement an audit process to review eligibility determinations, and conduct vigorous oversight to ensure consistency across VA in implementing this regulation, to include this definition.

To the extent commenters raised specific concerns about the definition of “unable to self-sustain in the community” based on concerns they had with the underlying definitions of inability to perform an ADL or need for supervision, protection, or instruction, we refer the commenters to those specific sections that discuss the definitions of inability to perform an ADL and need for supervision, protection, or instruction.

We make no changes based on these comments.

While we are not entirely certain, it appeared that one commenter, in the context of their comment concerning the lower-level stipend, suggested that the definition of “need for supervision, protection, or instruction” focuses on supervision and safety necessary due to cognitive or mental health issues. As discussed above in the context of “inability to perform an activity of daily living,” a need for supervision, protection, or instruction is inclusive of a veteran or servicemember with cognitive, neurological, or mental health issues. We are not making any changes based on this comment.

Another commenter was confused about this definition in the proposed

regulation and the FAQs posted on VA’s website about the proposed rule because this commenter asserts that in the FAQs we use a double negative for explaining when someone meets the lower stipend level, and the examples we provided are not consistent with our goal of focusing PCAFC on eligible veterans with moderate and severe needs and providing more objective criteria for clinicians evaluating PCAFC eligibility. We are unclear which examples the commenter is referring to but note that we provide examples throughout the proposed rule in order to help explain how certain criteria may be applied. Relatedly, another commenter raised similar concerns about the language, “not determined to be unable to self-sustain in the community” because they assert this definition is circular.

To the extent that the commenter asserts that the examples we provided for purposes of this definition are inconsistent with our intent to focus on veterans with moderate and severe needs and to provide more objective criteria for PCAFC, we respectfully disagree, and note that we are unable to further respond since this commenter did not identify the examples to which they are referring. In response to the commenters’ concerns that we used a double negative for explaining the lower stipend, we acknowledge that we did state that an individual would meet the lower stipend level if they are determined not to be unable to self-sustain in the community. While we understand that this use of “determined not to be unable to self-sustain in the community” can be confusing and appear circular, we used this language to clearly distinguish between those who are determined to be “unable to self-sustain in the community,” and those who are not, for purposes of determining the stipend level. Those eligible veterans who meet the definition of “unable to self-sustain in the community” are those with severe needs while those eligible veterans who do not meet this definition would be those with moderate needs. We intentionally did not use the phrase “able to self-sustain in the community” in reference to those veterans eligible at the lower stipend level. We note that the ability to self-sustain is considered on a continuum with unable to self-sustain at one end. If an eligible veteran does not meet the definition of unable to self-sustain in the community, that does not mean that he or she is able to self-sustain in the community, as he or she may fall somewhere in between on the continuum. We are not making any changes based on these comments.

Some commenters raised concerns about using “continuous” in the definition of unable to self-sustain in the community. One commenter recommended using “frequent” instead of “continuous” based on the assertion that continuous creates a presumption that conditions must have continuous symptomatology in order to qualify for the higher level stipend. The same commenter asserted that a continuous requirement would create an unrealistic standard that few, if any, veterans would be able to meet; and the term frequent is more aligned with how symptoms of impairments actually occur. One commenter raised concerns about what “continuous” means in the context of this definition, and asserted that a veteran who needs 24/7 care is in crisis and would need higher level care or hospitalization. This commenter recommended that VA better define this higher tier for veterans requiring a severe level of supervision, protection, or instruction. Relatedly, one commenter noted that use of “continuous” sets an untenable standard when the only alternative is “daily” for purposes of consistently administering a national program. The commenter also asserted that “varying types of functional impairment that can give rise to a need for supervision, protection, or instruction do not lend themselves to clear distinctions when attempting to distinguish between daily and continuous needs” and that the “definition would fail to provide intended improvements to PCAFC consistency and transparency.” Another commenter alleged that the definition of unable to self-sustain in the community may require continuous supervision, which they allege is contrary to prior regulatory statements VA has made about considering and rejecting requests to increase the amount of caregiving to more than 40 hours per week.

We appreciate the commenters’ concerns and suggestions; however, as indicated in the proposed rule, “continuous” is used to address the frequency with which an eligible veteran is in need of supervision, protection, or instruction, rather than the frequency of symptomatology of a specific condition. For example, an individual with a diagnosis of moderate to severe dementia may require instruction with dressing daily and due to a demonstrated pattern of wandering during the day, may meet the criteria for the higher level due to a “continuous” need for active intervention to ensure his or her daily safety is maintained. That does not mean the individual would be required to actually wander

on a constant basis in order to be determined as unable to self-sustain in the community. We find the use of continuous to be sufficient for purposes of distinguishing between the higher and lower levels of stipend when a veteran has a need for supervision, protection, or instruction. As we explained in the proposed rule and reiterated in this discussion, the distinction of “continuous” in this definition in contrast to “daily” in the definition of “need for supervision, protection, or instruction” allows us to differentiate between those who have moderate needs versus those who have a higher level of need for purposes of determining the appropriate monthly stipend level. 85 FR 13384 (March 6, 2020). We believe that the discussion above regarding “need for supervision, protection, or instruction” under § 71.15 provides clarification to explain how VA will distinguish between veterans and servicemembers who have a need for supervision, protection, or instruction (*i.e.*, whose functional impairment directly impacts the individual’s ability to maintain his or her personal safety on a daily basis) versus those who meet the definition of unable to self-sustain in the community (*i.e.*, those who have a need for supervision, protection, or instruction on a continuous basis).

We note that “continuous” does not mean constant or 24/7 supervision, protection, or instruction, and it is not our intent for PCAFC to require 24/7 care from a Family Caregiver. The definition is not meant to imply that an individual requires hospitalization or nursing home care; rather, eligible veterans meeting this definition will qualify for the higher-level stipend based on a higher level of personal care needs. Need for supervision, protection, or instruction on a continuous basis could be demonstrated by a regular, consistent, and prevalent need. We note that services provided by Family Caregivers are meant to supplement or complement clinical services provided to eligible veterans. As part of PCAFC, we do not require Family Caregivers provide 24/7 care to eligible veterans. PCAFC is one of many in-home VA services that are complementary but not necessarily exclusive to each other. As a result, an eligible veteran and his or her caregiver may participate in more than one in-home care program, as applicable and based on set requirements, and we can refer such individuals to other VA services and programs as needed.

We make no changes based on these comments.

One commenter appeared to confuse the different levels of the monthly stipend rate and questioned how a veteran with a serious cognitive impairment who is unable to self-sustain in the community would not require a caregiver to be physically present the remainder of the day. First, we clarify that the definition of need for supervision, protection, or instruction does not require such supervision, protection, or instruction be provided on a continuous basis, but in order to qualify for the higher stipend level, an individual would be required to have a need for supervision, protection, or instruction on a continuous basis. To the extent the commenter is referring to a veteran or servicemember who meets the definition of unable of self-sustain in the community due to a need for supervision, protection, or instruction on a continuous basis, we agree with the commenter that such individual may require a caregiver to be physically present the remainder of the day. For example, an eligible veteran with dementia who needs step-by-step instruction in dressing each morning and has a demonstrated pattern of wandering outside the home at various times throughout the day may meet this definition. Because of the demonstrated pattern of wandering outside the home at various times, the veteran cannot function safely and independently in the absence of a caregiver, and the Family Caregiver would actively intervene through verbal and physical redirection multiple times throughout the day. This veteran would have a continuous need for an active intervention to ensure his or her daily safety is maintained. In discussing the definition of need for supervision, protection, or instruction above, we also provided an example of a veteran or servicemember with TBI who has cognitive impairment resulting in difficulty initiating and completing complex tasks, such as a grooming routine, who may require step-by-step instruction in order to maintain his or her personal safety on a daily basis. If such veteran or servicemember also experiences daily seizures because of an uncontrolled seizure disorder due to the TBI, such that seizures occur at unpredictable times during the day, the individual may be determined to be in need of supervision, protection, or instruction on a continuous basis. In another example, a veteran or servicemember who has a diagnosis of schizophrenia who experiences active delusions or hallucinations and requires daily medications for those symptoms may require daily support with

medication management from another individual due to the paranoid thoughts that prevent the individual from independently taking the medication (that is, he or she may think the medication is harmful), and thus may be determined to have a need for supervision, protection, or instruction to maintain his or her personal safety on a daily basis. If such veteran or servicemember also responds to the delusions or hallucinations in a manner such as engaging in violent or self-harm behaviors at various and unpredictable times during the day, the individual may be determined to have a need for supervision, protection, or instruction on a continuous basis. We are not making any changes based on this comment.

One commenter stated that the definition does not meet the intended or accepted health care industry standards, including those related to safely remaining in the home or community. We are unclear as to what intended or accepted health care industry standards the commenter is referring. However, we note that PCAFC is a program unique to VA, and the statute requires us base the stipend payment on “the amount and degree of personal care services provided.” 38 U.S.C. 1720G(a)(3)(C)(i). The intent of this definition of “unable to self-sustain in the community” is to meet this statutory requirement by distinguishing between two levels of care. This definition is intended to cover those eligible veterans with severe needs, consistent with PCAFC’s focus on veterans with moderate and severe needs.

One commenter appeared to allege that the lower stipend level for ADLs was too low of a bar and, thus this definition would be inconsistent with current VA Case Mix Tools for Homemaker and/or H/HHA service authorizations. To the extent that this commenter is referring to the purchased HCBS Case-Mix and Budget Tool, that tool is an instrument that provides a uniformed and standard way of allocating Purchased HCBS to veterans based on functional need that allows them to remain independently in their homes and communities. Completion of the tool results in a case-mix score or level that correspond to a monthly dollar amount; inclusive of costs for selected Purchased HCBS programs. The Purchased HCBS programs covered by the Purchased HCBS Case-Mix and Budget Tool includes H/HHA, Community Adult Day Health Care (CADHC), In-Home Respite and Veteran-Directed Home and Community Base Services (VD-HCBS). We note that the intent and use of this tool is distinct

from PCAFC as the tool is used to determine hours of care for services other than PCAFC.

To the extent the commenter is referring to H/HHA eligibility requirements under VHA Handbook 1140.6 Purchased Home Health Care Services Procedures, we respectfully disagree with the commenter's assertion. Eligibility determinations for H/HHA under VHA Handbook 1140.6, target the population of eligible veterans who are most in need of H/HHA services as an alternative to nursing home care. An interdisciplinary assessment is used to determine whether a veteran has specific clinical conditions to include three or more ADL dependencies, or significant cognitive impairment. Also, in the instance a veteran only has two ADL dependencies, an additional two conditions are considered including a dependency in three or more IADLs or if the veteran is seventy-five years old, or older. We believe the definition of unable to self-sustain in the community is not a departure from the clinical conditions listed with respect to H/HHA services in VHA Handbook 1140.6, as it similarly includes certain eligible veterans that require assistance with three or more ADLs or have a need for supervision, protection, or instruction on a continuous basis which is similar to having a significant cognitive impairment. Additionally, we note that the definition for "unable to self-sustain in the community" is used to determine the higher level stipend (*i.e.*, 100 percent of the monthly stipend rate) for the Primary Family Caregiver. A Primary Family Caregiver would receive the stipend at the lower-level if the eligible veteran does not meet the definition of unable to self-sustain in the community but is still in need of personal care services for a minimum of six continuous months based on either an inability to perform an ADL, which means the eligible veteran requires personal care services each time he or she completes one or more of the seven listed ADLs in § 71.15, or a need for supervision, protection or instruction, which means the individual has a functional impairment that directly impacts the individual's ability to maintain his or her personal safety on a daily basis. Further, PCAFC is one of many clinical programs available to veterans and servicemembers, as applicable, that are complementary but are not required to be identical in terms of eligibility requirements. We are not making any changes based on this comment.

One commenter was not supportive of definitions to ensure that veterans can

"self-sustain" in the community and urged VA to define eligibility to ensure that veterans and Family Caregivers not only self-sustain but thrive in the community. First, we note that the definition of unable to self-sustain in the community is focused on the eligible veteran; not the Family Caregiver. Second, we note that "self-sustain" is meant to describe the eligible veteran's clinical condition, while thriving in the community may be open to various interpretations and is not a recognized or specific clinical term. "Unable to self-sustain in the community" is used only for the purposes of defining eligibility for the higher level stipend and is not intended to describe clinical objectives or long-term treatment goals. We do not think it would be appropriate to add the language "thrive in the community" to the definition since not all veterans and servicemembers who qualify for PCAFC will be able to "thrive" in the community. We also note that it may also not be their goal. We are not making any changes based on this comment.

Another commenter stated that the inequity in the two stipend levels would be economically unfair to Primary Family Caregivers of eligible veterans who are determined to be unable to self-sustain in the community. We refer this commenter to the related discussions in this section on the monthly stipend rate and on the specific number of caregiver hours or tasks.

Another commenter noted that VA should reconsider this requirement because few veterans will be eligible for the higher-level stipend, and the definition will work against VA's efforts to foster independence among veterans and will promote total reliance on a caregiver. The commenter recommended that VA remove the requirement for "full dependence." Similarly, another commenter opined that the fully dependent language was too strict, but appeared to confuse the requirement of "fully dependent" for three ADLs in the definition of unable to self-sustain in the community with the definition of inability to perform an ADL.

First, we note that the definition of "unable to self-sustain in the community" requires that an eligible veteran need personal care services each time he or she completes three or more ADLs listed in the definition of inability to perform an ADL in § 71.15, and is fully dependent on a caregiver to complete such ADLs; or has a need for supervision, protection, or instruction on a continuous basis. This definition, and in particular the requirement to be

"fully dependent" on a caregiver to complete at least three ADLs, is not required to be met in order to be eligible for PCAFC; it is solely used for purposes of determining the stipend level. The definition of inability to perform an ADL, which is one basis upon which a veteran or servicemember may be deemed in need of personal care services, requires that the veteran or servicemember need assistance each time that he or she completes at least one ADL; it does not require the eligible veteran be "fully dependent" on a caregiver to complete at least three ADLs. Thus, an eligible veteran who does not require personal care services each time he or she completes three or more ADLs, could still be eligible for PCAFC; however, the Primary Family Caregiver would receive the lower-level stipend (*i.e.*, 62.5 percent of the monthly stipend rate).

This recommendation to remove the "fully dependent" language relates to the first part of the definition of unable to self-sustain in the community that refers to the eligible veteran requiring personal care services each time he or she completes three or more of the seven ADLs listed in the definition of an inability to perform an ADL, and is fully dependent on a caregiver to complete such ADLs. We decline to make this change to the definition to remove the "fully dependent" language because we believe this language is necessary. We clarify in this rulemaking that fully dependent is the degree of need required for this prong of the definition. To be fully dependent means the eligible veteran requires the assistance of another to perform each step or task related to completing the ADL. We acknowledge this may be a high standard to meet, but it will target those eligible veterans with severe needs. We note that "fully dependent" is consistent with the clinical term, dependence, which is used to define and assess a higher level of care needed by a veteran, and ensures that the public understands this term. While dependence is considered along a spectrum, fully dependent is at the top of the spectrum. Thus, the fully dependent language is intended to cover those eligible veterans with severe needs for purposes of determining the higher stipend level. While we support each eligible veteran's ability to be as functional and independent as possible, we acknowledge that we do not anticipate that many eligible veterans who qualify under this definition will have much independence, as these would be those eligible veterans with

the highest needs. We do not make any changes based on these comments.

One commenter disagrees with the requirements of this definition and requests that VA retain the clinical ratings for determining stipend tiers in the current regulations. The same commenter asserts that this change from the current regulations unnecessarily and arbitrarily limits the flexibility of VA to consider all relevant factors in determining how much help an eligible veteran needs. The commenter further asserts that VA's proposed approach impedes VA's ability to consider the factors in 38 U.S.C. 1720G(a)(3)(C)(iii) by allowing VA to ignore a Family Caregiver's input and based on their assertion that the amount of time required to provide supervision, protection, and instruction would be irrelevant. One commenter stated that the language suggests that in order to be considered for the higher tier, a veteran would likely need to be in or nearing the geriatric based population, a requirement that would omit many of the program's current participants from being eligible or qualifying for the higher tier. Similarly, another commenter was concerned that this change for determining stipend levels and the definition of unable to self-sustain in the community will arbitrarily and adversely impact veterans PCAFC is intended to help, contrary to Congressional intent, as it will be harder for Family Caregivers to qualify for the higher stipend level which will reduce the benefit they receive and result in family members being less likely to serve as a Family Caregiver. This commenter asserted that an eligible veteran may be fully dependent on a Family Caregiver for assistance with performing only two ADLs or need supervision for 18 hours a day, but would not qualify under the definition of unable to self-sustain in the community, even though they need a caregiver for 40 hours per week. Another commenter stated that the higher level was too stringent, and appeared to confuse the definitions of "inability to perform an ADL" and "unable to self-sustain in the community," such that they believed the requirements related to ADLs under the definition of "unable to self-sustain in the community" must be met in order to qualify for PCAFC.

First, we note that the definition of "unable to self-sustain in the community" requires that an eligible veteran need personal care services each time he or she completes three or more ADLs listed in the definition of inability to perform an ADL in 71.15, and is fully dependent on a caregiver to complete

such ADLs; or has a need for supervision, protection, or instruction on a continuous basis. This definition is not required to be met in order to be eligible for PCAFC; it is solely used for purposes of determining the stipend level and is intended to cover those eligible veterans with severe needs. The definition of inability to perform an ADL, which is one basis upon which a veteran or servicemember may be deemed in need of personal care services, requires that the veteran or servicemember need assistance each time that he or she completes at least one ADL. Thus, an eligible veteran who does not require personal care services each time he or she completes three or more ADLs and may only need assistance with two, could still be eligible for PCAFC; however, the Primary Family Caregiver would receive the lower-level stipend (*i.e.*, 62.5 percent of the monthly stipend).

We note that the higher level is not intended to cover only those eligible veterans who are geriatric or nearing geriatric, and age is not a determining factor for purposes of the definition of unable to self-sustain in the community. Instead, the higher level is based on whether the eligible veteran meets the definition of unable to self-sustain in the community, which considers the amount and degree of need for personal care services. This definition is meant to address those eligible veterans that have severe needs, regardless of age, and this definition of unable to self-sustain in the community provides a way for us to distinguish between those who have severe needs and those who have moderate needs for purposes of the stipend level.

This definition will be used to determine the higher- and lower-level stipend payments, and VA believes it is necessary to establish a clear delineation between the amount and degree of personal care services provided to eligible veterans, as required by 38 U.S.C. 1720G(a)(3)(C)(i). We believe two levels will allow us to better focus on supporting the health and wellness of eligible veterans and their Family Caregivers, and will address the challenges we identified in using three levels. As we explained in the proposed rule and reiterate here, the utilization of three tiers has resulted in inconsistent assignment of "amount and degree of personal care services provided," and a lack of clear thresholds that are easily understood and consistently applied has contributed to an emphasis on reassessment to ensure appropriate stipend tier assignment. 85 FR 13383 (March 6, 2020). We believe that such

issues would be exacerbated by the addition of more tiers or levels, and that using only two levels will allow VA to better focus on supporting the health and wellness of eligible veterans and their Family Caregivers. We believe that two levels will provide the clearest delineation between the amount and degree of personal care services provided by the Family Caregiver.

