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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 875

RIN 3206-AJ71

Federal Long Term Care Insurance Regulation

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing the final regulations that set forth rules for the administration of the Federal Long Term Care Insurance Program (FLTCIP).

DATES: *Effective Date:* May 27, 2005.

FOR FURTHER INFORMATION CONTACT: Anne Easton, (202) 606-0770, or aseaston@opm.gov.

SUPPLEMENTARY INFORMATION: On February 4, 2003, interim regulations (68 FR 5530) governing the Federal Long Term Care Insurance Program (FLTCIP) became effective. There was a 60-day comment period. Nine comments were received in all regarding the regulations.

One commenter suggested that OPM revise its regulations to include information and procedures relating to other Federal statutes and regulations. OPM declines to do so. These regulations are for the purpose of providing information and guidance regarding the FLTCIP and do not purport to address the applicability or inapplicability of other Federal statutes or regulations to the FLTCIP.

Two commenters suggested that we broaden the definition of “qualified relative” to include domestic partners of Federal employees. We have determined that at this time we are not going to add any additional groups to those defined in statute.

Five commenters requested that we delete or modify § 875.407, which states that the Carrier determines the

insurability of all applicants and that the Carrier’s decision may not be appealed to OPM. They state that the insurance underwriting and the Carrier-determined criteria are not consistent with the intent of the FLTCIP statute. However, we believe that Congressional intent is clear upon reading of the statute. Section 9002(e)(3) of title 5, United States Code, specifically states that “(n)othing in this chapter shall be considered to require that long-term care insurance coverage be guaranteed to an eligible individual.”

Our intent in administering this Program is to offer coverage to eligible individuals but also to maintain competitive premiums. To guarantee coverage to all eligible individuals or all members of the workforce, regardless of their health, would require significantly higher premiums than are now being charged. This could jeopardize the viability of the Program as the more healthy individuals may choose to purchase their coverage elsewhere.

Four commenters requested that OPM enact an appeal process for insurability decisions made by the Carrier. OPM believes the current process ensures that individuals with adequate training are able to conduct the proper review of appeals. In addition, appeals that go beyond the internal review processes of Long Term Care Partners are handled by an independent, third party vendor, approved by OPM. We believe it is in the best interest of the Federal Long Term Care Insurance Program to leave insurability decisions to trained underwriters, as we do with the Federal Employees’ Group Life Insurance Program.

One commenter suggested that we change § 875.104(c) to clarify the enrollee’s right to appeal, specifically clarifying that any appeal of the Carrier’s reconsideration decision is to be made directly to the Carrier and not OPM. We agree that this clarification is helpful, and are making the change. The same commenter also suggested that we change the term “misconduct” in § 875.210(b) (1) to “gross misconduct.” We decline to do so, since relevant Federal law and regulations refer to and describe “misconduct,” not “gross misconduct.”

We are also taking this opportunity to make several minor changes and clarifications to the regulation.

We are clarifying in § 875.101 the definition of “Actively at Work.” We are broadening paragraph (1)(i) of the definition in two areas. The interim regulations stated that to be considered actively at work, you must be reporting for work “at your usual place of employment or other location to which Government business requires you to travel.” We are clarifying the language to ensure that a day spent at a telecommuting location counts as reporting for work. Also, the interim regulations did not specifically state that the requirement to be reporting for work is met with one-half day of active work, although this is how the requirement has been administered. The new language makes this clear.

In addition, we are removing paragraph (1)(iii), which stated that any type of leave or absence from work does not count as being actively at work (except that an alternative work schedule’s scheduled day off does count as a day actively at work). This deletion means that an alternative work schedule’s scheduled day off will not count as a day actively at work. It is treated just as a day on any other type of leave would be treated; that is, a day not actively at work. However, to offset this change we are liberalizing the actively at work requirement in § 875.404(b)(2) to give employees an entire week, rather than one day, to meet the requirement. With that change, paragraph (b)(2)(iii) became redundant to paragraph (b)(2)(i); thus we deleted the entire paragraph for clarity’s sake.

When the interim regulations were published, the FLTCIP law specifically excluded all District of Columbia employees from participation, even though some are eligible for FEHB coverage. The regulations made this exclusion clear. However, since that time, Public Law 108-7 went into effect. Section 138(a) of the law makes employees and annuitants of the D.C. Courts (and their qualified relatives) eligible to apply for insurance under the Program and we held an Open Season for them. We would have changed § 875.201(a)(1) to indicate that these groups became eligible to apply for insurance under the Program. However, later in 2003, Congress enacted Public Law 108-136, the National Defense Authorization Act, which included new provisions for the Federal Long Term

Care Insurance Program in section 561 of that law.

Section 561 of that law amends Section 9001(2)(A) of title 5, United States Code. Three additional groups, and their qualified relatives, are now eligible to apply for insurance under the Program:

- DC Government employees and retirees who were first employed by the DC Government before October 1, 1987,
 - Separated Federal employees with title to a deferred annuity, even if they aren't yet receiving that annuity, and
 - Retired "grey" reservists, even if they are not receiving retirement pay.
- The previous addition (employees and annuitants of the DC Courts) made by Public Law 108-7 was, in effect, superceded. (However, those DC Courts individuals hired before October 1, 1987 are added back to the eligible population by Public Law 108-136.)

