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B-333496

August 18, 2021

The Honorable Jon Tester
Chairman
The Honorable Jerry Moran
Ranking Member
Committee on Veterans' Affairs
United States Senate

The Honorable Mark Takano
Chairman
The Honorable Mike Bost
Ranking Member
Committee on Veterans' Affairs
House of Representatives

Subject: *Department of Veterans Affairs: Presumptive Service Connection for Respiratory Conditions Due to Exposure to Particulate Matter*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Veterans Affairs (VA) entitled "Presumptive Service Connection for Respiratory Conditions Due to Exposure to Particulate Matter" (RIN: 2900-AR25). We received the rule on August 5, 2021. It was published in the *Federal Register* as an interim final rule on August 5, 2021. 86 Fed. Reg. 42724. The effective date is August 5, 2021.

According to VA, it is issuing this interim final rule (IFR) to amend its adjudication regulations to establish presumptive service connection for three chronic respiratory health conditions (asthma, rhinitis, and sinusitis) to include rhinosinusitis, in association with presumed exposures to fine, particulate matter. VA stated that these presumptions would apply to veterans with a qualifying period of service, that is those who served on active military, naval, or air service in the Southwest Asia theater of operations during the Persian Gulf War (hereafter Gulf War), as well as in Afghanistan, Syria, Djibouti, or Uzbekistan, on or after September 19, 2001, during the Gulf War. VA also stated that this amendment is necessary to provide expeditious health care, services, and benefits to Gulf War Veterans who were potentially exposed to fine, particulate matter associated with deployment to the Southwest Asia theater of operations, as well as Afghanistan, Syria, Djibouti, and Uzbekistan. VA stated further that the intended effect of this amendment is to address the needs and concerns of Gulf War Veterans and service members who have served and continue to serve in these locations as military operations in the Southwest Asia theater of operations have been ongoing from August 1990 until the present time. According to VA, neither Congress nor the President has established an end date for the Gulf War. Therefore, VA stated, to provide immediate health care, services, and benefits to current and future Gulf War Veterans who may be affected by particulate matter due to their military service, it intends to provide presumptive service connection for the chronic disabilities of asthma, rhinitis, and sinusitis, to include rhinosinusitis, as well as a presumption of exposure to fine, particulate matter. VA asserts this will ease the evidentiary burden of Gulf War Veterans

who file claims with VA for these three conditions, which are among the most commonly claimed respiratory conditions.

The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). The 60-day delay in effective date can be waived, however, if the agency finds for good cause that delay is impracticable, unnecessary, or contrary to the public interest, and the agency incorporates a statement of the findings and its reasons in the rule issued. 5 U.S.C. §§ 553(b)(3)(B), 808(2). Here, although VA did not specifically mention CRA's 60-day delay in effective date requirement, VA stated that it has found that there is good cause to waive notice and comment procedures and the delayed effective date under sections 553(b)(3)(B) and 553(d)(3) of the Administrative Procedure Act. In sum, VA asserts that it is necessary to immediately implement this IFR in order to carry out the VA Secretary's decision to address the needs of service members and veterans who have been exposed to airborne hazards, that is, particulate matter, due to their service in the Southwest Asia theater of operations, Afghanistan, Syria, Djibouti, or Uzbekistan. Based on this assertion, VA stated that a delay in the implementation of this IFR would be contrary to the public interest.

Enclosed is our assessment of VA's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shari Brewster, Assistant General Counsel, at (202) 512-6398.



Shirley A. Jones
Managing Associate General Counsel

Enclosure

cc: Luvenia (Fran) Potts
Office of Regulation Policy and Management (00REG)
Office of General Counsel
Department of Veterans Affairs

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF VETERANS AFFAIRS
ENTITLED
“PRESUMPTIVE SERVICE CONNECTION FOR RESPIRATORY CONDITIONS
DUE TO EXPOSURE TO PARTICULATE MATTER”
(RIN: 2900-AR25)

(i) Cost-benefit analysis

The Department of Veterans Affairs (VA) prepared a regulatory impact analysis in a separate supporting document associated with this interim final rule (IFR). VA, *AR25-Interim Final-Impact Analysis-Presumptive Service Connection for Respiratory Conditions Due to Exposure to Particulate Matter* (Aug. 5, 2021), available at <https://www.regulations.gov/document/VA-2021-VBA-0015-0002>. Among other things, the regulatory impact analysis included a summary of the cost and benefits of this IFR. VA asserts that the benefits of this IFR include: access to immediate health care, services, and benefits, such as disability compensation and life insurance, to current and future Gulf War Veterans who may be affected by particulate matter due to their military service, and it will ease the evidentiary burden of Gulf War Veterans who file claims with VA for these most commonly claimed respiratory conditions associated with such exposure.

VA has determined that there are both transfers and costs associated with this IFR. The transfers are estimated to be \$129.0 million in fiscal year (FY) 2021 (2 months only in 2021), \$4.8 billion over 5 years, and \$11.6 billion over 10 years. VA also determined that the costs are estimated to be \$10.3 million in FY 2021 (2 months only in FY 2021), \$479.2 million over 5 years, and \$655.5 million over 10 years. Finally, VA stated that the total budgetary impact is estimated to be \$139.5 million in FY 2021 (2 months only in FY 2021), \$5.3 billion over 5 years, and \$12.2 billion over 10 years.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603–605, 607, and 609

The Secretary of the VA certified that this IFR will not have a significant economic impact on a substantial number of small entities.

(iii) Agency actions relevant to sections 202–205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532–1535

VA stated that this IFR will not 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.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

VA stated that it found that there is good cause to publish this IFR without prior opportunity for comment and to publish this rule with an immediate effective date. According to VA, it is necessary to immediately implement this IFR in order to carry out the VA Secretary's decision to address the needs of service members and veterans who have been exposed to airborne hazards, that is, particulate matter, due to their service in the Southwest Asia theater of operations, Afghanistan, Syria, Djibouti, or Uzbekistan. VA stated further that delaying the implementation of this IFR would be contrary to the public interest because imposing further delay on receipt of benefits would place at risk the welfare and health of claimants.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501–3520

According to VA, this IFR contains no provisions constituting a collection of information under PRA.

Statutory authorization for the rule

VA promulgated this IFR pursuant to section 501 of title 38, United States Code.

Executive Order No. 12866 (Regulatory Planning and Review)

VA stated that the Office of Management and Budget's Office of Information and Regulatory Affairs has determined that this IFR is an economically significant regulatory action under the Order.

Executive Order No. 13132 (Federalism)

In its submission to us, VA indicated that it did not prepare the analysis provided for under the Order.