As we explained in the proposed rule, while the changes we proposed to the PCAFC stipend methodology and levels would result in an increase in stipend payments for many Primary Family Caregivers of legacy participants, for others, these changes may result in a reduction in the stipend amount that they were eligible to receive before the effective date of the rule. 85 FR 13385 (March 6, 2020). We acknowledge that some legacy participants that are currently receiving stipend payment at tier three may not meet this definition of unable to self-sustain in the community for purposes of the stipend payment and may receive the stipend payment at the lower level. To help minimize the impact of such changes, we would make accommodations for Primary Family Caregivers of eligible veterans who meet the requirements of proposed § 71.20(b) and (c) (*i.e.*, legacy participants and legacy applicants) to ensure their stipend is not reduced for one year beginning on the effective date of the rule, except in cases where the reduction is the result of the eligible veteran relocating to a new address. Id. We do not agree that the changes to the stipend levels will deter family members from caring for eligible veterans, who may have been providing care to the eligible veteran even before approval and designation as a Family Caregiver under PCAFC. Additionally, the stipend is not intended to incentivize family members to be caregivers, but rather an acknowledgment of the sacrifices caregivers make to care for eligible veterans. 76 FR 26155 (May 5, 2011).

Further, the determination of whether an eligible veteran is unable to self-sustain in the community will occur during the initial assessment of eligibility and during reassessments, both of which will provide the Family Caregiver with the opportunity to provide input on the needs and limitations of the eligible veteran, and consider the assistance the Family Caregiver provides, including both assistance with ADLs and supervision, protection, and instruction.

For all of these reasons as explained above, we believe this definition fulfills VA's statutory requirement, and allows for VA consideration of those factors in

38 U.S.C. 1720G(a)(3)(C)(iii). We are not making any changes based on these comments.

One commenter noted that Family Caregivers do not have the skills or extensive training to assist veterans in need of assistance with 3 ADLs, and that veterans that qualify for these services should receive care from in-home care providers. We note that PCAFC provides additional options to eligible veterans and their Family Caregivers who may wish to remain in the home. Family Caregivers receive training and education to help them support the eligible veteran's care needs. We do not expect Family Caregivers to replace the need for medical professionals that provide specialized medical care that requires advanced skill and training. PCAFC is one of many options available for veterans who wish to remain in the home. Other programs available include Veteran-Directed care, home based primary care services, and adult day health care. As necessary and appropriate, we will make referrals to other VA programs and services. We make no changes based on this comment.

One commenter disagreed with the definition of "unable to self-sustain in the community," based on the experience of one of their fellows who is the Family Caregiver of a paraplegic, who has suffered significant muscle damage in his lower extremities. They noted that while this individual can complete most ADLs independently, he has shoulder damage resulting from overuse, and the Family Caregiver provides support and assistance on most days. They further noted that without the Family Caregiver's support on completing less than three ADLs, this individual would not be able to remain in the community. As we explained in the proposed rule and reiterated in this discussion, the definition of unable to self-sustain in the community is intended to provide a distinction for purposes of the higher- and lower-level stipend rate; it is not used for determining whether an individual is eligible for PCAFC. It is our intent that those eligible veterans with severe needs would meet the definition of unable to self-sustain in the community and qualify for the higher-level stipend. As we explained above, if an eligible veteran does not meet the definition of unable to self-sustain in the community, that does not mean they are ineligible for PCAFC. To determine eligibility for PCAFC, VA would assess the veteran or servicemember's eligibility under 38 CFR 71.20(a), including whether the individual is in need of personal care services based on an inability to perform

an ADL or a need for supervision, protection, or instruction. We make no changes based on this comment.

One commenter raised concerns about language in the proposed rule, in which we explained the difference between the need for supervision, protection, or instruction on a daily basis versus continuous basis by stating that ". . . an individual with dementia who only experiences changes in memory or behavior at certain times of the day, such as individuals who experience sundowning or sleep disturbances, may not be determined to have a need for supervision, protection, or instruction on a continuous basis." See 85 FR 13384 (March 6, 2020). This commenter further stated that "[t]he standard should be, in the veteran were not care for by a caregiver, would the VA or a Social Service division have to provide some type of regular aid." We are unable to determine whether this commenter thinks this "standard" should be for PCAFC eligibility or for the higher stipend level, but note that the commenter's examples repeat examples VA provided in the context of explaining "unable to self-sustain in the community."

First, we note that the definition of "unable to self-sustain in the community" requires that an eligible veteran need personal care services each time he or she completes three or more ADLs listed in the definition of inability to perform an ADL in 71.15, and is fully dependent on a caregiver to complete such ADLs; or has a need for supervision, protection, or instruction on a continuous basis. This definition is not required to be met in order to be eligible for PCAFC; it is solely used for purposes of determining the stipend level. The definition of need for supervision, protection, or instruction, which is one basis upon which a veteran or servicemember may be deemed in need of personal care services, requires that the veteran or servicemember have a functional impairment that directly impacts the individual's ability to maintain his or her personal safety on a daily basis; it does not require the eligible veteran to need supervision, protection, or instruction on a continuous basis. Thus, an eligible veteran who does not require need for supervision, protection, or instruction on a continuous basis could still be eligible for PCAFC; however, the Primary Family Caregiver would receive the lower-level stipend (*i.e.*, 62.5 percent of the monthly stipend rate).

As we explained in the proposed rule, an eligible veteran who has a need for supervision, protection, or instruction on a continuous basis, thus qualifying

them for the higher stipend level, would require more frequent and possibly more intensive care and the Family Caregiver would thus provide a greater amount and degree of personal care services to the eligible veteran. 85 FR 13384 (March 6, 2020). We refer the commenter to the discussion of "need for supervision, protection, or instruction" above where we distinguish the terms "daily" and "continuous."

We make no changes based on this comment.

#### *Two Stipend Levels*

VA proposed to establish two levels for the stipend payments versus the three tiers that are set forth in current § 71.40(c)(4)(iv)(A) through (C). Whether a Primary Family Caregiver qualifies for a stipend at the higher level will depend on whether the eligible veteran is determined to be "unable to self-sustain in the community" (as that term will be defined in § 71.15). The lower stipend level will apply to all other Primary Family Caregivers of eligible veterans such that the eligibility criteria under proposed § 71.20(a) will establish eligibility at the lower level. VA received multiple comments about the two stipend levels that are addressed below.

We received several comments that indicate confusion about the two levels for stipend payments. In particular, some commenters believed that the eligible veteran's type of disability, whether it be physical or related to cognition, neurological or mental health, will be a determinative factor in the stipend level. One commenter stated the higher-level leans too heavily on physical disabilities and believes that the lower level was for eligible veterans with needs related to supervision and safety. The commenter noted how difficult it is to perform the tasks associated with supervision and protection. The commenter further inquired as to how VA will address veterans who are eligible for both levels. The commenter was also concerned that by assuming that physical disabilities are greater than invisible injuries, VA would not be helping the suicide problem. Relatedly, another commenter believed that the higher level focused on ADLs. Another commenter also expressed general confusion about the lower stipend level.

To clarify, all eligible veterans who qualify for PCAFC will meet the criteria for the lower-level stipend. However, a Primary Family Caregiver will receive the higher-level monthly stipend rate if the eligible veteran is determined to be unable to self-sustain in the

community, as defined in § 71.15. The definition of “unable to self-sustain in the community” covers both “inability to perform an ADL” and “need for supervision, protection and instruction” and this accounts for both physical disabilities and cognitive, neurological, and mental health disabilities. Thus, eligible veterans can meet the requirements of unable to self-sustain in the community because of physical disabilities leading to impairments or disabilities leading to cognitive, neurological or mental health impairment. Therefore, we do not believe that the higher stipend level is primarily for or focused on veterans with physical disabilities. To the extent a commenter raised concerns that VA would not be helping the suicide problem, we refer the commenter to the discussion on veteran suicide in the miscellaneous comments section. We are not making any changes based on these comments.

Several commenters expressed concern with VA’s proposal to have more than one level of stipend payment. Multiple commenters disagreed with placing percentages on how much help a veteran can receive. One commenter asserted that everyone should be paid equally. Another commenter recommended there be one level, and that having two will present challenges, appeals, and confusion. The determination of whether a Primary Family Caregiver receives the lower-level stipend (*i.e.*, 62.5 percent of the monthly stipend rate) or the high level stipend (*i.e.*, 100 percent of the monthly stipend rate) is based on whether the eligible veteran is unable to self-sustain in the community. The percentages are assigned only for the purposes of calculating stipend payments. While we believe the percentages are consistent with the time and level of personal care services required by an eligible veteran from a Family Caregiver at each level (85 FR 13384 (March 6, 2020)), the percentages are not intended to equate to a specific amount of care related to the personal care services being received by the eligible veteran.

While we understand the commenters’ concern that having multiple levels could present challenges, appeals, or confusion, section 1720G of title 38, U.S.C., requires that the amount of the monthly personal caregiver stipend be determined in accordance with a schedule established by VA that specifies stipends based on upon the amount and degree of personal care services provided. See 38 U.S.C. 1720G(a)(3)(C)(i). We interpret this to mean that the schedule must account for

variation between the amount and degree of personal care services provided. Accordingly, we believe the statute requires VA to establish at least two PCAFC stipend levels; thus, we are unable to pay every Primary Family Caregiver the same monthly stipend. We are not making any changes based on these comments.

One commenter was concerned that because the veteran the commenter cares for suffers from PTSD, TBI, depression, and pain-related issues, they may no longer qualify for the program and requested more tiers, not less. We wish to clarify that the assignment of tiers (in the current regulations) or levels (as the regulations are revised by this rulemaking) is used to determine the amount of the monthly stipend payment issued to the designated and approved Primary Family Caregiver and is not used to determine eligibility. To the extent that the commenter is requesting that we add additional stipend tiers or levels for additional stipend rates, we decline to make those changes. As VA explained in the proposed rule, the utilization of three tiers has resulted in inconsistent assignment of “amount and degree of personal care services provided,” and a lack of clear thresholds that are easily understood and consistently applied has contributed to an emphasis on reassessment to ensure appropriate stipend tier assignment. 85 FR 13383 (March 6, 2020). We believe that such issues would be exacerbated by the addition of more tiers or levels, and that using only two levels will allow VA to better focus on supporting the health and wellness of eligible veterans and their Family Caregivers. We believe that two levels will provide the clearest delineation between the amount and degree of personal care services provided by the Family Caregiver. We also note that the eligibility criteria for PCAFC and the higher stipend level account for veterans and servicemembers with personal care needs related to cognitive, neurological, and mental health conditions are considered under the definition of serious injury, and further refer the commenter to our discussion of the eligibility criteria in § 71.20(a) and in the discussion of the term unable to self-sustain in the community. We make no changes based on this comment.

Several commenters suggested that certain VA disability ratings, including a 100 percent permanent and total service-connected disability rating and certain aid and attendance awards, should automatically qualify an eligible veteran for the highest stipend rate. While the eligibility requirements for

these disability ratings and awards referenced by the commenters may seem similar, we note these are not synonymous with VA’s definition of “unable to self-sustain in the community,” and we do not believe the criteria for those benefits are a substitute for a clinical evaluation of whether a veteran or servicemember is unable to self-sustain in the community. We believe that in order to ensure that PCAFC is implemented in a standardized and uniform manner across VHA, each veteran or servicemember must be evaluated based on the same criteria, including the criteria to qualify for the higher-level stipend. To that end, VA will utilize standardized assessments to evaluate both the veteran or servicemember and his or her identified caregiver when determining eligibility for PCAFC and the applicable stipend level, as applicable. It is our goal to provide a program that has clear and transparent eligibility criteria that is applied to each and every applicant.

Additionally, we do not believe it would be appropriate to consider certain disability ratings as a substitute for a clinical evaluation of whether a veteran or servicemember is unable to self-sustain in the community, as not all veterans and servicemembers applying for or participating in PCAFC will have been evaluated by VA for such ratings, and because VA has not considered whether additional VA disability ratings or other benefits determinations other than those recommended by the commenters may be appropriate for establishing that a veteran or servicemember is unable to self-sustain in the community for purposes of PCAFC. Finally, it should be noted in that VA disability ratings under VA’s schedule for rating disabilities are intended to evaluate the average impairment in earning capacity in civil occupations resulting from various disabilities or combinations of disabilities. 38 U.S.C. 1155. They are not designed to take into account the amount and degree of personal care services provided the eligible veteran. Thus, they would provide a very imprecise guide to determining stipend rates. We are not making any changes based on these comments.

Several commenters raised concerns about the hours or responsibilities associated with the stipend levels. Multiple commenters provided their personal stories about caring for a veteran in the current program and believed that the current hours were not indicative of the how long the caregiver actually spends taking care of the eligible veteran or expressed concerns



that the new stipend level would be insufficient for the number of hours required. Some stated that the 10-hour category was insufficient, another shared that the tasks required 14 hours a day, every day and that the new program would not adequately compensate for the required hours, another commenter explained that the care required was 24/7 and requested that VA require caregivers to provide a log of the activities that they perform, and another stated that the current system was insufficient and the regulations do not account for the amount of time required. Another commenter questioned whether that there will be an expectation for caregivers to provide 24/7 care. One commenter was concerned that most of the current caregivers receiving stipends at tier three will be excluded because the higher stipend level will require 24/7 care.

Foremost, we thank the caregivers who are providing personal care services to their family members and the sacrifices that they make. Further, it has never been VA's intent that the monthly stipend directly correlates with a specific number of caregiving hours. See 80 FR 1369 (January 9, 2015). We note that to the extent commenters are dissatisfied with the current criteria, we understand and have removed the references to numbers of hours, and instead will rely on a percentage of the GS rate when determining the monthly stipend. While we know that some Family Caregivers provide in excess of 40 hours or more of caregiving a week, we reiterate that the stipend payment does not represent a direct correlation to the number of hours a Family Caregiver provides. Additionally, eligible veterans who require 24/7 care may be eligible for additional support services, such as homemaker or home health aide, to supplement the personal care services provided by the Family Caregiver. In addition, we note that the reference in the definition of "unable to self-sustain in the community" to an eligible veteran who has a need for supervision, protection, or instruction on a "continuous basis," was not intended to mean that the eligible veteran requires or that the Family Caregiver provides 24/7 or nursing home level care. This is not VA's intent or expectation of Family Caregivers. Further, VA does not believe it is necessary to require caregivers to provide a log of the activities they perform. Participation in PCAFC is conditioned, in part, upon the Family Caregiver providing personal care services to the eligible veteran. Through wellness contacts and reassessments,

VA will provide oversight and monitoring of the adequacy of care and supervision being provided by the Family Caregiver. We are making no changes based on these comments.

One commenter expressed concern over how VA plans to adjust for bias towards those with higher ratings in the new two-level system. This commenter asked whether the individual conducting the assessment would have access to the veteran's rating decision and be persuaded to place the veteran in the more financially beneficial category if the veteran has a higher rating than 70 percent, and asserted that this factor and others must be addressed. We thank the commenter for their concern and clarify that a 70 percent single or combined service-connected disability rating is used to determine whether an eligible veteran has a serious injury; however, an eligible veteran's service-connected disability rating has no bearing on the determination of whether an eligible veteran is in need of personal care services or whether he or she is unable to self-sustain in the community for purposes of the monthly stipend. Determinations of whether an eligible veteran is unable to self-sustain in the community are made by CEATs, which are informed by evaluations and assessments of the veteran's functional needs for which the specific service-connected rating has no bearing. Through training, VA will ensure this is clear to those rendering determinations of whether an eligible veteran is unable to self-sustain in the community. We are not making any changes based on this comment.

One commenter recommended that assessment of the stipend level be completed "with the Primary doctor and Primary Caregiver," and potentially a licensed occupational therapist, but disagreed with allowing others such as a nurse, social worker, physical therapist, or kinesiologist to complete such assessments as that can lead to inconsistencies. As stated above, eligibility determinations for PCAFC will be based upon evaluations of both the veteran and caregiver applicant(s) conducted by clinical staff at the local VA medical center, with input from the primary care team, including the veteran's primary care provider, to the maximum extent practicable. These evaluations include assessments of the veteran's functional status and the caregiver's ability to perform personal care services. Additional specialty assessments may also be included based on the individual needs of the veteran. When all evaluations are completed, the CEAT will review the evaluations and

pertinent medical records, in order to render a determination regarding eligibility, including whether the veteran is determined to be unable to self-sustain in the community for the purposes of PCAFC. The CEATs are comprised of a standardized group of inter-professional, licensed practitioners with specific expertise and training in the eligibility requirements for PCAFC and the criteria for the higher-level stipend.

While primary care teams will not collaborate directly with the CEATs on determining eligibility, documentation of their input in the local staff evaluation of PCAFC applicants will be available in the medical record for review. This documentation will be used by the CEATs to help inform eligibility determinations, including whether the veteran is determined to be unable to self-sustain in the community for the purposes of PCAFC. We are not making any changes based on this comment.

One commenter commended VA for proposing a more streamlined approach to determining the monthly stipend, and we appreciate the comment. However, multiple commenters believed that VA did not provide sufficient rationale for going from three tiers to two levels. One commenter asserted that little information and rationale was provided on why it is necessary to move from three tiers to two levels, and that this change will disadvantage veterans and their caregivers. Similarly, one commenter stated that the two levels should be better defined to ensure the program is consistently implemented across VHA. One commenter stated that VA provided no explanation on why the current evaluation and scoring is no longer sufficient. Another commenter disagreed with the change to two levels and asked for the theoretical or conceptual basis for this change. Two commenters expressed concern that there are no specific criteria defining the two levels and asserted that VA provided no explanation as to why the current clinical scoring is no longer sufficient.

As indicated in the proposed rule, VA has found that the utilization of the current three tiers has resulted in inconsistent assignment of the "amount and degree of personal care services provided." See 85 FR 13383 (March 6, 2020). Further, there can often be little variance in the personal care services provided by Primary Family Caregivers between assigned tier levels (e.g., between tier 1 and tier 2, and between tier 2 and tier 3) which has led to a lack of clear thresholds. *Id.* These tier assignments were based on criteria and

a subsequent score that were subjective in nature due to the lack of clear delineations between the amount and degree of required personal care services based on the veteran's or servicemember's inability to perform an ADL or need for supervision and protection based on symptoms or residuals of neurological or other impairment or injury. For example, providers surmised the difference between the level of assistance needed to complete a task or activity when assigning a "score." Additionally, the sum of all ratings lacked clear delineation between tiers. For example, the difference between a rating of 12 and 13 was the difference between tier one and tier two. This subjectivity has led to lack of clear threshold and thus confusion and frustration for both PCAFC participants and VA staff. Assessing the needs and functional impairments of a veteran is complex and we believe transitioning from a subjective rating which attempts to delineate degrees of need in specific ADLs and impairments, to an assessment of the veteran's overall level of impairment will simplify the determination, which will in turn result in consistency and standardization throughout PCAFC in determining the appropriate level for stipend payments. Additionally, as previously explained, we are standardizing PCAFC to focus on veterans and servicemembers with moderate and severe needs. Therefore, VA believes it is necessary to base stipend payments on only two levels of need that establish a clear delineation between the amount and degree of personal care services provided to eligible veterans. Id. We are not making any changes based on these comments.