Another change occurred in legislation (Pub. L. 107-314) giving the Secretary of Defense the authority to determine that employees of a Non-Appropriated Fund (NAF) instrumentality are eligible to apply for insurance under the Federal Program. In § 875.201(a) we are adding language to treat eligible NAF employees and retirees the same as Federal civilian employees or retirees, as the case may be, for this Part.

Notwithstanding our ability to reflect the addition of groups that have been added by congressional action this past year, it has become clear that the regulations do not easily keep up with these legislative changes. Therefore, § 101, "workforce member" is being amended to make it clear that when a new group is added by law it is not necessary to amend the regulations to reflect this change. We are changing applicable references to Federal civilian and Postal employees and members of the uniformed services throughout the regulations to "active workforce member." This is to reflect the likelihood in the future of the addition of other groups. The changes in the wording occur in the table of contents and in §§ 101, 201, 204, 206, 211, 404, 405, and 410.

We are changing § 875.208 pertaining to eligibility rules with respect to qualified relatives of deceased individuals. The adult child of a Federal civilian survivor annuitant is considered to be a qualified relative who can apply for coverage, as is the current spouse of that survivor. But this is not the case for qualified relatives of the surviving spouse of a deceased member or a deceased retired member of the uniformed services who is receiving

a survivor annuity. Neither their adult children nor their current spouses are considered qualified relatives. We are changing the regulation to extend the same eligibility status to all adult children and current spouses of surviving spouses receiving an annuity, regardless of whether this is based on civilian or uniformed service status.

We are also adding a subsection (c) to § 402 to reflect that we provide an Open Season to employees of newly eligible groups that have been added to FLTCIP. Traditionally, this is a 60-day period where there is abbreviated underwriting (equivalent to what was done in 2002 when the Program first became available) for those active workforce members of the new group.

We are clarifying § 875.403 to state that there are two exceptions to the requirement for full underwriting outside of an open season. Those exceptions are described in § 875.206 and § 875.405 and are for new and newly eligible employees and their spouses, new and newly eligible active members of the uniformed services and their spouses, and the newly married spouses of eligible employees and active members of the uniformed services. They can apply with abbreviated underwriting within 60 days after becoming eligible.

As mentioned previously, we are changing the actively at work requirement in § 875.404(b) (2). An active workforce member who submits an abbreviated underwriting application must now be actively at work at least 1 day during the calendar week immediately before the week that contains the person's original effective date. Interim regulations required that the person be actively at work on the original effective date. If that date fell on a weekend or holiday, the person had to be actively at work on the last workday before that date for coverage to become effective. This change will make it easier for employees to meet the actively at work requirement and should result in fewer postponements of coverage effective dates.

E.O. 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it affects only Federal, Postal and D.C. Government employees and annuitants, active members of the uniformed services, retired members of

the uniformed services, their qualified relatives, and the FLTCIP carrier(s).

List of Subjects in 5 CFR Part 875

Administrative practices and procedures, Employee benefit plans, Government contracts, Government employees, Health insurance, Military personnel, Organization and functions, Retirement.

U.S. Office of Personnel Management.

Dan G. Blair,
Acting Director.

- Accordingly, the interim rule establishing 5 CFR part 875 which was published at 68 FR 5530 on February 4, 2003, is adopted as a final rule with the following changes:

PART 875—FEDERAL LONG TERM CARE INSURANCE PROGRAM

- 1. The authority citation for part 875 continues to read as follows:

Authority: 5 U.S.C. 9008.

- 2. Amend § 875.101 by:
 - a. Remove the words "Federal civilian or Postal employee" wherever they appear in the section and add, in their place, the words "active workforce member".
 - b. Revise the definition of *Actively at work* to read as follows; and
 - c. Revise the definition of *Workforce member* to read as follows:

§ 875.101 Definition.

* * * * *

Actively at work means:

(1) That as an active workforce member other than a member of the uniformed services you meet all of the following conditions:

- (i) You are reporting for work at an approved work location and you work at least one-half of your regularly scheduled hours for that day; and
- (ii) You are able to perform all the usual and customary duties of your employment on your regular work schedule.

(2) For a member of the uniformed services, that you are on active duty and are physically able to perform the duties of your position.

* * * * *

Workforce member means a Federal civilian or Postal employee, member of the uniformed services, Federal annuitant, retired member of the uniformed services, or member of any other eligible group, as defined in section 9001 of title 5, United States Code. An active workforce member is one who is currently employed or is on active duty.

■ 3. Amend § 875.104 by revising the first sentence of paragraph (c) to read as follows:

§ 875.104 What are the steps required to resolve a dispute involving benefit eligibility or payment of a claim?

* * * * *

(c) If the Carrier upholds its denial (or does not respond within 60 days), you have the right to appeal its reconsideration decision directly to the Carrier.* * *

* * * * *

■ 4. Amend § 875.201 by adding a new sentence at the end of paragraph (a)(1) and by adding a new paragraph (a)(3) to read as follows:

§ 875.201 Am I eligible as a Federal civilian or Postal Employee?