#### *Concern for Current Legacy Participants, Including Those Receiving Lowest Tier Stipend*

Several commenters expressed concern for current participants who may no longer be eligible for PCAFC or whose stipends may be reduced. In recognizing the focus on eligible veterans with moderate and severe needs, one commenter recommended that VA identify other services and supports available to current participants who may be impacted by this change and verify that these other programs are available consistency across the country and effective in delivering support. The commenter specifically mentioned Veteran-Directed care, home based primary care, respite care, and homemaker and home health aide services, and asserted that they are often underfunded by VA, and urged VA to ensure the success and viability

of these programs. Another commenter urged VA to rethink the adjustment from three tiers to two levels, and asserted that VA needs to ensure eligible veterans and their caregivers do not fall through the cracks and jeopardize their financial stability, specifically current PCAFC participants. Another commenter believed that, although the role is not changing, VA was changing the acknowledgement of the validity of the role and indicating that it is not worth as much. The commenter further stated that by removing the necessary funding the access to the program will be greatly diminished.

While we are making no changes based on these comments, we emphasize that we do not believe that the sacrifices made by caregivers are not worthwhile. Family Caregivers play a significant role in the lives of veterans and servicemembers, and we thank them for their service. We wish to emphasize that PCAFC is one way VA supports eligible veterans and the Family Caregivers. For those who may no longer qualify, CSCs are available to assist in identifying the needs of the veterans and their caregivers, and making referrals and connections to alternative services as appropriate. VA offers a menu of supports and services that supports caregivers caring for veterans such as homemaker and home health aides, home based primary care, Veteran-Directed care, and adult day care health care to name a few. In addition, VA offers supports and services provided directly to caregivers of covered veterans through PGCSS including access to CSCs located at every VA medical center, a caregiver website, training and education offered online and in person on topics such as self-care, peer support, and telephone support by licensed social workers through VA's Caregiver Support Line.

While offering assurance of funding and availability of specific services in specific areas is outside the scope of this rulemaking, we note that VA is actively improving and expanding PGCSS, including the establishment of General Caregiver Support staff to ensure nationwide support at each medical center.

In addition, as explained in the proposed rule, we understand that Primary Family Caregivers may have their stipend amount impacted by changes to the stipend payment calculation. We take this opportunity to highlight that the VA MISSION Act of 2018 expanded benefits available to Primary Family Caregivers, which includes Primary Family Caregivers of legacy participants and legacy applicants, to include financial

planning services, as that term is defined in § 71.15. These services may be helpful to those who will be adjusting to a lower stipend amount. Family Caregivers also have access to mental health services that can provided support as needed. We are not making any changes based on these comments.

Several commenters disagreed with the change in the tiers, especially the elimination of current PCAFC participants who qualify at the lowest tier (tier one). Another commenter noted that VA presumes the lowest tier does not include veterans with moderate to severe needs for personal care services, and asserted that VA provided no data, literature, or study to support this presumption. This commenter disagrees with this presumption and asserted that VA must provide data and analysis to support it. To further clarify, VA's assumption that the current tier one participants will be removed from PCAFC as a result of eligibility changes in part 71 was used for estimating the potential impact of the regulation on VA's budget. VA made this assumption because per the current rating criteria, Tier 1 is indicative of a low amount of need. As VA expands PCAFC to include eligible veterans of all eras and makes other changes to focus on veterans with moderate and severe needs it is possible that the current tier one participants may not meet the eligibility criteria in § 71.20(a). VA will not automatically discharge current PCAFC participants whose Primary Family Caregivers receive stipends at tier one. Instead, VA will conduct reassessments for all legacy participants and legacy applicants, regardless of assigned tier to determine continued eligibility in PCAFC, and for those who are eligible, the applicable stipend rate. We are not making any changes based on these comments.

#### *Specific Number of Caregiver Hours or Tasks*

One commenter appreciated the idea of moving into different tiers but was not sure if this was the appropriate direction, especially as it is difficult to calculate time providing care. Other commenters raised concerns about being placed in the lowest tier level when they provide more than 10 hours of caregiving per week. Some commenters noted that the stipend is based on 40 hours of care per week, when they may be providing more than that and otherwise the veteran would have to be institutionalized. This new pay scale would not cover those situations, and one commenter recommended basing the stipend amount on the actual number of hours of care provided.

Relatedly, one commenter stated that VA should consider the daily, weekly, monthly tasks caregivers perform when determining the level of stipend. One commenter asserted that the two levels is economically unfair to caregivers of eligible veterans who are unable to self-sustain in the community. We respond to these comments below.

As indicated in the proposed rule, it has never been VA's intent that the monthly stipend directly correlates with a specific number of caregiving hours. See 80 FR 1369 (January 9, 2015). Further, VA recognizes that the reference to a number of hours in the current regulation has caused confusion; therefore, we are seeking to change the stipend calculation to use a percentage of the monthly stipend rate based on the eligible veteran's level of care need. See 85 FR 13384 (March 6, 2020). Similarly, as we standardize PCAFC to focus on veterans and servicemembers with moderate and severe needs, we do not believe it is necessary to consider the number of tasks a Family Caregiver performs as we believe a determination on the level of care need (*i.e.*, whether an eligible veteran is unable to self-sustain in the community) is appropriate for determining the monthly stipend amount that is commensurate with the needs of the veteran. We are not making any changes based on these comments.

#### *Multiple Residences*

One commenter asked for clarification that families who live at more than one address during the year are eligible for PCFAC and for the calculation method that would be used to determine their stipend rate. Living in multiple locations during the year does not disqualify an otherwise eligible participant from participation in PCFAC. The address on record with PCAFC determines the geographic location for purposes of calculating the monthly stipend rate. It is presumed that the address on record is where the eligible veteran consistently spends the majority of his or her time and where they receive VA care. Therefore, a temporary move or vacation would not affect the monthly stipend rate. However, we note that we require notification of a relocation within 30 days from the date of relocation and will seek to recover overpayments of benefits if VA does not receive timeline notification of a relocation. We recognize that in some cases, a temporary move to an out-of-town relative may be planned as respite for a short period, say one month, but perhaps unforeseen circumstances could arise, whereby the return to the

veteran's home is delayed. In this instance, the veteran's home remains their intended permanent address. Additionally, we are aware of cases in which a veteran may have a 'summer' residence and a 'winter residence.' In these cases, VA would expect notification of the veteran's address change, not only for the purposes of calculating the stipend payment but also to allow VA to conduct the required wellness contact, which is required generally every 120 days. Such cases would be reviewed on a case by case basis. VA will develop written guidance to guide consistent determinations of these circumstances.

#### *Change to Heading in § 71.40(c)(4)(i)(D)*

In the proposed rule, we included a heading for new § 71.40(c)(4)(i)(D) which establishes a special rule for Primary Family Caregivers of legacy participants subject to decrease as a result of VA's transition from the combined rate to the new monthly stipend rate. As part of this final rule, we are removing the heading, "Special rule for Primary Family Caregivers subject to decrease because of monthly stipend rate" as this heading is unnecessary. We make no other changes to this paragraph.

#### *Additional Benefits*

Several commenters requested VA provide additional benefits for Primary Family Caregivers to include, Military Airlift Command flights, retirement options, dental care (for both an eligible veteran who is rated below 100 percent service-connected disability and his or her caregiver), long-term care benefits, assistance with mortgage and survivor benefits. We address these comments below.

Section 71.40(b) and (c) of 38 CFR implement the benefits provided to Secondary Family Caregivers and Primary Family Caregivers, respectively, under 38 U.S.C. 1720G(a)(3)(A). Secondary Family Caregivers are generally eligible for all of the benefits authorized for General Caregivers, based on our interpretation and application of section 1720G(a)(3)(A) and (B), in addition to benefits specific to the Secondary Family Caregiver provided in § 71.40(b)(1)–(6). See 76 FR 26153 (May 5, 2011). Similarly, Primary Family Caregivers are authorized by section 1720G(a)(3)(A)(ii)(I) to receive all of the benefits that VA provides to Secondary Family Caregivers in addition to a higher level of benefits authorized only for Primary Family Caregivers provided in § 71.40(c)(2)–(6). *Id.* VA is unable to provide additional benefits as suggested above (*e.g.*, Military Airlift Command

flights, retirement options, dental care, long-term care benefits, assistance with mortgage, survivor benefits) because these benefits are not authorized under 38 U.S.C. 1720G(a)(3)(A). Furthermore, to the extent one commenter believes VA should provide dental care to veterans who have less than 100 percent service-connected disability rating, we believe this is beyond the scope of this rulemaking. We make no changes based on these comments.

One commenter requested that Secondary Family Caregivers be allowed to obtain CHAMPVA benefits. Additionally, one commenter requested that CHAMPVA include coverage for pre-existing conditions due to natural disasters after suffering dental injury from a hurricane. 38 U.S.C. 1720G(3)(A) delineates between benefits provided to "family caregivers of an eligible veteran" and "family caregivers designated as the primary provider of personal care services for an eligible veteran." Under section 1720G(a)(3)(A)(ii)(IV), VA must provide certain Primary Family Caregivers with medical care under 38 U.S.C. 1781 and VA administers section 1781 authority through the CHAMPVA program and its implementing regulations. See 76 FR 26154 (May 5, 2011). Therefore, VA lacks the statutory authority required to provide CHAMPVA benefits to Secondary Family Caregivers as they are not designated as the primary provider of personal care services. To the extent the commenter believes CHAMPVA should provide coverage for pre-existing conditions, there is currently no restriction in the services provided under CHAMPVA based on pre-existing conditions. To the extent commenters further suggest or request that VA should revise the CHAMPVA regulations, those comments are beyond the scope of this rulemaking. We are not making any changes based on these comments.

One commenter requested more access to caregiver support groups. Another commenter asserted that in addition to offering financial services, VA should include increased vocational rehabilitation services to those who are no longer eligible for the monthly stipend to help them find meaningful employment. While we are making no changes based on these comments, we note that as part of PGCSS, we offer peer support mentoring, local caregiver support groups, education and skills training for caregivers, REACH (Resources for enhancing All Caregivers Health) VA Telephone support groups and Spanish-Speaking telephone support groups. We are ensuring that a consistent menu of these services is

available across all VA facilities to any caregiver providing personal care services to an enrolled veteran. We also note that VA has a toll-free Caregiver Support Line, staffed by licensed social workers to provide information about services that are available to caregivers. Social workers assess caregiver's psychosocial needs, and provide counseling, education, and advocacy to problem solve stressors associated with caregiving. The Caregiver Support Line can also connect caregivers with CSCs at local VA medical facilities and with other VA and community resources.

#### **§ 71.45 Revocation and Discharge of Family Caregivers**

##### *General*

One commenter asserted that it is extremely difficult to discharge a veteran or caregiver in PCAFC but did not provide any additional information regarding that assertion. The changes to 38 CFR 71.45 that we proposed and now make final are intended to clarify for eligible veterans, Family Caregivers, and staff the various reasons for which a Family Caregiver may be subject to discharge and revocation from PCAFC, and will allow VA to take any appropriate action that is necessary when those situations described in § 71.45 occur. We make no changes based on this comment.

One commenter asked what veterans and caregivers can expect from VA in terms of being discharged from PCAFC, as VA has strict guidelines for clinical discharge planning, and how VA plans to smoothly transition veterans and Family Caregivers after PCAFC benefits, supports, and services are terminated to ensure that the veteran's need for personal care services are met. As explained in the proposed rule, we would 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 may have their stipend amount impacted by changes to the stipend payment calculation. We also described in proposed § 71.45 instances when VA would provide 60 days advanced notice of discharge and when benefits would continue for a period of time, as we believe both advanced notice of discharge and extended benefits would assist with the adjustment of being discharged from PCAFC. We also note that Family Caregivers can transition to PGCSS, which provides a robust array of services such as training, education, peer support, and ability to connect with VA Caregiver Program staff, who can refer Family Caregivers and veterans

to local VA and community resources. We make no changes based on this comment.

One commenter requested that VA ensure both eligible veterans and Family Caregivers are aware and comprehend the revocation and discharge procedures as part of the initial PCAFC training. We agree with this commenter and will provide information on revocation and discharge procedures as part of the roles, responsibilities, and requirements that are discussed with Family Caregivers and eligible veterans when approved for PCAFC. However, we would not make any changes to the regulation based on this comment, as training information would be more appropriate for internal VA policy and training materials. We make no changes based on this comment.

One commenter asserted that the changes we are making to part 71 will provide VA avenues to remove veterans from the existing program. We note that we have had the ability to revoke the Family Caregiver from PCAFC pursuant to 38 CFR 71.45 in multiple instances, including when an eligible veteran or Family Caregiver no longer meets the requirements of part 71. We make no changes based on this comment.

##### *Revocation for Cause*

One commenter recommended discharge be swifter, as fraud is fraud. We believe this commenter was referring to revocation, as we proposed using fraud as a basis for revoking the Family Caregiver's designation. Another commenter was concerned about numerous instances they are aware of in which individuals are abusing PCAFC and committing fraud, and generally suggested VA do more to address fraud. As explained in the proposed rule, we would revoke Family Caregiver designation when fraud has been committed, discontinue benefits on the date the fraud began (or if VA cannot identify when the fraud began, the earliest date that the fraud is known by VA to have been committed, and no later than the date on which VA identifies that fraud was committed), and would seek to recover overpayment of benefits (benefits provided after the fraud commenced). We believe that the revocation date in cases of fraud in the proposed rule is swift, and that any earlier date would be premature. Also, we do not tolerate fraud in PCAFC, and believe that this is reflected in the revocation actions outlined in the proposed rule. However, we also acknowledge that PCAFC is a clinical program and PCAFC staff are not investigators; thus, we refer instances of potential fraud to VA's OIG and work

with OIG to the fullest extent to identify and address instances of fraud within PCAFC. We make no changes based on these comments.

##### *Revocation Due to VA Error*

One commenter did not oppose revocation of the Family Caregiver due to VA error if the error was designating a Family Caregiver who is not actually a family member and who does not live with the veteran. However, this commenter asked what if VA erred in determining the veteran's eligibility for PCAFC. This commenter expanded upon this question by further asking what action VA would take if VA made an administrative error in the veteran's eligibility and later determined the veteran was not eligible, and would VA discharge the veteran and his or her caregiver from the program. While we note that the reasons for VA error may vary based on individual cases, if VA erred in determining a veteran eligibility for PCAFC, we would revoke the Family Caregiver's designation from PCAFC pursuant to § 71.45(a)(1)(iii). For example, we would revoke their status if VA erred in finding a veteran eligible for PCAFC despite the veteran not meeting the minimum service-connected disability rating. We make no changes based on this comment.

One commenter appeared to suggest that VA should fully recoup benefits provided in instances in which VA erred in determining a veteran or servicemember and his or her Family Caregiver eligibility for PCAFC when they never met the requirements of part 71, and suggested VA error include legacy participants who never met the requirements of part 71. As we explained in the proposed rule, eligibility under new § 71.20 (b) or (c) would not exempt the Family Caregiver of a legacy participant or legacy applicant from being revoked or discharged pursuant to proposed § 71.45 for reasons other than not meeting the eligibility criteria in proposed § 71.20(a) in the one-year period beginning on the effective date of the rule. For example, the Family Caregiver could be revoked for cause, non-compliance, or VA error, or discharged due to death or institutionalization of the eligible veteran or the Family Caregiver, as discussed in the context of § 71.45 below. 85 FR 13373 (March 6, 2020).

We assume this commenter was suggesting recoupment of overpayments of all benefits received; not just those as of the date of the error. As explained further in the proposed rule, the date of revocation would be the date of the error, and if VA cannot identify when the error was made, the date of

revocation would be the earliest date that the error is known by VA to have occurred, and no later than the date on which the error is identified. This is our current practice, which we would continue, unless the error is due to fraud which is separately addressed in the regulation and in which case, we could make revocation effective retroactively and recoup overpayments of benefits provided after the fraud commenced. We believe this is reasonable to prevent VA from providing any more benefits to a Family Caregiver and veteran, including legacy participants, who are not eligible for PCAFC. We note that we would not recoup all overpayments of benefits received as that could result in hardship to the Family Caregiver and veteran, and as a matter of fairness, as the error was on the part of VA, and the Family Caregiver and/or veteran may not have been aware of the error. We do not make any changes based on this comment.

#### *Revocation for Noncompliance*

One commenter expressed concern with “noncompliance,” stating that it would become VA’s new “in the best interest of” and requesting VA provide a detailed set of data for dismissals, and that noncompliance particularly be scrutinized. While it is not entirely clear what aspect of § 71.45(a)(1)(ii) the commenter’s concern is directed towards, we assume this commenter is expressing concern over the language in § 71.45(a)(1)(ii)(E). We believe that this commenter is requesting that this language be further defined, so that all the reasons for revocation based on noncompliance be included in this section. Another commenter generally opposed any catch-all language in the proposed rule. As such, we believe that the commenter was expressing objection to the language in § 71.45(a)(1)(ii)(E), which amounts to a catch-all provision, as we explained in the preamble for the proposed rule. This commenter seemed to indicate that such language is problematic because it gives VA too much discretion to do what they want or cover circumstances as they see fit.

We disagree that this language gives VA too much discretion, as this language is consistent with VA’s authority to revoke the Family Caregiver under 38 U.S.C. 1720G(a)(7)(D)(i) and (a)(9)(C)(ii)(II). In addition, this language is meant to ensure that PCAFC is available only to eligible veterans and Family Caregivers who meet the requirements of part 71. Also, to the extent that the commenter indicated that all the reasons for revocation based on noncompliance be included in this section, we do not believe that this is

necessary. As we proposed, 38 CFR 71.45(a)(1)(ii) describes all the reasons for revocation from PCAFC due to noncompliance. In paragraph (a)(1)(ii), we further describe the areas of noncompliance under part 71 that would lead to revocation, which included a catch-all category in paragraph (a)(1)(ii)(E). Paragraphs (a)(1)(ii)(A) through (D) of § 71.45 are the most common reasons for noncompliance that we have identified, which is why they are specifically enumerated here. However, there may be other instances of noncompliance that may arise, and as such, a catch-all category would be appropriate as such other instances may not be as frequent, and to list all the requirements of Part 71 under paragraph (a)(1) would be overly lengthy. This catch-all category would allow us to have a clear basis for revocation if the eligible veteran or Family Caregiver(s) are not in compliance with part 71 outside of those that are enumerated in § 71.45(a)(1)(ii)(A) through (D). Moreover, we do intend to monitor the usage of paragraph (a)(1)(ii)(E). As we noted in the preamble to the proposed rule, if we find that this basis for revocation is frequently relied upon, we would consider proposing additional specific criteria for revocation under this section in a future rulemaking. We make no changes based on these comments.

#### *Discharge Due to no Longer in the Best Interest*

One commenter opposed VA determining that the caregiver relationship is not in the veteran’s “best interest,” particularly if both individuals are consenting adults with capacity to make informed decisions, and that the best interest standard is only applicable in situations in which the veteran lacks decision-making capacity. As discussed above, the definition for “in the best interest” here is not focused on the relationship and quality of a veteran’s or servicemember’s relationship with their Family Caregiver, rather it is focused on whether it is in the best interest of the eligible veteran to participate in PCAFC, and this is a clinical decision guided by the judgement of a VA health professional on what care will best support the health and well-being of the veteran or servicemember. Moreover, 38 U.S.C. 1720G(a)(1)(B) provides that support under PCAFC will only be provided if VA determines it is in the best interest of the eligible veteran to do so. We make no changes based on this comment.

#### *Discharge Due to Incarceration*

Several commenters suggested VA discharge veterans from PCAFC, without extended benefits, when the eligible veteran has been incarcerated for 60 or more days. Commenters opposed VA providing eligible veterans and Family Caregivers who are incarcerated with extended benefits because they indicated that it was inappropriate and contradicted 38 CFR 17.38, and similarly opposed VA’s inclusion of jail and prison in the proposed definition of institutionalization. Other commenters opposed the inclusion of jail or prison in the definition of institutionalization because it conflicts with the common use of the term by health care providers and other federal programs. Additionally, commenters asserted that VHA does not have independent access to city, county, state, or Federal prison databases and questioned whether PCAFC can leverage existing Federal databases or agreements, similar to VBA, to obtain veteran incarceration data.

We disagree with the comments indicating that providing extended benefits to Family Caregivers who are discharged due to the Family Caregiver or veteran being in jail or prison contradicts § 17.38, since the authorities for the provision of VA health care and PCAFC differ. Promulgated pursuant to 38 U.S.C. 1710, 38 CFR 17.38 describes the medical care and services (*i.e.*, the medical benefits package) for which eligible veterans under §§ 17.36 and 17.37 may receive, and excludes the provision of hospital and outpatient care for a veteran who is either a patient or inmate in an institution of another government agency if that agency has a duty to give the care or services. Paragraph (h) of 38 U.S.C. 1710 explicitly authorizes such exclusion of providing care to veterans, such as those who are incarcerated, when another agency of Federal, State, or local government has a duty under law to provide care to the veteran in an institution of such government. We note that PCAFC is governed by section 1720G, which does not contain any similar language to section 1710 authorizing exclusion of the provision of PCAFC benefits in the instance of incarceration. It is also important to note that PCAFC is a program unique to VA, and that no other Federal, State, or local government agencies have a duty under law to provide these same benefits. Thus, we find the authorizing statutes, 38 U.S.C. 1710 and 1720G, to be distinguishable.

We acknowledge that institutionalization in the health care context, including in other federal health care programs, usually refers to long-term health care and treatment; not jail or prison. However, we include jail and prison in the definition of institutionalization, as referenced for purposes of continuation of benefits in cases of discharge from PCAFC, because it provides Family Caregivers time to transition and minimizes the negative impact that may result from their discharge from PCAFC due to an eligible veteran being placed in jail or prison, which may often happen unexpectedly. We note that PCAFC is intended to support the Family Caregiver, and we believe continuation of benefits in such an instance would be consistent with that intent. Also, we include jail and prison in the definition of institutionalization, as referenced for purposes of continuation of benefits in cases of discharge from PCAFC, because it provides a period of transition for the veteran to replace the Primary Family Caregiver due to the Family Caregiver being placed in jail or prison, which may also often happen unexpectedly.

We also note that it is administratively difficult to treat institutionalization due to jail or prison differently from other reasons for institutionalization (e.g., nursing home, assisted living facility). Further, the eligible veteran or Family Caregiver being placed in jail or prison is a very rare occurrence.

While we understand the support and rationale for the position that those who are incarcerated should not be discharged from PCAFC with extended benefits, we are not making any changes to 38 CFR 71.45 or the definition of institutionalization based on these comments, as we would need to spend more time collecting and reviewing data to better understand this issue and determine whether benefits should not be extended and whether we should revise the definition of institutionalization. Based on this review, we would then consider proposing changes to the definition of institutionalization and the revocation and discharge section in a future rulemaking.

We are not making changes based on these comments.

#### *Discharge Due to Family Caregiver Request*

One commenter asserted that the proposed rule provides incentive to caregivers to make false allegations of abuse and does not adequately protect eligible veterans from abuse and exploitation. This same commenter

inquired as to the required burdens of proof for caregivers who allege abuse to receive extended benefits. Additionally, this commenter asked about the measures that will be taken to ensure veterans receive continuity of care so that a veteran who is being abused/exploited can discharge the caregiver without fear of being left without assistance with necessary Activities of Daily Living. This same commenter also opined that there are inherent risks associated with providing a spouse with the veteran's health information and asked how VA will protect the veteran's health information from unauthorized use or disclosure for non-medical purposes.

While Primary Family Caregiver allegations of abuse could result in discharge from PCAFC with extended benefits, we disagree that that creates an incentive to make false allegations as Family Caregiver designation will still be discharged, which will ultimately lead to discontinuation of benefits. It is also important to note that we require certain documentation to be provided if the Family Caregiver requests discharge due to domestic violence or intimate partner violence, such as police reports or records of arrest, protective orders, or disclosures to a treating provider, which we believe further acts as a disincentive for making false allegations. See 85 FR 13356, at 13410–13411 (March 6, 2020).

In order to protect eligible veterans from abuse and exploitation, we would conduct wellness contacts and reassessments (including in home visits) in which we would be able to identify potential vulnerabilities for the eligible veteran. If we determine there is abuse occurring, participation in PCAFC may be revoked under 38 CFR 71.45(a)(1)(i)(B). Current 38 CFR 71.45(c) addresses actions we may take if we suspect that the safety of the eligible veteran is at risk. In order to better describe the appropriate protocol and response to be taken in such situations, we proposed revising this paragraph to state that VA may suspend the caregiver's responsibilities, and facilitate appropriate referrals to protective agencies or emergency services is needed, to ensure the welfare of the eligible veteran, prior to discharge or revocation. See 85 FR 13411 (March 6, 2020). Measures that VA may take to ensure eligible veterans continue to receive care when a Primary Family Caregiver is discharged may include assisting the eligible veteran, or surrogate, in identifying another individual to perform the required personal care services, or assist with the designation of a new Primary Family Caregiver. Additionally, local VA staff

can work with the eligible veteran to determine whether their needs may be met by other VA programs or community resources, and can further refer, as appropriate. We note that when requesting discharge, benefits continue for a period of time so that the eligible veteran has time to adjust to the discharge.

To the extent that the commenters raised concerns about protecting veterans' health information from Primary Family Caregivers, we consider such comments out of the scope of this rulemaking. We note that being a Primary Family Caregiver does not necessarily mean such individuals have access to the health records of the veteran, as generally the veteran would need to consent to such access by the Primary Family Caregiver, although there may be exceptions to this, such as instances in which the Primary Family Caregiver is the legal guardian. We do not provide information on the eligible veteran to the Primary Family Caregiver solely on their status as the Primary Family Caregiver, and VA has procedures in place for authorizing release of records in compliance with Federal laws. It is also important to note that we cannot protect against all risks that may exist when an eligible veteran's caregiver is their spouse and the parties enter into divorce proceedings, in which the eligible veteran's information may be used against them. We make no changes based on these comments.

One commenter suggested VA allow other reasonable standards of proof to substantiate claims of intimate partner violence for purposes of extended benefits, as the proposed standard of proof differs from those accepted for the arrest of a perpetrator (i.e., witness statements, videos, taped 911 calls, photographs of injuries or destroyed property, medical treatment records), and differs from those required for receipt of benefits for conditions related to physical assault, such as military sexual trauma. We decline to make any changes based on this comment, as it would put us in an awkward position of assessing and evaluating the authenticity and legitimacy of statements, videos, and 911 calls; and could lead to further confusion about what documentation would be sufficient. However, if the Primary Family Caregiver presented such information to VA to request discharge and establish an extension of benefits, but they did not have the documents required under § 71.45, we would refer them to the intimate partner violence/domestic violence (IPV/DV) office and/or to a therapist or counselor to assess

his or her safety and provide assistance in obtaining any required documentation.

This same commenter opposed treating family caregivers who are dismissed “for cause” better than those who relinquish caregiving duties due to unsubstantiated IPV. This commenter noted that those dismissed for cause must receive notice of revocation from VA within 60 days and may receive 90 days of continued services. This commenter also noted that when a veteran dies, is institutionalized or whose condition improves to the extent that services are no longer necessary, the Primary Family Caregiver is provided 60 days to notify VA of the change followed by 90 days of continued benefits. This commenter thus suggested providing Primary Family Caregivers a minimum of 60 days to notify VA of their request for discharge when it is due to abuse. Under § 71.45(b)(3)(i), a Primary Family Caregiver who requests discharge due to unsubstantiated IPV can provide the present or future date of discharge. If they do not, VA will contact the Primary Family Caregiver to request a date. As a result, the Primary Family Caregiver is able to set the date of discharge, after which they will receive 30 days of continued benefits. We do not agree that a Primary Family Caregiver whose designation is revoked for cause will receive more favorable treatment than a Primary Family Caregiver discharged due to unsubstantiated IPV, as a Primary Family Caregiver who is revoked for cause will not receive an advanced notice of findings and would not receive continued benefits per § 71.45(a)(2) and (3). Also, as previously mentioned, a Primary Family Caregiver who requests discharge due to unsubstantiated IPV can select a future date to be discharged. Additionally, as explained in the response to the preceding comment, if a Primary Family Caregiver does not have the documents required under § 71.45(b)(3)(iii)(B) to substantiate IPV/DV, we would refer them to the IPV/DV office and/or to a therapist or counselor to assess his or her safety and provide assistance in obtaining any required documentation. Also, we would like to clarify that, contrary to the commenter’s statement concerning improvement in the veteran’s condition, death, and institutionalization, the minimum of 60 day notice that is provided for discharge due to improvement in the veteran’s condition is provided by VA and not the Primary Family Caregiver, and there is no minimum of 60 day advanced notice from VA for discharge due to death or institutionalization.

One commenter commended VA for extending services and support to caregivers dealing with IPV/DV, but requested VA add shelter coordinators and safe home coordinators to the list of those designated to provide documentation to VA to allow for a more inclusive list of professionals who work with those who have experienced IPV/DV. We make no changes based on this comment, as the regulation lists VA clinical professionals that may directly treat individuals experiencing IPV/DV and those that frequently work with individuals experiencing IPV/DV and have necessary and important expertise in this area to be able to assess and address these issues. While this list of professionals is not intended to be an exhaustive list, we note that shelter coordinators and safe home coordinators are not treating providers, as they generally are not required to hold licenses like those professionals listed in the regulation.

#### *Advanced Notice*

One commenter supported VA’s proposal to provide advanced notice of decisions, which would also provide veterans and family caregivers the opportunity to voice disagreement with VA’s findings before benefits are reduced or terminated. We thank this commenter for their support.

Another commenter suggested VA provide 90 days’ notice to an eligible veteran before reducing any PCAFC benefit or revoking their participation in PCAFC, particularly in cases of non-compliance. As explained in the proposed rule, we believe 60 days is a sufficient and appropriate period of time to give notice that the stipend is being decreased or that a Family Caregiver is revoked or discharged since this would balance the desire to provide sufficient opportunity for eligible veterans and Family Caregivers to dispute VA’s findings while ensuring benefits are not provided beyond a reasonable time to participants who are determined to be eligible at a lower stipend rate or no longer eligible for PCAFC. Consistent with that rationale, we believe that 90 days is too long, and we make no changes based on this comment.

This commenter also recommended that such notice should include the following information, to the extent applicable: The specific reduction in benefit, if any; a detailed explanation of the basis for the determination to reduce the benefit; each specific eligibility requirement with respect to which VA claims the veteran or caregiver is noncompliant; a detailed explanation for how the veteran or caregiver is

noncompliant with each such requirement; the identity of all personnel involved in the decision to reduce the benefit or revoke the veteran’s participation in PCAFC; all information and copies of all documentation relied upon by VA in making its determination to reduce the benefit or in making its determination of noncompliance. This commenter also recommended VA allow the veteran to respond to any such notice and provide information or explanations for why the reduction in benefits or revocation should not be implemented; and such response should generally be due within 60 days of receipt of the notice, but the veteran should be permitted to request an extension of 60 days to provide the response, which should be granted in the absence of any determination that such request is being made in bad faith. This commenter added that if a veteran requests a 60-day extension, VA should not be permitted to implement the reduction in benefits or revocation until at least 30 days after such extension. This commenter also recommended that VA give good-faith consideration to any response provided by the veteran, and to consider additional input from the veteran’s primary care team. Lastly, this commenter recommended VA be required to provide a written decision, after considering the veteran’s response; and if VA still determines to reduce the veteran’s benefits or revoke the veteran’s participation in PCAFC, such action should not be effective until at least 30 days after VA provides its written decision to the veteran.

The commenter mentioned above who supported VA’s proposal to provide advanced notice of decisions also urged VA to propose a standard format containing a minimum set of information required in these notices, such as those elements described under 38 U.S.C. 5104(b) (identification of the issues adjudicated; a summary of the evidence considered by the Secretary; a summary of the applicable laws and regulations; identification of findings favorable to the claimant; in the case of a denial, identification of elements not satisfied leading to the denial; an explanation of how to obtain or access evidence used in making the decision; and if applicable, identification of the criteria that must be satisfied to grant service connection or the next higher level of compensation). We appreciate both commenters’ feedback, and will consider this when developing any future changes to the appeals process and related policies. We note that this would be in policy rather than regulation to be consistent with how we

handle clinical appeals within VHA. Because PCAFC decisions are medical determinations, we provide PCAFC participants with the opportunity to dispute decisions made under PCAFC through the VHA clinical appeals process, which is already established in VHA Directive 1041, Appeal of VHA Clinical Decisions. Also, as explained in the proposed rule and reiterated in this final rule, we will issue advanced notices before stipend payment decreases and certain revocations and discharges. We make no changes based on these comments.

#### **§ 71.47 Collection of Overpayment**

Several commenters disagreed with VA's definition of overpayment as it would allow VA to collect any overpayments due to VA errors, such as erroneous determinations of eligibility. These commenters opined that VA should not collect in such circumstances as it would be contrary to VA's authority to provide equitable relief pursuant to 38 U.S.C. 503(b) and 38 CFR 2.7. One commenter noted that if VA sought collection of overpayments, caregivers would file requests for equitable relief, which would cost VA time and resources to process and would not be in VA's or the taxpayers' best interest. That same commenter noted that collecting overpayments when it was VA's error creates financial hardship for the caregiver, the veteran, and their family.

While we understand the concerns the commenters raise, VA is required to create a debt even in instances when overpayments are due to VA error, and may collect on such overpayment. Collection of overpayments is not unique to PCAFC, and does occur in other VA programs, such as compensation and pension, as well as with employees who incur debts as a result of overpayment in salary and benefits. Individuals who incur a debt that VA attempts to collect can seek equitable relief from VA as well as waiver of the debt. As one of the commenters noted, VA's authority to grant equitable relief is found at 38 U.S.C. 503(b) and 38 CFR 2.7. VA may provide equitable relief due to administrative errors made by VA. Section 2.7 specifically states that if the Secretary determines that any . . . person, has suffered loss, as a consequence of reliance upon a determination by the Department of Veterans Affairs of eligibility or entitlement to benefits, without knowledge that it was erroneously made, the Secretary is authorized to provide such relief as the Secretary determines equitable, including the

payment of moneys to any person equitably entitled thereto. Additionally, VA has the authority to waive debts that are incurred from participation in a benefit program, including PCAFC, administered under any law by VA when it is determined by a regional office Committee on Waivers and Compromises that collection would be against equity and good conscience. See 38 CFR 1.962. In evaluating whether collection is against equity and good conscience, these local committees consider the following elements: The fault of the debtor, balancing of faults, undue hardship, defeat the purpose, unjust enrichment, changing position to one's detriment. See 38 CFR 1.965.

While we anticipate that we should not have errors in PCAFC that would result in overpayment, especially in light of the changes we are making as part of this rulemaking, we acknowledge that errors can occur. In the instance that VA has erred resulting in overpayment, an individual can still seek equitable relief or waiver of the debt to avoid collection by VA. However, there is no guarantee that either of these will be granted, as the individual facts of such requests will need to be reviewed and determined on a case by case basis. We make no changes based on these comments.

One commenter requested VA clarify that it will not initiate collections of overpayments to legacy participants when it is determined they do not meet eligibility requirements, including situations when they were initially approved in error. Another commenter agreed with collecting overpayments due to VA error to ensure VA is being a good financial steward of the taxpayers' dollar, and that VA should similarly collect overpayments from legacy participants who have never met the requirements of part 71. This commenter asserted that VA has a duty to recover overpayments due to erroneous determinations by VA, as all improper payments degrade the integrity of government programs and compromise trust in the government.

We agree that we should collect overpayments pursuant to 31 U.S.C. 3711 and in accordance with the Federal Claims Collection Standards, and 38 U.S.C. 5302 and 5314. In instances of VA error, we would go back to the earliest date possible to collect improper payments that we made to individuals. This determination will vary based on the facts of each individual case. For example, if a Family Caregiver is determined eligible for PCAFC under the new criteria and VA erred in making that determination, VA would need to collect that

overpayment from the date VA erred (*i.e.*, the date the determination of eligibility for PCAFC was made). However, we note that this may vary for legacy participants depending on the circumstances. For example, if a legacy participant is reassessed under the new eligibility criteria, and is determined to be ineligible under the new criteria, they will be discharged from PCAFC and we will not recoup any benefits previously received based on the fact that they are ineligible under the new criteria. If a legacy participant is reassessed under the new criteria and we erred in our initial determination that the participant was eligible for PCAFC when they were not, and they do not qualify for PCAFC under the new eligibility criteria, we would discharge them from PCAFC. We would not recoup any benefits received as a matter of fairness and because we believe that would result in hardship to the participant.

We further note that waiver of the debt and equitable relief may be available to eliminate the debt that VA is trying to collect. However, we cannot guarantee that either debt waiver or equitable relief would be granted since these will need to be evaluated on a case by case basis.

We make no changes based on these comments.

One commenter opined that PCAFC is a program susceptible to significant improper payments; and the Office of Management and Budget (OMB) should identify PCAFC as such and put in place measures to determine the amount and causes of improper payments, which will allow PCAFC to focus on corrective action plans to address these issues. We consider this comment outside the scope of this rulemaking and note that we cannot direct OMB to take any action. We make no changes based on this comment.

Another commenter requested that VA provide eligible veterans and Family Caregivers with information during the initial training to fully understand collection of overpayments. We make no changes to the regulation based on this comment. We would not provide this information during initial training, but we will provide this information in fact sheets which will be available to eligible veterans and Family Caregivers upon approval for PCAFC.

One commenter noted that there are multiple instances of catch-all within the proposed regulations (*e.g.*, in the preamble discussion of proposed § 71.47) of which they have concerns that this will allow VA to do what it wants, which the commenter considers a "red flag." We responded to this



comment in the discussion on revocation and discharge, above, and refer the commenter to that response. We make no changes based on this comment.

#### Miscellaneous Comments

We received many comments that did not directly relate to any regulatory sections from the proposed rule, but that expressed concerns with VA's administration of PCAFC and PGCSS. Although we do not make changes to the proposed rule based on these comments because they are beyond the scope of the proposed rule or address issues that would be best addressed through policy, we summarize the comments below by topic.