(a) * * *

(1) * * * There is a related exception, however: D.C. government employees and retirees who were first employed by the D.C. government before October 1, 1987 are eligible to apply for coverage.

* * * * *

(3) If you are a Non-Appropriated Fund (NAF) employee or retiree you are eligible to apply when the Secretary of Defense determines such eligibility for the NAF instrumentality that employs you, and you will be treated the same as a Federal civilian employee or retiree (as applicable) under this Part.

* * * * *

■ 5. Amend § 875.202 by revising the last sentence to read as follows:

§ 875.202 Am I eligible as a Federal annuitant?

* * * Separated Federal employees with title to a deferred annuity may apply for coverage, even if they are not yet receiving that annuity.

■ 6. Amend § 875.205 by adding a paragraph (c) to read as follows:

§ 875.205 Am I eligible as a retired member of the uniformed services?

* * * * *

(c) You are eligible to apply for coverage as a retired (“grey”) reservist, even if not yet receiving retirement pay.

■ 7. Amend § 875.206 by:

■ a. Remove the words “Federal civilian or Postal employee or member of the uniformed service” wherever they appear in the section and add, in their place, “active workforce member”; and

■ b. Revise the section title and paragraphs (a) and (c) to read as follows:

§ 875.206 As a new active workforce member when may I apply?

(a) As a new, newly eligible, or returning active workforce member, you may apply as follows:

(1) If you are a new active workforce member entering a position that conveys eligibility, you may apply for coverage within 60 days after becoming eligible.

(2) If you are entering a position that conveys eligibility as an active workforce member from a position that did not convey eligibility, you may apply for coverage within 60 days after becoming eligible.

(3) If you return to active service after a break in service of 180 days or more to a position that conveys eligibility, you may apply for coverage within 60 days after becoming eligible.

* * * * *

(c) The underwriting requirements that will be required will be those applicable to active workforce members and their spouses during the last open season for enrollment before the date of your application.

* * * * *

■ 8. Amend § 875.208 by adding a new sentence at the end of the paragraph to read as follows:

§ 875.208 May I apply as a qualified relative if the person on whom I am basing my eligibility status has died?

* * * In this case, your adult children and your current spouse are also considered to be qualified relatives.

■ 9. Revise § 875.211 to read as follows:

§ 875.211 What happens if my eligibility status changes after I submit my application?

(a) If you applied as an active workforce member, and separate from service under the MRA+10 provisions of 5 U.S.C. 8412(g), or retire after you submit an application for coverage, but before your coverage becomes effective, you must reapply as an annuitant and submit to full underwriting requirements.

(b) If you applied as an active workforce member, and otherwise separate from service, but you are a qualified relative of another workforce member, you must reapply based on the additional underwriting requirements specified for that type of qualified relative.

■ 10. Amend § 875.402 by adding a new paragraph (c) to read as follows:

§ 875.402 When will open seasons be held?

* * * * *

(c) In situations where new eligibility groups are added to the Program, and OPM determines that it is appropriate to have an open season, OPM will provide notice and set the requirements for a special open season limited to those eligible individuals.

■ 11. Amend § 875.403 by adding a new sentence at the end of the paragraph to read as follows:

§ 875.403 May I apply for coverage outside of an open season?

* * * The only exceptions to the full underwriting requirements outside of an open season are described in § 875.206 and § 875.405.

■ 12. Amend § 875.404 by revising paragraph (b) (2) to read as follows:

§ 875.404 What is the effective date of coverage?

* * * * *

(b) * * *

(2) If you are an active workforce member and you are applying for coverage under abbreviated underwriting, you also must be actively at work at least 1 day during the calendar week immediately before the week which contains your coverage effective date for your coverage to become effective. You must inform the Carrier if you do not meet this requirement. In the event you do not meet this requirement, the Carrier will issue you a revised effective date, which will be the 1st day of the next month. You also must meet the actively at work requirement for any revised effective date for coverage to become effective, or you will be issued another revised effective date in the same manner.

[FR Doc. 05-10642 Filed 5-26-05; 8:45 am]

BILLING CODE 6325-39-P

MERIT SYSTEMS PROTECTION BOARD

5 CFR Parts 1200 and 1201

Practices and Procedures

AGENCY: Merit Systems Protection Board.

ACTION: Final rule.

SUMMARY: The Merit Systems Protection Board (MSPB or the Board) is amending its rules relating to Board organization in 5 CFR part 1200 to more accurately reflect the Board’s staff organization and functions. The Board is also amending its rules of practice and procedure in 5 CFR part 1201 to correct statutory references and to clarify certain matters.

DATES: Effective May 27, 2005.

FOR FURTHER INFORMATION CONTACT: Bentley M. Roberts, Clerk of the Board, Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419; (202) 653-7200; fax: (202) 653-7130; or e-mail: mspb@mspb.gov.

SUPPLEMENTARY INFORMATION: The Board is amending its rules relating to Board