#### Appeals

We received many comments related to VA's appeals process with regard to PCAFC, which primarily argued that PCAFC determinations should be subject to the jurisdiction of the Board of Veterans' Appeals (BVA) and expressed concerns with the current PCAFC appeals process. Commenters asserted that PCAFC services are benefits that should be subject to BVA review to ensure consistency and fairness across PCAFC. Specifically, some commenters suggested that the first sentence in 38 CFR 20.104(b) allows for PCAFC determinations to be appealed to BVA. One commenter specifically suggested it is contrary to 38 U.S.C. 7104 and 511(a) to restrict PCAFC determinations from the jurisdiction of BVA, and that VA should amend or waive 38 CFR 20.104(b) to allow PCAFC determinations to be appealed to BVA (we note that although the commenter referred to both 38 CFR 20.10(b) and 20.101(b), based on the content of the comment, we believe that the intended reference was § 20.104(b) as § 20.10(b) does not exist and § 20.101(b) was redesignated as § 20.104(b) (84 FR at 177 (January 18, 2019))). Several commenters asserted that applicants are deprived of due process if they cannot further appeal PCAFC determinations to BVA. One commenter opined that the authorizing statute, 38 U.S.C. 1720G, does not consider all decisions under PCAFC to be medical determinations; only those "affecting the furnishing of assistance or support," thus those non-medical determinations should be appealable to BVA. Other commenters suggested that BVA should have jurisdiction over PCAFC determinations because they are more similar to other VHA determinations over which BVA has jurisdiction. One commenter asserted that because VHA provides expert

medical review of cases for BVA, VA should be able to utilize BVA in reviewing its cases of PCAFC clinical appeals decisions. Additionally, some commenters asserted that by expanding the definition of serious injury to include a service-connected disability that is 70 percent or more, or a combined rating of 70 percent or more, VA should expand the ability to appeal PCAFC decisions to BVA since PCAFC would be using VBA criteria and decisions to influence VHA clinical determinations. Commenters also expressed that the current appeals process for PCAFC determinations, the VHA clinical appeals process, was unfair and inconsistent; and some commenters recommended that PCAFC establish its own unique appeals process. Some commenters also recommended setting forth the appeals process for PCAFC determinations in regulation, in order to provide clarity, consistency, and an opportunity for public comment. We address these comments below.

First, we note that while 38 U.S.C. 1720G confers benefits, which would typically be subject to 38 U.S.C. 7104(a) and 511(a) and confer BVA jurisdiction, Congress specifically intended to further limit review of PCAFC determinations with the language set forth by section 1720G(c)(1), which states that "[a] decision by the Secretary under this section affecting the furnishing of assistance or support shall be considered a medical determination." Medical determinations are not subject to BVA's jurisdiction under 38 CFR 20.104(b) which describes BVA's appellate jurisdiction over VHA determinations. The first sentence in § 20.104(b) states that BVA's appellate jurisdiction extends to questions of eligibility for hospitalization, outpatient treatment, and nursing home and domiciliary care; for devices such as prostheses, canes, wheelchairs, back braces, orthopedic shoes, and similar appliances; and for other benefits administered by VHA. However, the second sentence of § 20.104(b) clarifies that medical determinations, such as determinations of the need for and appropriateness of specific types of medical care and treatment for an individual, are not adjudicative matters and are beyond BVA's jurisdiction. *Id.* Therefore, because 38 U.S.C. 1720G establishes that PCAFC decisions are medical determinations, such decisions are not appealable to BVA. Accordingly, we disagree with the assertion that the first sentence in 38 CFR 20.104(b) allows for PCAFC determinations to be appealed to BVA. For these same

reasons, regardless of whether or not PCAFC determinations are more similar to other VHA determinations that BVA has jurisdiction over and despite the extent to which VHA provides expert medical review of cases for BVA, PCAFC determinations cannot be appealed to BVA. Accordingly, we disagree with commenters asserting that BVA should have jurisdiction over PCAFC determinations on these grounds.

We also disagree with the assertion that 38 CFR 20.104(b) as applied to PCAFC determinations is contrary to 38 U.S.C. 7104(a) and 511(a), thus requiring that PCAFC appeals be reviewed by BVA. In addition, we disagree with the assertion that 38 U.S.C. 1720G does not consider all decisions under the PCAFC to be medical determinations (*e.g.*, procedural and factual questions, such as whether an applicant has furnished all required information, whether VA has contributed to a delay in an applicant caregiver completing his or her training and education requirements in a timely manner, whether a veteran's serious injury was incurred or aggravated in the line of duty, when a serious injury was incurred or aggravated, or whether an applicant's disability rating meets or exceeds 70 percent). As mentioned above, while 38 U.S.C. 1720G confers benefits, which would typically be subject to 38 U.S.C. 7104(a) and 511(a), Congress specifically intended to further limit review of PCAFC determinations by designating such determinations as "medical determinations." Congress also specifically intended that all decisions under PCAFC be considered medical determinations by stating broadly that decisions "affecting the furnishing of assistance or support" under section 1720G would be considered a medical determination. PCAFC benefits under section 1720G consist of assistance and support services, and as such, any decision under the PCAFC would affect the furnishing of assistance or support under this section, including the examples relating to PCAFC eligibility provided by the commenter. As explained in the final rule implementing PCAFC and PGCSS, "[t]he plain language of section 1720G(c)(1) removes any doubt that Congress intended to insulate even decisions of eligibility from appellate review under [PCAFC], and VA's regulation at § 20.104(b) cannot circumvent a statutory requirement. 'If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the

unambiguously expressed intent of Congress.’ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). Further, Congress is presumed to know what laws and regulations exist when it enacts new legislation, and it is reasonable to infer that Congress knew that medical determinations were not appealable under § 20.104[4], and subsequently used that precise phrase in the statute to limit appeals of decisions in the [PCAFC]. See *California Indus. Products, Inc. v. United States*, 436 F.3d 1341, 1354 (Fed. Cir. 2006) (“These regulations are appropriately considered in the construction of [this particular statute] because Congress is presumed to be aware of pertinent existing law.”) 80 FR at 1366 (January 9, 2015).

We further note that, to the extent commenters contend that the exclusion of medical determinations from the jurisdiction of BVA is invalid and that VA should amend or waive 38 CFR 20.104(b), we believe that this is beyond the scope of this rulemaking. As previously explained, § 20.104(b) restricts medical determinations from BVA’s appellate jurisdiction. However, we did not propose changes to this regulation as part of this rulemaking; therefore, any requests to amend or waive § 20.104(b) is beyond the scope of this rulemaking.

Additionally, we believe that expanding the definition of serious injury to include a 70 percent service-connected disability rating, or a combined rating of 70 percent or more, does not change the jurisdictional limitations of BVA concerning PCAFC determinations discussed above. A determination under PCAFC that a veteran or servicemember does not have a serious injury because he or she has a service-connected disability rating, or a combined rating, below 70 percent, is still a PCAFC determination and would therefore still be deemed a medical determination and not subject to BVA’s jurisdiction. However, if a veteran or servicemember believes that his or her service-connection rating is incorrect, he or she may seek correction of their service-connection rating from VBA or appeal their rating to BVA, if appealable.

Commenters asserted that applicants are deprived of due process if they cannot further appeal PCAFC determinations to BVA. In particular, one commenter suggested that PCAFC creates an entitlement, such that applicants have a constitutional right to due process to further appeal PCAFC determinations. However, we note that PCAFC is not an entitlement. Section 1720G(c)(2)(B) of 38 U.S.C. specifically

states that the statute does not create any entitlement to any assistance or support provided under PCAFC. Notwithstanding this explicit language, the commenter contends that this provision is not dispositive of whether otherwise nondiscretionary, statutorily mandated benefits create an entitlement protected by the constitution. However, these benefits are not nondiscretionary; they are discretionary, as they can be granted or denied within VA’s discretion. In this regard, 38 U.S.C. 1720G(a)(1)(B) specifically states, “[t]he Secretary shall only provide support under the program required by subparagraph (A) to a family caregiver of an eligible veteran if the Secretary determines it is in the best interest of the eligible veteran to do so.” Therefore, we disagree with the commenter’s assertion that PCAFC benefits create a constitutional due process right to further appeal such determinations to BVA. See *Cushman v. Shinseki*, 576 F.3d 1290, 1297 (2009) (“A benefit is not a protected entitlement if government officials may grant or deny it in their discretion.”). However, we further note that despite this, VA nonetheless provides applicants with due process through the VHA clinical appeals process. Under the VHA clinical appeals process, veterans and Family Caregivers have access to a fair and impartial review of disputes regarding clinical decisions. Thus, because the process for appealing clinical decisions, such as PCAFC determinations, is set forth in policy rather than regulation, we would make no changes to the regulations to include appeals of PCAFC decisions. Moreover, VA has provided a new advanced notice provision in the PCAFC regulations where VA must provide no less than 60-days advanced notice prior to a decrease in the monthly stipend payment, revocation, or discharge (as applicable) from PCAFC. This 60-day period will provide an opportunity to contest VA’s findings before a stipend decrease, revocation, or discharge (as applicable) become effective. We believe providing advanced notice and opportunity to contest VA’s findings before benefits are reduced or terminated would benefit both VA and eligible veterans and Family Caregivers. 85 FR 13394 (March 6, 2020)). By adding a requirement for advanced notice before stipend payment decreases and certain revocations and discharges, it is our hope that communication between VA and eligible veterans and their Family Caregivers would improve, and that PCAFC participants would have a better

understanding of VA’s decision-making process. Id.

To the extent that commenters recommended that the appeals process for PCAFC determinations be set forth in regulation and that PCAFC have its own unique appeals process, as we explained above, all decisions under PCAFC are considered medical determinations pursuant to 38 U.S.C. 1720G; and disputes of medical determinations (*i.e.*, clinical disputes) are subject to the VHA clinical appeals process per VHA Directive 1041, Appeal of VHA Clinical Decisions. We note that while we generally follow the VHA clinical appeals process outlined in VHA Directive 1041 for appeals of PCAFC decisions, there are some processes unique to PCAFC, which will be addressed in an appendix to VHA Directive 1041. The updated directive with that appendix will be published at a future date on VHA’s publication website. Thus, because the clinical appeals process is already established in VHA Directive 1041, we do not find it necessary to establish an entirely separate appeals process for PCAFC decisions or set forth in regulation the appeals process for PCAFC decisions. For these reasons, at this time, we decline to establish an entirely separate appeals process for PCAFC decisions or set forth in regulation the appeals process for PCAFC decisions.

A commenter also encouraged VA to utilize mediation and online dispute resolutions for clinical appeals pursuant VHA Directive 1041, Appeal of VHA Clinical Decisions. Commenters also opined that the VHA clinical appeals process is not fair as there is no neutral party to impartially adjudicate appeals and inconsistent as clinical review could vary from provider to provider, VAMC to VAMC, and VISN to VISN. We do not address these as these comments are outside the scope of this rulemaking and apply to all of VHA clinical appeals, not just PCAFC. However, we will take these under consideration for future changes to VHA Directive 1041, or subsequent directive.

#### *Electronic Communications*

One commenter opined that it is necessary to include the ability of caregivers to electronically be in touch with the ones they are giving care to. The same commenter asserted that being unable to see or speak to the person you have been taking care of for years puts stress on the caregiver and the client. Further, the commenter stated that the recreation group in a nursing home can accommodate the use social media platforms. We do not understand the exact concerns of this commenter and

encourage anyone encountering these issues to contact their local CSC.

#### *Contracting*

One commenter stated they have not received any patients from VA despite having a contract for over three years and questioned what they should do. We consider this comment outside the scope of this rulemaking and would recommend this commenter reach out to the contracting officer for the contract.

#### *Current Execution of PCAFC*

Several commenters did not suggest specific changes to the proposed rule but rather expressed frustration with the current execution and management of PCAFC, to include inconsistent application of program requirements, problematic eligibility determinations, inappropriate discharges, and a general lack of knowledge and accountability by CSCs. Other commenters provided general information about their circumstances. We make no changes based on these comments; however, we note that we are implementing processes to standardize and improve PCAFC eligibility determinations to include a robust staff education and training plan, centralized eligibility, and enhanced oversight. Additionally, as we shift eligibility determinations to the CEATs, we will shift the role of the CSCs to providing care and advocacy for the eligible veteran and his or her caregiver. Also, eligible veterans and his or her caregivers who believe they have been inappropriately discharged from the program may contact their local facility patient advocate as well as appeal PCAFC determinations through the VHA clinical appeals process. Furthermore, individuals interested in applying to PCAFC may contact their local VA medical facility CSC or refer to <https://www.caregiver.va.gov/> for additional information about the program and the application process.

#### *Denial of Aide and Attendance Benefit*

One commenter stated that they have submitted VA Form 21-2680 three times and have been denied by VA. We note that PCAFC is a VHA clinical program that is separate from a VBA aide and attendance allowance. For questions regarding eligibility please contact your nearest VBA regional office.

#### *Funding for PCAFC and Regulatory Impact Analysis*

Multiple commenters questioned how VA will pay for the expansion of PCAFC. One commenter raised concerns that the program has too many holes in and may likely be financially unsustainable. The 2020 President's

Budget included estimated funding to meet the caregiver population expansion from the MISSION Act. The Further Consolidated Appropriations Act, 2020 (Pub. L. 116-94) included sufficient funding to meet the Caregiver Program cost estimates. The 2021 President's Budget included a funding request for the Caregiver Program based on the same updated projection model as used to formulate the regulatory impact analysis budget impact. Future President's Budget requests will incorporate new data and updated cost projections as they become available. For a detailed analysis of the costs of this program, please refer to the regulatory impact analysis accompanying this rulemaking. We make no changes based on these comments.

Another comment requested VA explain the discrepancy between the economically significant description of the proposed rule and the regulatory impact analysis that states 2022 is not economically significant. The commenter further opined that after unloading all of the post-9/11 veterans, the costs of all previous era veterans equal out so that this rule is not economically significant. First, with regards to the commenter's statement that the regulatory impact analysis states that 2022 is not economically significant, we are unclear as to what this commenter is referring by "2022." As the regulatory impact analysis states, we determined that this regulatory action is economically significant. Further, as previously discussed, we are not expanding to pre-9/11 eligible veterans at the expense of post-9/11 veterans and servicemembers, rather we are building one program to encompass veterans and servicemembers of all eras.

#### *Intent of Program*

One commenter requested VA "get back" to the original intent of the program, which the commenter stated is for home bound veterans from military service injury, and that most veterans with qualifying issues do not require a caregiver for 24/7 care and thus will not be eligible. This commenter also asserted that PCAFC may enable veterans and their caregivers, causing negative impacts on veteran/caregiver mental health.

First, we note that the intent of PCAFC has always been to provide comprehensive assistance to Family Caregivers of eligible veterans who have a serious injury incurred or aggravated in the line of duty on or after September 11, 2001. It was never intended to be solely for "home bound veterans" nor was it intended to require caregivers

provide 24/7 care. PCAFC was intended to provide supportive services, and education and training to Family Caregivers of injured veterans. Services provided by Family Caregivers are meant to supplement or complement clinical services provided to eligible veterans. As part of PCAFC, we do not require Family Caregivers provide 24/7 care to eligible veterans. The changes we previously proposed and now make final do not alter that intent. However, we note that the changes we are making to PCAFC are necessary as a result of the VA MISSION Act of 2018 which requires PCAFC to be expanded to veterans of all eras. Thus, because veterans of different eras have different needs, we need to adapt PCAFC to meet the needs of these veterans and are doing so by making such changes as decoupling serious injury and the need for personal care services. We believe these changes are consistent with the original intent of PCAFC.

We respectfully disagree with the commenter's assertion that PCAFC will enable veterans and their caregivers, causing negative impacts on veteran and caregiver mental health. We reiterate that PCAFC is meant to provide certain assistance to Family Caregivers and recognize the sacrifices caregivers make to care for veterans. It is intended to help veterans and servicemembers achieve their highest level of health, quality of life, and independence. 85 FR 13360 (March 6, 2020). While we understand and recognize that being a Family Caregiver can be challenging, Family Caregivers can receive respite care and counseling, including individual and group therapy, and peer support groups, under PCAFC. Primary Family Caregivers may also receive health care and services through CHAMPVA. Additionally, eligible veterans would be enrolled in VA healthcare and would be able to seek mental health care through VA. We make no changes based on this comment.

#### *Interaction With Other Programs*

Multiple commenters requested clarification on how PCAFC interacts with other VA and federal programs (e.g., VHA Homemaker and Home Health Aide, VHA Home Based Primary Care, VHA Veteran-Directed Care, VBA Aid and Attendance, programs administered by the Social Security Administration (SSA)). Additionally, one commenter requested information about services available to them to use now until they are eligible for PCAFC as a result of expansion. PCAFC is one of many in-home VA services that are complementary but not necessarily

exclusive to one another. As a result, an eligible veteran and his or her caregiver may participate in more than one in-home care program, as applicable. Furthermore, older veterans or servicemembers awaiting expansion for his or her service era, may be eligible for other VA programs and benefits (e.g., PGCSS, Homemaking and Home Health Aide, Veteran-Directed Care, home based primary care, SMC). As we have noted throughout this rule, VA offers a menu of supports and services that supports caregivers caring for veterans such as PGCSS, homemaking and home health aides, home based primary care, Veteran-Directed care, and adult day care health care to name a few. We note that the definition of serious injury requires a single or combined service-connected disability rating of 70 percent, which is the minimum threshold we will use for determining eligibility for PCAFC. As explained previously, other criteria, including that the individual be in need of personal care services and that PCAFC be in the best interest of the veteran, must be further met to be eligible for PCAFC. Eligibility for SSA benefits does not impact eligibility for PCAFC. It is also important to note that stipend payments received under PCAFC do not earn credits toward Social Security retirement as stipend payments are non-taxable. We further note that all income counts against eligibility for Supplemental Security Income, but not against eligibility for Social Security Disability Income or Social Security retirements. Because we do not administer SSA benefits, we would further refer commenters to SSA's website (at <https://www.ssa.gov/>) for more information on eligibility for SSA benefits. We will also consider these comments in determining requirements in contracts for personal financial services. We are not making any changes to the regulation based on these comments.

#### Meeting Notes

One commenter requested VA provide the meetings notes from a current employee from February 25, 2019. If the commenter is referring to the February 25, 2019 meeting notes identified in the proposed rule, the meeting notes titled "Meeting Notes 02.25.19" is posted in the docket folder for this rulemaking (i.e., AQ48—Proposed Rule—Program of Comprehensive Assistance for Family Caregivers Improvements and Amendments under the VA MISSION Act of 2018) at <https://www.regulations.gov>. The commenter may need to select "View All" beside the Primary Documents heading in the

docket. We make no changes based on this comment.

#### *Electronic Medical Record and Health Insurance Portability and Accountability Act (HIPAA)*

One commenter asserted that access to a patient's medical record, including the ability to insert a document into a patient's medical record should be limited to only the medical provider(s) who treat the veteran or servicemember. The same commenter further opined that introducing this security method to the Computerized Patient Record System (CPRS) would help eliminate HIPAA violations and cross provider communication that crowds up the medical record. The commenter also asserted that the medical records should only consist of the patient's medical information. We consider this comment outside the rulemaking, but note that VA has implemented security mechanisms, including access and audit controls, within VA's Veterans Health Information System Technology Architecture (Vista)/CPRS that comply with the HIPAA Security Rule. All staff with access to patient information are required, in the performance of their duties, to know their responsibilities in maintaining the confidentiality of VA sensitive information, especially patient information, by completing the annual Cyber Security and Privacy training. We note that the health record consists of the patient's medical information, including the individual's health history, examinations, tests, treatments, and outcomes. It also includes an administrative component that is an official record pertaining to the administrative aspects involved in the care of a patient, including: Demographics, eligibility, billing, correspondence, and other business-related aspects. Such information is necessary, particularly, as individuals other than a treating provider utilize the information contained in the VHA health record on a daily basis for eligibility determinations and other health care functions, such as coding and billing; thus, we cannot limit access to the medical record to only the treating providers. We make no changes based on this comment.

One commenter stated this is ludicrous and a clear HIPAA violation for said caregiver. As the commenter did not provide further information, we cannot address this comment. We make no changes based on this comment.

#### *Move PCAFC to VBA*

Several commenters asserted that PCAFC is a permanent benefits program and questioned whether the program

should be administered by VBA. Commenters further expounded that VHA has shown it is unable to consistently administer the program and that VHA medical facility staff should not be involved with decisions that have financial implications to veterans and his or her caregiver. While we agree that PCAFC does provide benefits to the Family Caregivers of eligible veterans, PCAFC is a clinical program that provides assistance to Family Caregivers of eligible veterans who have a serious injury incurred or aggravated in the line of duty, and is designed to support the health and well-being of such veterans, enhance their ability to live safely in a home setting, and support their potential progress in rehabilitation, if such potential exists. See 85 FR 13356, at 13367 (March 6, 2020). Thus, PCAFC is intended to be a program under which assistance may shift depending on the changing needs of the eligible veteran. We do acknowledge that while some eligible veterans may improve over time, others may not, and PCAFC and other VHA services are available to ensure the needs of those veterans continue to be met. Given the placement of authority for the PCAFC program in Chapter 17 of title 38, U.S. Code—Hospital, Nursing Home, Domiciliary, and Medical Care, VHA has the exclusive authority to carry out the PCAFC program. See 38 U.S.C. 7301. Any relocation of the program to VBA would require statutory change. Further, section 1720G does not create any entitlement to any assistance or support provided under PCAFC and PGCSS. See 38 U.S.C. 1720G(c)(2)(B). In administering PCAFC pursuant to VHA's statutory authority in section 1720G, as explained in the proposed rule, we have recognized that improvements to PCAFC were needed to improve consistency and transparency within the PCAFC. See 85 FR 13356 (March 6, 2020). We believe the changes that we are making in this rule will improve PCAFC, especially with regards to eligibility determinations. We also note that we are implementing processes to standardize and improve PCAFC eligibility determinations to include a robust staff education and training plan, centralized eligibility, and enhanced oversight.

#### *Most In Need*

Several commenters expressed concern over the phrase "most in need." In particular, one commenter asserted that the purpose and application of this phrase "eliminates participation because the word 'most' [implies] not all who are eligible." We note that, although the comment used the word

“entitles,” based on the content of the comment, we believe that the intended word was “implies.” This commenter further asserted that it is unlawful for VA to deny or revoke eligibility to focus on those who are most in need. We do not have unlimited resources to provide PCAFC to all caregivers of veterans, and note that the purpose and intent of PCAFC is to provide benefits to Family Caregivers who make sacrifices to care for veterans, who would otherwise not be able to manage without that caregiver’s assistance. We note that the phrase “most in need” was only used in the proposed rule in reference to a **Federal Register** Notice published on January 5, 2018, requesting information and comments from the public on how to improve PCAFC. We note that the changes we are making through this rulemaking are intended to better address the needs of veterans of all eras and standardize the program to focus on eligible veterans with moderate and severe needs. 84 FR 13356 (March 6, 2020). We also further refer the commenter to the discussion directly above addressing that PCAFC is not an entitlement program.

We do not make any changes based on these comments.

#### *Not Veteran-Centric*

One commenter asserted that the proposed rule is VA-centric versus veteran-centric. Specifically, this commenter asserted that the changes will lead to veterans not receiving the quality care they deserve, and deny eligibility to other veterans under expansion who would be previously eligible.

As we explained in the proposed rule, we are making changes to the current regulations in part 71 to improve the PCAFC to ensure consistency and transparency in decision making within the program, to update the regulations to comply with amendments made to 38 U.S.C. 1720G by the VA MISSION Act of 2018, and to allow PCAFC to better address the needs of veterans of all eras and standardize PCAFC to focus on eligible veterans with moderate and severe needs. These efforts to standardize PCAFC will ensure that eligible veterans and Family Caregivers will receive a high level of care through PCAFC. Thus, we disagree that the proposed rule is VA-centric. We do not believe this will lead to veterans not receiving the quality of care they deserve, as veterans who are not eligible for PCAFC may be eligible for other VHA care and services, such as home based primary care, Veteran-Directed, and adult day health care. Similarly, we acknowledge there may be veterans who

would be eligible for PCAFC under the previous eligibility criteria but will not be eligible under the new eligibility criteria. However, for the reasons described in this paragraph, we believe these changes are necessary.

We make no changes based on this comment.

#### *Veteran Suicide*

Commenters expressed concern that the proposed changes will result in an increase in veteran suicides. One commenter also requested that VA refrain from proposing another rule change before addressing why veterans are committing suicide on VA hospital property. While we consider these comments out of scope and make no changes based on these comments, it is important to note that PCAFC is focused on providing support and services to caregivers of veterans, and does not replace appropriate clinical services from which a veteran may benefit. We also note that suicide prevention is VA’s top clinical priority. More information on VA’s suicide prevention efforts can be found at: [https://www.mentalhealth.va.gov/MENTALHEALTH/suicide\\_prevention/index.asp](https://www.mentalhealth.va.gov/MENTALHEALTH/suicide_prevention/index.asp). If you are a veteran in crisis or you are concerned about one, free and confidential support is available 24/7 by calling the Veterans Crisis Line at 1-800-273-8255 and Press 1 or by sending a text message to 838255. We make no changes based on these comments.

#### *Overhaul of Existing Program*

Multiple commenters expressed frustration that this rulemaking is a complete overhaul rather than fixing issues with the current program. Specifically, commenters noted that the proposed rule does nothing to address non-compliance and inconsistency in the implementation and management of the current program and questioned the purpose of the moratorium on tier reductions and discharges based on clinical determinations. As indicated in the proposed rule, VA has recognized the need to improve consistency and transparency since the implementation of PCAFC in 2011 and the current moratorium was put in place to prevent discharges and tier reductions while PCAFC focused on education, guidance and conducted audits. We note that this moratorium is still in place, and will be lifted once this regulation is final and effective. Additionally, the current regulations are focused on post-9/11 veterans and servicemembers and as discussed above we believe the eligibility requirements must be revised to be inclusive of veterans and

servicemembers of all eras. Furthermore, we will continue to provide robust training and education to our staff, implement an audit process to review assessments at medical centers as well as centralized eligibility determinations, and conduct vigorous oversight to ensure consistency across VA in implementing this regulation. We make no changes based on these comments.

#### *PCAFC Is Not a VBA Nonmedical Benefit*

One commenter urged VA to stop modeling PCAFC as though it is a VBA nonmedical benefit, and cited to *Tapia v. United States*, 146 Fed. Cl. 114 (2016), in which the United State Court of Federal Claims affirmed that PCAFC determinations are clinical and thus subject to VHA’s clinical appeals process. We do not understand this comment, and to the extent that this commenter is asserting that PCAFC is a clinical program operated by VHA, we agree. To the extent that this commenter is asserting that PCAFC determinations are subject to the clinical appeals process and are not within BVA’s jurisdiction, we also agree. We make no changes based on this comment.

#### *PCAFC Staffing*

Several commenters expressed concern that VA does not have the staff to handle the wave of applications that will come once expansion occurs. Specifically, commenters noted that VA staff are already overwhelmed serving current PCAFC participants. We thank the commenters for their concerns and note that we are actively increasing PCAFC staff nationwide in anticipation of expansion. We make no changes based on these comments.

#### *Plain Writing Act and FAQs*

Two commenters requested VA better explain PCAFC by using plain language consistent with the Plain Writing Act of 2010. A separate comment indicated VA should follow the plain language guidelines of Plain Writing. Two commenters indicated that the rule was difficult to understand and one of those commenter’s requests FAQs. We are aware of the complexity of the proposed changes; however, we conformed the regulation to the Office of Federal Register guidelines which were developed to help agencies produce clear, enforceable regulation documents. Additionally, we have and will continue to provide FAQs on various aspects of the program. We are not making any changes based on this comment.

### *Pilot Program*

One commenter requested that VA pilot the proposed changes before implementing the changes. The same commenter asserted that veterans of all eras should join under the current regulations. As amended by section 163 of the VA MISSION Act of 2018, 38 U.S.C. 1720G requires VA expand eligibility for PCAFC to all veterans in two phases. We would not pilot the proposed changes before implementing them as that would not be appropriate in this instance. Pilot programs are conducted to determine whether an approach may work and whether such an approach is the correct one to use. However, the changes we have proposed and are making final as part of this rulemaking are based on challenges and issues we have seen and identified over the years since PCAFC was first implemented. We have conducted thorough analysis to determine what changes to make and to support those changes. In addition, running two separate and distinct programs for different groups of veterans will lead to confusion for caregivers, veterans, and staff. We do not make any changes based on this comment but will continue to review and analyze PCAFC and make any changes we deem necessary.

### *Requirement To Reapply After Moving*

One commenter opposed the current practice and requirement for participants to reapply for the program because they have moved, as this has resulted in denial of PCAFC benefits. We wish to clarify that an eligible veteran and the Family Caregiver are not required to submit a new joint application if or when they relocate; that is, move to another address. However, we will require a wellness contact be conducted in the eligible veteran's home to determine if the new environment meets the care needs of the eligible veteran. During the wellness contact, the clinical staff member conducting such contact may identify a change in the eligible veteran's condition or other such change in circumstances whereby a need for a reassessment may be deemed necessary and arranged accordingly pursuant to § 71.30 if necessary. We note that wellness contacts and reassessments are distinct and separate processes.

Further, as explained above, we will provide robust training and education to our staff, implement an audit process to review eligibility determinations, and conduct vigorous oversight to ensure consistency across VA in implementing

this regulation. We are not making any changes based on this comment.

### *Special Compensation for Assistance With Activities of Daily Living (SCAADL)*

Several commenters asserted that DoD's SCAADL program was intended to be a part of a servicemembers' seamless transition to PCAFC. One commenter provided SCAADL performance metrics and stated that there has been little coordination with SCAADL by PCAFC or the Recovery Coordination Program despite a Memorandum of Understanding between VA and DoD for interagency complex care coordination requirements for servicemembers and veterans. The commenter further asserted that the Congressional intent of PCAFC was very clear following the passage of three crucial laws: Caregivers Act, section 603 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111-84), and the Veterans' Benefits Act of 2010 (Pub. L. 111-275).

While we consider these comments outside the scope of the proposed rule, we will briefly explain SCAADL and PCAFC, and the coordination between VA and DoD to meet the needs of servicemembers and veterans. Authorized by section 603 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111-84) and codified at 37 U.S.C. 439, SCAADL is taxable financial compensation that DoD provides to eligible permanent catastrophically injured or ill servicemembers who require caregiver support for assistance with activities of daily living or for constant supervision and protection, without which they would require hospitalization or residential institutional care. It is important to note that PCAFC and SCAADL are distinct programs, as the statutory authorities set forth different requirements and benefits for each program. For example, unlike PCAFC, SCAADL does not provide benefits directly to the Family Caregiver nor does it provide benefits other than financial compensation.

These commenters also refer to the Recovery Coordination Program, and we assume they are referring to the joint DoD/VA Federal Recovery Coordination Program, which is a joint effort between the Departments to coordinate the clinical and nonclinical services needed by severely wounded, ill, and injured servicemembers and veterans.

DoD and VA continue to take efforts to support a smooth transition as servicemembers leave active duty and become veterans. Through the Transition Assistance Program, every

year approximately 200,000 servicemembers, who are preparing to transition to civilian life, receive information, resources, and tools to help prepare for this transition. VA's portion of this program includes an in-person course called VA Benefits and Services, which helps servicemembers understand how to navigate VA and the benefits and services they have earned through their military careers. This includes information on PCAFC. It is important to note that if a servicemember has been discharged from the military or has a date of medical discharge, he or she is eligible to apply for PCAFC. We note that CSP partners with VA's Transition and Care Management through their partnership with the Federal Recovery Program and DoD Medical Treatment Facilities. We make no changes based on these comments.

These same commenters also recommended that PCAFC be more aligned with SCAADL, including definitions, application timelines, and eligibility determinations. As explained in response to the comments directly above, there are differences between the two programs based on the authorizing statutes. Thus, the definitions and eligibility determinations for these programs are necessarily different. Additionally, the application timelines differ as a result of differences between the programs' processes. For example, initial eligibility for SCAADL is certified by a DoD- or VA-licensed physician, after which time, DoD recommends that all responsible parties complete the SCAADL application form within 30 days. In contrast, PCAFC does not provide a recommended a timeline for completing the PCAFC application form. Because we view these as distinct programs with different requirements, we make no changes based on these comments.

### *Staff Training on Eligibility Determinations*

Several commenters asserted that current PCAFC staff are unable to make accurate eligibility determinations because they have been improperly trained. Specifically, one commenter asserted that training provided was not properly vetted by VA's Chief Education Officer to ensure the training meets the standards of the Caregiver Omnibus Act of 2010. We are preparing multi-day trainings to be provided to staff that will be making eligibility determinations. These trainings will be approved by VA's Employee Education Service (EES), and will be tailored to the various disciplines of the staff that will be determining eligibility for PCAFC.

These trainings will be accredited by EES as these will be considered continuing education credits for staff licenses, as applicable. We currently provide in VA's employee training system, the Talent Management System, standardized trainings on many portions of PCAFC, including caregiver support and eligibility. These standardized trainings have been approved by EES. We are also developing trainings on how to use assessment instruments. We will ensure that quality assurance and peer reviews are conducted to ensure that eligibility determinations are made appropriately and consistently. Where we determine improvement is needed, we will remediate and provide re-training of staff. We make no changes based on these comments.

#### *VA Should Pay all Veterans Before Caregivers*

One commenter asserted that there should be some type of compensation for all veterans who served regardless of whether they have a service-connected disability prior to providing a stipend and health care services to Family Caregivers. The same commenter further opined that veterans with a certain percentage of service-connected disability are free to schedule multiple VA medical appointments and questioned why able-bodied veterans are not compensated nor able to use VA for medical care. To the extent the commenter requests VA to revise how veterans are compensated and priority designation for access to VA medical care, this is beyond the scope of this rulemaking. We make no changes based on this comment.

#### *Veteran Functional Assessment Instrument*

One commenter specifically stated that after the proposed rule was published, they requested additional information from VA about how the proposed eligibility evaluation and reassessment process will work, including any assessment instruments that VA staff will use. This commenter recommended that because VA did not adequately explain how the process will work, VA should publish a supplemental notice of proposed rulemaking or an interim final rule to explain this process, upon which to provide the public the opportunity to comment. One commenter recommended VA use an interrater reliability measure to determine the level of standardization of the veteran functional assessment instrument that VA staff may use to inform eligibility determinations, recommended the current assessment instrument be

revised to ensure standardization and yield consistency, and further suggested that the current assessment instrument be independently validated, subject to public scrutiny, which should prove the instrument's reliability, validity, responsiveness as an outcome measure, and interpretability. This commenter also asked VA to provide justification to prove the current assessment instrument was so fatally flawed and beyond repair such that any necessary improvements would cause greater burden than deploying a new assessment instrument or undue burden on the public and the government. This commenter also noted that VA has not provided the public with any valid and reliable data or research to prove that the new veteran functional assessment instrument has equivalent interrater reliability and validity as the three assessment instruments on which it is based. Another commenter opined that the current assessment tool used for evaluating the level of assistance required by a veteran to complete ADLs or to determine a veteran's need for supervision or protection is a good instrument and asked what assessment/evaluation guidelines will be put in place now. Additionally, one of the commenters referenced our current use of the Katz Basic Activities of Daily Living Scale; the UK Functional Independence Measure and Functional Assessment Measure; and the Neuropsychiatric Inventory for conducting assessments of veterans. One commenter raised concerns about using a new tool as VA staff is not using the current tool properly. Two commenters requested VA provide a detailed list of requirements and the scoring methodology to determine eligibility.

We consider these comments to be outside the scope of the rule and do not make any changes based on these comments nor will we publish a supplemental notice of proposed rulemaking or an interim final rule; however, we provide additional information as follows. The exact processes and instruments that will be used to assess eligible veterans and Family Caregivers for PCAFC would best be handled through policy. While we note that commenters specifically inquired, or raised concerns about the veteran functional assessment instrument, we note that it is one of several factors that may be used by staff to inform determinations for PCAFC eligibility. There will be no scoring methodology for determining eligibility. Because these determinations are clinical, the indicators and information

used to make the determinations will vary on a case by case basis depending on the veteran's situation. After the regulation is published, we will publish related policies that will describe the assessment process, including any assessment instruments VA staff may use when PCAFC applicants are evaluated for the program. We will ensure VA staff utilizing the any assessment instruments are properly trained. We further note that we will continue to monitor to ensure that any instruments used to assist in assessing a veteran's needs for purposes of PCAFC are reliable and valid. We make no changes based on these comments.

Several comments copied and pasted SMAG committee minutes, with no further explanation or discussion. We concur that these are the minutes from the SMAG Committee meetings. However, because no further context to these comments were provided, we cannot address them further. We make no changes based on these comments.

#### *Other*

Several commenters posted comments that did not provide additional information beyond what appears to be a news release from Senator Patty Murray on March 9, 2019 regarding PCAFC and minutes from the 1999 Archives of the U.S. Senate Taskforce on Hispanic Affairs, Veteran Advisory Committee. Another commenter posted their interpretation of the major takeaways for the proposed rule. One commenter posted information on an herbal formula that can be used for ALS. One commenter posted what appears to be excerpts from VA OIG reports. As no further explanation or discussion was provided by the commenters, we cannot further address. We make no changes based on these comments.

#### **Technical Edits**

We would make a technical edit to §§ 71.10 through 71.40, and 71.50. We would remove the statutory authority citations at the end of each of these sections and amend the introductory "Authority" section of part 71 to include the statutory citations listed in these sections that are not already provided in the "Authority" section of part 71 to conform with publishing guidelines established by the Office of the Federal Register. We note that current §§ 71.20 and 71.30 include a citation to 38 U.S.C. 1720G(a)(2) and 1720G(b)(1), (2), respectively. However, we would reference 38 U.S.C. 1720G, not specific subsections and paragraphs. We would also add a reference to 31 U.S.C. 3711, which pertains to collections; 38 U.S.C. 5302, which

pertains to waiver of benefits overpayments; and 38 U.S.C. 5314, which pertains to the offset of benefits overpayments. These references would be added for purposes of proposed § 71.47, Collection of overpayment.

#### Paperwork Reduction Act

This final rule contains provisions that would constitute a revised collection of information under 38 CFR 71.25, which is currently approved under Office of Management and Budget (OMB) Control #2900–0768. This rule also contains provisions that constitute a new collection of information under 38 CFR 71.40, which will be added under OMB Control #2900–0768. As required by 44 U.S.C. 3507(d), VA will submit, under a separate document, the revised collection of information associated with §§ 71.25 and 71.40 to OMB for its review and approval. Notice of OMB approval for this revised collection of information will be published in a future **Federal Register** document.

#### Regulatory Flexibility Act

The Secretary hereby certifies that this 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 (RFA), 5 U.S.C. 601–612. We note that caregivers are not small entities. However, this final rule may directly affect small entities that we would contract with to provide financial planning services and legal services to Primary Family Caregivers; however, matters relating to contracts are exempt from the RFA requirements. Any effects on small entities would be indirect. 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.

#### Congressional Review Act

This regulatory action is a major rule under the Congressional Review Act, 5 U.S.C. 801–808, because it may result in an annual effect on the economy of \$100 million or more. In accordance with 5 U.S.C. 801(a)(1), VA will submit to the Comptroller General and to Congress a copy of this regulatory action and VA's Regulatory Impact Analysis.

#### Executive Order 12866, 13563, and 13771

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 an economically significant regulatory action under Executive Order 12866. VA's impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's website at <http://www.va.gov/orpm/>, by following the link for "VA Regulations Published."

This rulemaking is considered an E.O. 13771 regulatory action. VA has determined that the net costs are \$483.4 million over a five-year period and \$70.5 million per year on an ongoing basis discounted at 7 percent relative to year 2016, over a perpetual time horizon. Details on the estimated costs of this final rule can be found in the rule's economic analysis.

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

#### Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.009, Veterans Medical Care Benefits.

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

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

#### Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document 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.

Brooks D. Tucker, Acting Chief of Staff, Department of Veterans Affairs, approved this document on July 17, 2020, for publication.

#### Consuela Benjamin,

*Regulations Development Coordinator, Office of Regulation Policy & Management, Office of the Secretary, 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 is revised 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.

■ 2. Amend § 71.10 by revising paragraph (b) and removing the authority citation at the end of the section.

The revision reads as follows:

#### § 71.10 Purpose and scope.

\* \* \* \* \*

(b) *Scope.* This part regulates the provision of benefits under the Program of Comprehensive Assistance for Family Caregivers and the Program of General Caregiver Support Services authorized by 38 U.S.C. 1720G. Persons eligible for such benefits may be eligible for other VA benefits based on other laws or other parts of this title. These benefits are provided only to those individuals residing in a State as that term is defined in 38 U.S.C. 101(20).

■ 3. Amend § 71.15 by:

- a. Removing the definition of "Combined rate";
- b. Adding in alphabetical order definitions for "Domestic violence (DV)", "Financial planning services", and "In need of personal care services";
- c. Redesignating in proper alphabetical order the definition of "In the best interest" and revising it;
- d. Revising the definition of "Inability to perform an activity of daily living (ADL)";
- e. Adding in alphabetical order definitions for "Institutionalization", "Intimate partner violence (IPV)", "Joint application", "Legacy applicant", "Legacy participant", "Legal services", and "Monthly stipend rate";



- f. Removing the definition of “Need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury”;
- g. Adding in alphabetical order definitions for “Need for supervision, protection, or instruction” and “Overpayment”;
- h. Revising the definitions of “Primary care team” and “Serious injury”;
- i. Adding in alphabetical order a definition of “Unable to self-sustain in the community”; and
- j. Removing the authority citation at the end of the section.

The revisions and additions read as follows:

**§ 71.15 Definitions.**

\* \* \* \* \*

*Domestic violence (DV)* refers to any violence or abuse that occurs within the domestic sphere or at home, and may include child abuse, elder abuse, and other types of interpersonal violence.

\* \* \* \* \*

*Financial planning services* means services focused on increasing financial capability and assisting the Primary Family Caregiver in developing a plan to manage the personal finances of the Primary Family Caregiver and the eligible veteran, as applicable, to include household budget planning, debt management, retirement planning review and education, and insurance review and education.

\* \* \* \* \*

*In need of personal care services* means that the eligible veteran requires in-person personal care services from another person, and without such personal care services, alternative in-person caregiving arrangements (including respite care or assistance of an alternative caregiver) would be required to support the eligible veteran’s safety.

*In the best interest* means, for the purpose of determining whether it is in the best interest of the veteran or servicemember to participate in the Program of Comprehensive Assistance for Family Caregivers under 38 U.S.C. 1720G(a), a clinical determination that participation in such program is likely to be beneficial to the veteran or servicemember. Such determination will include consideration, by a clinician, of whether participation in the program significantly enhances the veteran’s or servicemember’s ability to live safely in a home setting, supports the veteran’s or servicemember’s potential progress in rehabilitation, if such potential exists, increases the veteran’s or servicemember’s potential

independence, if such potential exists, and creates an environment that supports the health and well-being of the veteran or servicemember.

*Inability to perform an activity of daily living (ADL)* means a veteran or servicemember requires personal care services each time he or she completes one or more of the following:

- (1) Dressing or undressing oneself;
- (2) Bathing;
- (3) Grooming oneself in order to keep oneself clean and presentable;
- (4) Adjusting any special prosthetic or orthopedic appliance, that by reason of the particular disability, cannot be done without assistance (this does not include the adjustment of appliances that nondisabled persons would be unable to adjust without aid, such as supports, belts, lacing at the back, etc.);
- (5) Toileting or attending to toileting;
- (6) Feeding oneself due to loss of coordination of upper extremities, extreme weakness, inability to swallow, or the need for a non-oral means of nutrition; or
- (7) Mobility (walking, going up stairs, transferring from bed to chair, etc.).

*Institutionalization* refers to being institutionalized in a setting outside the home residence to include a hospital, rehabilitation facility, jail, prison, assisted living facility, medical foster home, nursing home, or other similar setting.

*Intimate partner violence (IPV)* refers to any violent behavior including, but not limited to, physical or sexual violence, stalking, or psychological aggression (including coercive acts or economic harm) by a current or former intimate partner that occurs on a continuum of frequency and severity which ranges from one episode that might or might not have lasting impact to chronic and severe episodes over a period of years. IPV can occur in heterosexual or same-sex relationships and does not require sexual intimacy or cohabitation.

*Joint application* means an application that has all fields within the application completed, including signature and date by all applicants, with the following exceptions: social security number or tax identification number, middle name, sex, email, alternate telephone number, and name of facility where the veteran last received medical treatment, or any other field specifically indicated as optional.

*Legacy applicant* means a veteran or servicemember who submits a joint application for the Program of Comprehensive Assistance for Family Caregivers that is received by VA before October 1, 2020 and for whom a Family Caregiver(s) is approved and designated

on or after October 1, 2020 so long as the Primary Family Caregiver approved and designated for the veteran or servicemember on or after October 1, 2020 pursuant to such joint application (as applicable) continues to be approved and designated as such. If a new joint application is received by VA on or after October 1, 2020 that results in approval and designation of the same or a new Primary Family Caregiver, the veteran or servicemember would no longer be considered a legacy applicant.

*Legacy participant* means an eligible veteran whose Family Caregiver(s) was approved and designated by VA under this part as of the day before October 1, 2020 so long as the Primary Family Caregiver approved and designated for the eligible veteran as of the day before October 1, 2020 (as applicable) continues to be approved and designated as such. If a new joint application is received by VA on or after October 1, 2020 that results in approval and designation of the same or a new Primary Family Caregiver, the veteran or servicemember would no longer be considered a legacy participant.

*Legal services* means assistance with advanced directives, power of attorney, simple wills, and guardianship; educational opportunities on legal topics relevant to caregiving; and referrals to community resources and attorneys for legal assistance or representation in other legal matters. These services would be provided only in relation to the personal legal needs of the eligible veteran and the Primary Family Caregiver. This definition excludes assistance with matters in which the eligible veteran or Primary Family Caregiver is taking or has taken any adversarial legal action against the United States government, and disputes between the eligible veteran and Primary Family Caregiver.

*Monthly stipend rate* means the Office of Personnel Management (OPM) General Schedule (GS) Annual Rate for grade 4, step 1, based on the locality pay area in which the eligible veteran resides, divided by 12.

*Need for supervision, protection, or instruction* means an individual has a functional impairment that directly impacts the individual’s ability to maintain his or her personal safety on a daily basis.

*Overpayment* means a payment made by VA pursuant to this part to an individual in excess of the amount due, to which the individual was not eligible, or otherwise made in error. An overpayment is subject to collection action.

\* \* \* \* \*

*Primary care team* means one or more medical professionals who care for a patient based on the clinical needs of the patient. Primary care teams must include a VA primary care provider who is a physician, advanced practice nurse, or a physician assistant.

\* \* \* \* \*

*Serious injury* means any service-connected disability that:

(1) Is rated at 70 percent or more by VA; or

(2) Is combined with any other service-connected disability or disabilities, and a combined rating of 70 percent or more is assigned by VA.

*Unable to self-sustain in the community* means that an eligible veteran:

(1) Requires personal care services each time he or she completes three or more of the seven activities of daily living (ADL) listed in the definition of an inability to perform an activity of daily living in this section, and is fully dependent on a caregiver to complete such ADLs; or

(2) Has a need for supervision, protection, or instruction on a continuous basis.

\* \* \* \* \*

■ 4. Revise § 71.20 to read as follows:

**§ 71.20 Eligible veterans and servicemembers.**

A veteran or servicemember is eligible for a Family Caregiver under this part if he or she meets the criteria in paragraph (a), (b), or (c) of this section, subject to the limitations set forth in such paragraphs.

(a) A veteran or servicemember is eligible for a Primary or Secondary Family Caregiver under this part if he or she meets all of the following requirements:

(1) The individual is either:

(i) A veteran; or

(ii) A member of the Armed Forces undergoing a medical discharge from the Armed Forces.

(2) The individual has a serious injury incurred or aggravated in the line of duty in the active military, naval, or air service:

(i) On or after September 11, 2001;

(ii) Effective on the date specified in a future **Federal Register** document, on or before May 7, 1975; or

(iii) Effective two years after the date specified in a future **Federal Register** document as described in paragraph (a)(2)(ii) of this section, after May 7, 1975 and before September 11, 2001.

(3) The individual is in need of personal care services for a minimum of six continuous months based on any one of the following:

(i) An inability to perform an activity of daily living; or

(ii) A need for supervision, protection, or instruction.

(4) It is in the best interest of the individual to participate in the program.

(5) Personal care services that would be provided by the Family Caregiver will not be simultaneously and regularly provided by or through another individual or entity.

(6) The individual receives care at home or will do so if VA designates a Family Caregiver.

(7) The individual receives ongoing care from a primary care team or will do so if VA designates a Family Caregiver.

(b) For one year beginning on October 1, 2020, a veteran or servicemember is eligible for a Primary or Secondary Family Caregiver under this part if he or she is a legacy participant.

(c) For one year beginning on October 1, 2020, a veteran or servicemember is eligible for a Primary or Secondary Family Caregiver under this part if he or she is a legacy applicant.

■ 5. Amend § 71.25:

■ a. By revising paragraph (a);

■ b. In paragraph (c)(1) introductory text, by removing the phrase “a VA primary care team” and adding in its place “VA”; and

■ c. By revising paragraphs (c)(1)(i) and (ii), (c)(2), (e), and (f); and

■ d. By removing the authority citation at the end of the section.

The revisions read as follows:

**§ 71.25 Approval and designation of Primary and Secondary Family Caregivers.**

(a) *Application requirement.* (1) Individuals who wish to be considered for designation by VA as Primary or Secondary Family Caregivers must submit a joint application, along with the veteran or servicemember.

Individuals interested in serving as Family Caregivers must be identified as such on the joint application, and no more than three individuals may serve as Family Caregivers at one time for an eligible veteran, with no more than one serving as the Primary Family Caregiver and no more than two serving as Secondary Family Caregivers.

(2)(i) Upon receiving such application, VA (in collaboration with the primary care team to the maximum extent practicable) will perform the evaluations required to determine the eligibility of the applicants under this part, and if eligible, determine the applicable monthly stipend amount under § 71.40(c)(4). Notwithstanding the first sentence, VA will not evaluate a veteran's or servicemember's eligibility under § 71.20 when a joint application is received to add a Secondary Family

Caregiver for an eligible veteran who has a designated Primary Family Caregiver.

(ii) Individuals who apply to be Family Caregivers must complete all necessary eligibility evaluations (along with the veteran or servicemember), education and training, and the initial home-care assessment (along with the veteran or servicemember) so that VA may complete the designation process no later than 90 days after the date the joint application was received by VA. If such requirements are not complete within 90 days from the date the joint application is received by VA, the joint application will be denied, and a new joint application will be required. VA may extend the 90-day period based on VA's inability to complete the eligibility evaluations, provide necessary education and training, or conduct the initial home-care assessment, when such inability is solely due to VA's action.

(3)(i) Except as provided in this paragraph, joint applications received by VA before October 1, 2020 will be evaluated by VA based on 38 CFR 71.15, 71.20, and 71.25 (2019). Notwithstanding the previous sentence, the term “joint application” as defined in § 71.15 applies to applications described in this paragraph.

(ii) Joint applications received by VA on or after October 1, 2020 will be evaluated by VA based on the provisions of this part in effect on or after October 1, 2020.

(A) VA will deny any joint application of an individual described in § 71.20(a)(2)(ii), if such joint application is received by VA before the date published in a future **Federal Register** document that is specified in such section. A veteran or servicemember seeking to qualify for the Program of Comprehensive Assistance for Family Caregivers pursuant to § 71.20(a)(2)(ii) should submit a joint application that is received by VA on or after the date published in a future **Federal Register** document that is specified in § 71.20(a)(2)(ii).

(B) VA will deny any joint application of an individual described in § 71.20(a)(2)(iii), if such joint application is received by VA before 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). A veteran or servicemember seeking to qualify for the Program of Comprehensive Assistance for Family Caregivers pursuant to § 71.20(a)(2)(iii) should submit a joint application that is received by VA on or after 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).

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

(i) Whether the applicant can communicate and understand the required personal care services and any specific instructions related to the care of the eligible veteran (accommodation for language or hearing impairment will be made to the extent possible and as appropriate); and

(ii) Whether the applicant will be capable of performing the required personal care services without supervision, in adherence with the eligible veteran's treatment plan in support of the needs of the eligible veteran.

(2) Complete caregiver training and demonstrate the ability to carry out the specific personal care services, core competencies, and additional care requirements.

\* \* \* \* \*

(e) *Initial home-care assessment.* VA will visit the eligible veteran's home to assess the eligible veteran's well-being and the well-being of the caregiver, as well as the caregiver's competence to provide personal care services at the eligible veteran's home.

(f) *Approval and designation.* VA will approve the joint application and designate Primary and/or Secondary Family Caregivers, as appropriate, if the applicable requirements of this part are met. Approval and designation is conditioned on the eligible veteran and designated Family Caregiver(s) remaining eligible for Family Caregiver benefits under this part, the Family Caregiver(s) providing the personal care services required by the eligible veteran, and the eligible veteran and designated Family Caregiver(s) complying with all applicable requirements of this part, including participating in reassessments pursuant to § 71.30 and wellness contacts pursuant to § 71.40(b)(2). Refusal to comply with any applicable requirements of this part will result in revocation from the program pursuant to § 71.45, Revocation and Discharge of Family Caregivers.

**§ 71.30 [Redesignated as § 71.35]**

■ 6. Redesignate § 71.30 as § 71.35.

■ 7. Add a new § 71.30 to read as follows:

**§ 71.30 Reassessment of Eligible Veterans and Family Caregivers.**

(a) Except as provided in paragraphs (b) and (c) of this section, the eligible veteran and Family Caregiver will be reassessed by VA (in collaboration with

the primary care team to the maximum extent practicable) on an annual basis to determine their continued eligibility for participation in PCAFC under this part. Reassessments will include consideration of whether the eligible veteran is unable to self-sustain in the community for purposes of the monthly stipend rate under § 71.40(c)(4)(i)(A). Reassessment may include a visit to the eligible veteran's home.

(b) Reassessments may occur more frequently than annually if a determination is made and documented by VA that more frequent reassessment is appropriate.

(c) Reassessments may occur on a less than annual basis if a determination is made and documented by VA that an annual reassessment is unnecessary.

(d) Failure of the eligible veteran or Family Caregiver to participate in any reassessment pursuant to this section will result in revocation pursuant to § 71.45, Revocation and Discharge of Family Caregivers.

(e)(1) If the eligible veteran meets the requirements of § 71.20(b) or (c) (*i.e.*, is a legacy participant or a legacy applicant), the eligible veteran and Family Caregiver will be reassessed by VA (in collaboration with the primary care team to the maximum extent practicable) within the one-year period beginning on October 1, 2020 to determine whether the eligible veteran meets the requirements of § 71.20(a). This reassessment may include a visit to the eligible veteran's home. If the eligible veteran meets the requirements of § 71.20(a), the reassessment will consider whether the eligible veteran is unable to self-sustain in the community for purposes of the monthly stipend rate under § 71.40(c)(4)(i)(A).

(2) Notwithstanding paragraph (e)(1) of this section, a reassessment will not be completed under paragraph (e)(1) if at some point before a reassessment is completed during the one-year period beginning on October 1, 2020 the individual no longer meets the requirements of § 71.20(b) or (c).

**§ 71.35 [Amended]**

■ 8. In newly redesignated § 71.35, remove the authority citation at the end of the section.

■ 9. Amend § 71.40 by revising paragraphs (b)(2), (c) introductory text, and (c)(4), adding paragraphs (c)(5) and (6), revising paragraph (d), and removing the authority citation at the end of the section.

The revisions and additions read as follows:

**§ 71.40 Caregiver benefits.**

\* \* \* \* \*

(b) \* \* \*

(2) Wellness contacts to review the eligible veteran's well-being, adequacy of personal care services being provided by the Family Caregiver(s), and the well-being of the Family Caregiver(s). This wellness contact will occur, in general, at a minimum of once every 120 days, and at least one visit must occur in the eligible veteran's home on an annual basis. Failure of the eligible veteran and Family Caregiver to participate in any wellness contacts pursuant to this paragraph will result in revocation pursuant to § 71.45, Revocation and Discharge of Family Caregivers.

\* \* \* \* \*

(c) *Primary Family Caregiver benefits.* VA will provide to Primary Family Caregivers all of the benefits listed in paragraphs (c)(1) through (6) of this section.

\* \* \* \* \*

(4) Primary Family Caregivers will receive a monthly stipend for each month's participation as a Primary Family Caregiver.

(i) *Stipend amount.* (A) Except as provided in paragraph (c)(4)(i)(C) of this section, if the eligible veteran meets the requirements of § 71.20(a), the Primary Family Caregiver's monthly stipend is the amount set forth in paragraph (c)(4)(i)(A)(1) or (2) of this section.

(1) The Primary Family Caregiver's monthly stipend is calculated by multiplying the monthly stipend rate by 0.625.

(2) If VA determines that the eligible veteran is unable to self-sustain in the community, the Primary Family Caregiver's monthly stipend is calculated by multiplying the monthly stipend rate by 1.00.

(B) Except as provided in paragraph (c)(4)(i)(C) of this section, for one year beginning on October 1, 2020, if the eligible veteran meets the requirements of § 71.20(b) or (c), (*i.e.*, is a legacy participant or a legacy applicant), the Primary Family Caregiver's monthly stipend is calculated based on the clinical rating in 38 CFR 71.40(c)(4)(i) through (iii) (2019) and the definitions applicable to such paragraphs under 38 CFR 71.15 (2019). If the sum of all of the ratings assigned is:

(1) 21 or higher, then the Primary Family Caregiver's monthly stipend is calculated by multiplying the monthly stipend rate by 1.00.

(2) 13 to 20, then the Primary Family Caregiver's monthly stipend is calculated by multiplying the monthly stipend rate by 0.625.

(3) 1 to 12, then the Primary Family Caregiver's monthly stipend is calculated by multiplying the monthly stipend rate by 0.25.

(C) For one year beginning on October 1, 2020, if the eligible veteran meets the requirements of § 71.20(a) and (b) or (c), the Primary Family Caregiver's monthly stipend is the amount the Primary Family Caregiver is eligible to receive under paragraph (c)(4)(i)(A) or (B) of this section, whichever is higher. If the higher monthly stipend rate is the amount the Primary Family Caregiver is eligible to receive under paragraph (c)(4)(i)(A) of this section, the stipend rate will be adjusted and paid in accordance with paragraph (c)(4)(ii)(C)(2)(i) of this section.

(D) Notwithstanding paragraphs (c)(4)(i)(A) through (C) of this section, for one year beginning on October 1, 2020, if the eligible veteran meets the requirements of § 71.20(b), the Primary Family Caregiver's monthly stipend 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 the Program of Comprehensive Assistance for Family Caregivers on such date) so long as the eligible veteran resides at the same address on record with the Program of Comprehensive Assistance for Family Caregivers as of the day before October 1, 2020. If the eligible veteran relocates to a different address, the stipend amount thereafter is determined pursuant to paragraph (c)(4)(i)(A), (B), or (C) of this section and adjusted in accordance with paragraph (c)(4)(ii)(B) of this section.

(ii) *Adjustments to stipend payments.* (A) Adjustments to stipend payments that result from OPM's updates to the General Schedule (GS) Annual Rate for grade 4, step 1 for the locality pay area in which the eligible veteran resides take effect prospectively following the date the update to such rate is made effective by OPM.

(B) Adjustments to stipend payments that result from the eligible veteran relocating to a new address are effective the first of the month following the month in which VA is notified that the eligible veteran has relocated to a new address. VA must receive notification within 30 days from the date of relocation. If VA does not receive notification within 30 days from the date of relocation, VA will seek to recover overpayments of benefits under this paragraph (c)(4) back to the latest date on which the adjustment would have been effective if VA had been notified within 30 days from the date of relocation, as provided in § 71.47.

(C) The Primary Family Caregiver's monthly stipend may be adjusted pursuant to the reassessment conducted by VA under § 71.30.

(1) If the eligible veteran meets the requirements of § 71.20(a) only (and does not meet the requirements of § 71.20(b) or (c)), the Primary Family Caregiver's monthly stipend is adjusted as follows:

(i) In the case of a reassessment that results in an increase in the monthly stipend payment, the increase takes effect as of the date of the reassessment.

(ii) In the case of a reassessment that results in a decrease in the monthly stipend payment, the decrease takes effect as of the effective date provided in VA's final notice of such decrease to the eligible veteran and Primary Family Caregiver. The effective date of the decrease will be no earlier than 60 days after VA provides advanced notice of its findings to the eligible veteran and Primary Family Caregiver.

(2) If the eligible veteran meets the requirements of § 71.20(b) or (c), the Primary Family Caregiver's monthly stipend may be adjusted as follows:

(i) In the case of a reassessment that results in an increase in the monthly stipend payment, the increase takes effect as of the date of the reassessment. The Primary Family Caregiver will also be paid the difference between the amount under paragraph (c)(4)(i)(A) of this section that the Primary Family Caregiver is eligible to receive and the amount the Primary Family Caregiver was eligible to receive under paragraph (c)(4)(i)(B) or (D) of this section, whichever the Primary Family Caregiver received for the time period beginning on October 1, 2020 up to the date of the reassessment, based on the eligible veteran's address on record with the Program of Comprehensive Assistance for Family Caregivers on the date of the reassessment and the monthly stipend rate on such date. If there is more than one reassessment for an eligible veteran during the one-year period beginning on October 1, 2020, the retroactive payment described in the previous sentence applies only if the first reassessment during the one-year period beginning on October 1, 2020 results in an increase in the monthly stipend payment, and only as the result of the first reassessment during the one-year period.

(ii) In the case of a reassessment that results in a decrease in the monthly stipend payment and the eligible veteran meets the requirements of § 71.20(a), the new stipend amount under paragraph (c)(4)(i)(A) of this section takes effect as of the effective date provided in VA's final notice of such decrease to the eligible veteran and Primary Family Caregiver. The effective date of the decrease will be no earlier than 60 days after the date that is one year after October 1, 2020. On the date

that is one year after October 1, 2020, VA will provide advanced notice of its findings to the eligible veteran and Primary Family Caregiver.

*Note to paragraph (c)(4)(ii)(C)(2):* If an eligible veteran who meets the requirements of § 71.20(b) or (c) is determined, pursuant to a reassessment conducted by VA under § 71.30, to not meet the requirements of § 71.20(a), the monthly stipend payment will not be increased under paragraph (c)(4)(ii)(C)(2)(i) of this section or decreased under paragraph (c)(4)(ii)(C)(2)(ii) of this section. Unless the Family Caregiver is revoked or discharged under § 71.45 before the date that is 60 days after the date that is one year after October 1, 2020, the effective date for discharge of the Family Caregiver of a legacy participant or legacy applicant under § 71.45(b)(1)(ii) will be no earlier than 60 days after the date that is one year after October 1, 2020. On the date that is one year after October 1, 2020, VA will provide advanced notice of its findings to the eligible veteran and Family Caregiver.

(D) Adjustments to stipend payments for the first month will take effect on the date specified in paragraph (d) of this section. Stipend payments for the last month will end on the date specified in § 71.45.

(iii) *No employment relationship.* Nothing in this section shall be construed to create an employment relationship between the Secretary and an individual in receipt of assistance or support under this part.

(iv) *Periodic assessment.* In consultation with other appropriate agencies of the Federal government, VA shall periodically assess whether the monthly stipend rate meets the requirements of 38 U.S.C. 1720G(a)(3)(C)(ii) and (iv). If VA determines that adjustments to the monthly stipend rate are necessary, VA shall make such adjustments through future rulemaking.

(5) Primary Family Caregivers are eligible for financial planning services as that term is defined in § 71.15. Such services will be provided by entities authorized pursuant to any contract entered into between VA and such entities.

(6) Primary Family Caregivers are eligible for legal services as that term is defined in § 71.15. Such services will be provided by entities authorized pursuant to any contract entered into between VA and such entities.

(d) *Effective date of benefits under the Program of Comprehensive Assistance for Family Caregivers.* Except for paragraphs (b)(6) and (c)(3) and (4) of this section, caregiver benefits under

paragraphs (b) and (c) of this section are effective upon approval and designation under § 71.25(f). Caregiver benefits under paragraphs (b)(6) and (c)(3) and (4) are effective on the latest of the following dates:

(1) The date the joint application that resulted in approval and designation of the Family Caregiver is received by VA.

(2) The date the eligible veteran begins receiving care at home.

(3) The date the Family Caregiver begins providing personal care services to the eligible veteran at home.

(4) In the case of a new Family Caregiver applying to be the Primary Family Caregiver for an eligible veteran, the day after the effective date of revocation or discharge of the previous Primary Family Caregiver for the eligible veteran (such that there is only one Primary Family Caregiver designated for an eligible veteran at one time).

(5) In the case of a new Family Caregiver applying to be a Secondary Family Caregiver for an eligible veteran who already has two Secondary Family Caregivers approved and designated by VA, the day after the effective date of revocation or discharge of a previous Secondary Family Caregiver for the eligible veteran (such that there are no more than two Secondary Family Caregivers designated for an eligible veteran at one time).

(6) In the case of a current or previous Family Caregiver reapplying with the same eligible veteran, the day after the date of revocation or discharge under § 71.45, or in the case of extended benefits under § 71.45(b)(1)(iii), (b)(2)(iii), (b)(3)(iii)(A) or (B), and (b)(4)(iv), the day after the last date on which such Family Caregiver received caregiver benefits.

(7) The day after the date a joint application is denied.

■ 10. Revise § 71.45 to read as follows:

**§ 71.45 Revocation and discharge of Family Caregivers.**

(a) *Revocation of the Family Caregiver*—(1) *Bases for revocation of the Family Caregiver*—(i) *For cause*. VA will revoke the designation of a Family Caregiver for cause when VA determines any of the following:

(A) The Family Caregiver or eligible veteran committed fraud under this part;

(B) The Family Caregiver neglected, abused, or exploited the eligible veteran;

(C) Personal safety issues exist for the eligible veteran that the Family Caregiver is unwilling to mitigate;

(D) The Family Caregiver is unwilling to provide personal care services to the eligible veteran or, in the case of the

Family Caregiver's temporary absence or incapacitation, fails to ensure (if able to) the provision of personal care services to the eligible veteran.

(ii) *Noncompliance*. Except as provided in paragraph (f) of this section, VA will revoke the designation of a Family Caregiver when the Family Caregiver or eligible veteran is noncompliant with the requirements of this part. Noncompliance means:

(A) The eligible veteran does not meet the requirements of § 71.20(a)(5), (6), or (7);

(B) The Family Caregiver does not meet the requirements of § 71.25(b)(2);

(C) Failure of the eligible veteran or Family Caregiver to participate in any reassessment pursuant to § 71.30;

(D) Failure of the eligible veteran or Family Caregiver to participate in any wellness contact pursuant to § 71.40(b)(2); or

(E) Failure to meet any other requirement of this part except as provided in paragraph (b)(1) or (2) of this section.

(iii) *VA error*. Except as provided in § 71.45(f), VA will revoke the designation of a Family Caregiver if the Family Caregiver's approval and designation under this part was authorized as a result of an erroneous eligibility determination by VA.

(2) *Revocation date*. All caregiver benefits will continue to be provided to the Family Caregiver until the date of revocation.

(i) In the case of revocation based on fraud committed by the Family Caregiver or eligible veteran under paragraph (a)(1)(i)(A) of this section, the date of revocation will be the date the fraud began. If VA cannot identify when the fraud began, the date of revocation will be the earliest date that the fraud is known by VA to have been committed, and no later than the date on which VA identifies that fraud was committed.

(ii) In the case of revocation based on paragraphs (a)(1)(i)(B) through (D) of this section, the date of revocation will be the date VA determines the criteria in any such paragraph has been met.

(iii) In the case of revocation based on noncompliance under paragraph (a)(1)(ii) of this section, revocation takes effect as of the effective date provided in VA's final notice of such revocation to the eligible veteran and Family Caregiver. The effective date of revocation will be no earlier than 60 days after VA provides advanced notice of its findings to the eligible veteran and Family Caregiver.

(iv) In the case of revocation based on VA error under paragraph (a)(1)(iii) of this section, the date of revocation will

be the date the error was made. If VA cannot identify when the error was made, the date of revocation will be the earliest date that the error is known by VA to have occurred, and no later than the date on which VA identifies that the error occurred.

(3) *Continuation of benefits*. In the case of revocation based on VA error under paragraph (a)(1)(iii) of this section, caregiver benefits will continue for 60 days after the date of revocation unless the Family Caregiver opts out of receiving such benefits. Continuation of benefits under this paragraph will be considered an overpayment and VA will seek to recover overpayment of such benefits as provided in § 71.47.

(b) *Discharge of the Family Caregiver*—(1) *Discharge due to the eligible veteran*—(i) *Bases for discharge*. Except as provided in paragraph (f) of this section, the Family Caregiver will be discharged from the Program of Comprehensive Assistance for Family Caregivers when VA determines any of the following:

(A) Except as provided in paragraphs (a)(1)(ii)(A) and (b)(1)(i)(B) of this section, the eligible veteran does not meet the requirements of § 71.20 because of improvement in the eligible veteran's condition or otherwise; or

(B) Death or institutionalization of the eligible veteran. Note: VA must receive notification of death or institutionalization of the eligible veteran as soon as possible but not later than 30 days from the date of death or institutionalization. Notification of institutionalization must indicate whether the eligible veteran is expected to be institutionalized for 90 or more days from the onset of institutionalization.

(ii) *Discharge date*. (A) In the case of discharge based on paragraph (b)(1)(i)(A) of this section, the discharge takes effect as of the effective date provided in VA's final notice of such discharge to the eligible veteran and Family Caregiver. The effective date of discharge will be no earlier than 60 days after VA provides advanced notice of its findings to the eligible veteran and Family Caregiver that the eligible veteran does not meet the requirements of § 71.20.

(B) For discharge based on paragraph (b)(1)(i)(B) of this section, the date of discharge will be the earliest of the following dates, as applicable:

(1) Date of death of the eligible veteran.

(2) Date that institutionalization begins, if it is determined that the eligible veteran is expected to be institutionalized for a period of 90 days or more.

(3) Date of the 90th day of institutionalization.

(iii) *Continuation of benefits.*

Caregiver benefits will continue for 90 days after the date of discharge.

(2) *Discharge due to the Family Caregiver—(i) Bases for discharge.*

Except as provided in paragraph (f) of this section, the Family Caregiver will be discharged from the Program of Comprehensive Assistance for Family Caregivers due to the death or institutionalization of the Family Caregiver. Note: VA must receive notification of death or institutionalization of the Family Caregiver as soon as possible but not later than 30 days from the date of death or institutionalization. Notification of institutionalization must indicate whether Family Caregiver is expected to be institutionalized for 90 or more days from the onset of institutionalization.

(ii) *Discharge date.* The date of discharge will be the earliest of the following dates, as applicable:

(A) Date of death of the Family Caregiver.

(B) Date that the institutionalization begins, if it is determined that the Family Caregiver is expected to be institutionalized for a period of 90 days or more.

(C) Date of the 90th day of institutionalization.

(iii) *Continuation of benefits.*

Caregiver benefits will continue for 90 days after date of discharge in paragraph (b)(2)(ii)(B) or (C) of this section.

(3) *Discharge of the Family Caregiver by request of the Family Caregiver—(i) Request for discharge.*

Except as provided in paragraph (f) of this section, the Family Caregiver will be discharged from the Program of Comprehensive Assistance for Family Caregivers if a Family Caregiver requests discharge of his or her caregiver designation. The request may be made verbally or in writing and must provide the present or future date of discharge. If the discharge request is received verbally, VA will provide the Family Caregiver written confirmation of receipt of the verbal discharge request and the effective date of discharge. VA will notify the eligible veteran verbally and in writing of the request for discharge and the effective date of discharge.

(ii) *Discharge date.* The date of discharge will be the present or future date provided by the Family Caregiver or the date of the Family Caregiver's request for discharge if the Family

Caregiver does not provide a date. If the request does not include an identified date of discharge, VA will contact the Family Caregiver to request a date. If unable to successfully obtain this date, discharge will be effective as of the date of the request.

(iii) *Continuation of benefits.* (A)

Except as provided in paragraph (b)(3)(iii)(B) of this section, caregiver benefits will continue for 30 days after the date of discharge.

(B) If the Family Caregiver requests discharge due to domestic violence (DV) or intimate partner violence (IPV) perpetrated by the eligible veteran against the Family Caregiver, caregiver benefits will continue for 90 days after the date of discharge when any of the following can be established:

(1) The issuance of a protective order, to include interim, temporary and/or final protective orders, to protect the Family Caregiver from DV or IPV perpetrated by the eligible veteran.

(2) A police report indicating DV or IPV perpetrated by the eligible veteran against the Family Caregiver or a record of an arrest related to DV or IPV perpetrated by the eligible veteran against the Family Caregiver; or

(3) Documentation of disclosure of DV or IPV perpetrated by the eligible veteran against the Family Caregiver to a treating provider (e.g., physician, dentist, psychologist, rehabilitation therapist) of the eligible veteran or Family Caregiver, Intimate Partner Violence Assistance Program (IPVAP) Coordinator, therapist or counselor.

(4) *Discharge of the Family Caregiver by request of the eligible veteran or eligible veteran's surrogate—(i) Request for discharge.*

Except as provided in paragraph (f) of this section, the Family Caregiver will be discharged from the Program of Comprehensive Assistance for Caregivers if an eligible veteran or the eligible veteran's surrogate requests discharge of the Family Caregiver. The discharge request may be made verbally or in writing and must express an intent to remove the Family Caregiver's approval and designation. If the discharge request is received verbally, VA will provide the eligible veteran written confirmation of receipt of the verbal discharge request and effective date of discharge. VA will notify the Family Caregiver verbally and in writing of the request for discharge and effective date of discharge.

(ii) *Discharge date.* The date of discharge will be the present or future date of discharge provided by the eligible veteran or eligible veteran's surrogate. If the request does not provide a present or future date of discharge, VA will ask the eligible

veteran or eligible veteran's surrogate to provide one. If unable to successfully obtain this date, discharge will be effective as of the date of the request.

(iii) *Rescission.* VA will allow the eligible veteran or eligible veteran's surrogate to rescind the discharge request and have the Family Caregiver reinstated if the rescission is made within 30 days of the date of discharge. If the eligible veteran or eligible veteran's surrogate expresses a desire to reinstate the Family Caregiver more than 30 days from the date of discharge, a new joint application is required.

(iv) *Continuation of benefits.*

Caregiver benefits will continue for 30 days after the date of discharge.

(c) *Safety and welfare.* If VA suspects that the safety of the eligible veteran is at risk, then VA may suspend the caregiver's responsibilities, and facilitate appropriate referrals to protective agencies or emergency services if needed, to ensure the welfare of the eligible veteran, prior to discharge or revocation.

(d) *Overpayments.* VA will seek to recover overpayments of benefits provided under this section as provided in § 71.47.

(e) *Transition and bereavement counseling.* VA will, if requested and applicable, assist the Family Caregiver in transitioning to alternative health care coverage and mental health services. In addition, in cases of death of the eligible veteran, bereavement counseling may be available under 38 U.S.C. 1783.

(f) *Multiple bases for revocation or discharge.* In the instance that a Family Caregiver may be both discharged pursuant to any of the criteria in paragraph (b) of this section and have his or her designation revoked pursuant to any of the criteria in paragraph (a) of this section, the Family Caregiver's designation will be revoked pursuant to paragraph (a). In the instance that the designation of a Family Caregiver may be revoked under paragraph (a)(1)(i) and paragraph (a)(1)(ii) or (iii) of this section, the designation of the Family Caregiver will be revoked pursuant to paragraph (a)(1)(i). In the instance that the designation of a Family Caregiver may be revoked under paragraphs (a)(1)(ii) and (iii) of this section, the designation of the Family Caregiver will be revoked pursuant to paragraph (a)(1)(iii). In the instance that a Family Caregiver may be discharged under paragraph (b)(1), (2), (3), or (4) of this section, the Family Caregiver will be discharged pursuant to the paragraph most favorable to the Family Caregiver.

- 11. Add § 71.47 to read as follows:

**§ 71.47 Collection of overpayment.**

VA will collect overpayments as defined in § 71.15 pursuant to the Federal Claims Collection Standards.

**§ 71.50 [Amended]**

- 12. Amend § 71.50 by removing the statutory authority citation at the end of the section.

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