

alia, as “*indef. art.* 1 – used before nouns and noun phrases that denote a single, but unspecified, person or thing <a mountain> <a woman>[,]” “5. . . . b. – Used before a mass noun to indicate a single type or example <a dark beer>.”, 26 (defining “an” as “*indef. art.* A form of *a*. – Used before words beginning with a vowel or with an unpronounced *h* <an emerald> <an honor>.”)).

38 U.S.C. § 7107(b) states that “The Board shall decide any appeal only after affording the appellant an opportunity for a hearing.” 38 U.S.C. § 7107(b) (emphasis supplied). Subsection (d)(1) of that section also states, “An appellant may request that a hearing before the Board be held at its principal location or at a facility of the Department located within the area served by a regional office [(RO)] of [VA].” 38 U.S.C. § 7107(d)(1). Subsection (e) predicates the availability of videoconference hearings on the availability of facilities and equipment. See 38 U.S.C. § 7107(e). This statute states that the Board must provide a single hearing; no section of the statute states that it must provide more than one hearing.

This Court has supported an interpretation of 38 U.S.C. § 7107 that would allow for more than one hearing by right when a Board member who decided an appellant’s case had not conducted the hearing. Importantly, the Court did not find that such a second hearing was available upon request. See *Arneson v.*

Shinseki, 24 Vet.App. 379, 385-86 (2011).¹ In *Arneson*, the Court held that a claimant is “entitled to *an* opportunity for a hearing before all members of the Board who will ultimately decide his appeal.” *Id.* at 386 (emphasis supplied). It emphasized that a claimant must “be afforded the opportunity to be heard . . . by every panel member who will decide his case.” *Id.* While this interpretation would allow for multiple hearings by right when a case is re-assigned to a different Board member after a hearing has already been conducted, it does not establish a right to multiple hearings upon request. Instead, it uses language that supports the right to a single hearing before the Board member who will decide the appeal. *See id.*

Similarly, the potentially relevant regulations state that the Board must provide an opportunity for a (singular) hearing; none of them state that it must provide more than one hearing. 38 C.F.R. Part III, Adjudication, Subpart A, contains regulations relating to “pension, compensation and dependency and indemnity compensation.” This Part does not contain Board-specific regulations.²

¹ The Secretary recognizes that this is not directly on point because the Court’s analysis in *Arneson* concerned 38 U.S.C. § 7102 and the interpretation of 38 C.F.R. § 20.707.

² The Secretary acknowledges that Appellant cited to *Bryant v. Shinseki*, 23 Vet.App. 488 (2010), which held that subsection 3.103(c) applied to the Board in terms of the duty of the hearing officer to explain the issues. *See* App. Mem. at 10; *see also Procopio v. Shinseki*, 26 Vet.App. 76 (2012) (reaffirming *Bryant*). However, the fact that subsection 3.103 applies to the Board in terms of the duty to explain the issue should not be read to hold that that subsection governs all procedural and substantive rights associated with Board hearings.

Within this Part, Section 3.103 discusses “Procedural due process and appellate rights,” and subsection (c) discusses the right to “a” hearing. See 38 C.F.R. § 3.103.³ It is entitled, “the right to a hearing[.]” again indicating the singular. See 38 C.F.R. § 3.103(c) (emphasis supplied).

Subsection 3.103(c)(1) states, in relevant part, “Upon request, a claimant is entitled to a hearing at any time on any issue involved in a claim within the purview of part 3 of this chapter, subject to limitations described in § 20.1304 . . . with respect to hearings in claims which have been certified to the [Board].” 38 C.F.R. § 3.103(c)(1) (emphasis supplied). The subsection goes on, “VA will provide the place of hearing in the VA office having original jurisdiction over the claim or at the VA office nearest the claimant’s home having adjudicative functions, or, *subject to available resources* and solely at the option of VA, at any other VA facility or federal building at which suitable hearing facilities are available.” *Id* (emphasis supplied).

Subsection (c)(2) provides, again in pertinent part, “The purpose of a hearing is to permit the claimant to introduce into the record, in person, any

³ The regulatory history of subsection 3.103(c) indicates that this provision related to a hearing before the agency of original jurisdiction (AOJ), not the Board. See 38 C.F.R. § 3.103(c) (Jul. 18, 1972) (Appendix 1). The first construction provided: “Upon request a claimant is entitled to a hearing at any time on any issue . . . [VA] will provide the place of hearing at the [AOJ] . . . and will provide [VA] personnel *who have original determinative authority* of such issues to be responsible for preparation of the transcript[.]” *Id* (emphasis supplied).

available evidence which he or she considers material and any arguments . . . with respect to the facts or applicable law which he or she may consider pertinent.” 38 C.F.R. § 3.103(c)(2). That subsection also states that “The Veterans Benefits Administration will not normally schedule a hearing for the purpose of receiving argument from a representative.” *Id.*

38 C.F.R. Part 20 (Board of Veterans’ Appeals: Rules of Practice), Subpart H (Hearings On Appeal), covers hearings before the Board. See 38 C.F.R. §§ 20.700-20.799. Subsection 20.700 is the general provision, and derives its authority from 38 U.S.C. §§ 7102, 7105(a), and 7107. See 38 C.F.R. § 20.700. Subsection 20.700(a) is entitled “Right to a hearing.” 38 C.F.R. § 20.700(a) (emphasis supplied). It states, in pertinent part, that, “A hearing on appeal will be granted if an appellant, or an appellant’s representative acting on his or her behalf, expresses a desire to appear in person.” See *id.* (emphasis supplied).⁴ Subsection 20.700(b) discusses the purpose of a hearing, and states, “The purpose of a hearing is to receive argument and testimony relevant and material to the appellate issue. . . . A hearing will not normally be scheduled solely for

⁴ The construction of “a hearing” dates back to Rule 14 of the Board of Veterans Appeals Rules of Practice, effective July 12, 1941, which stated “After all available evidence in support of an appeal has been submitted . . . a hearing will be allowed” if desired by the claimant or his representative, either before [the agency of original jurisdiction or the Board],” and continues throughout the regulatory history. See Board R. 14 (Jul. 12, 1941); Board R. 15 (Aug. 22, 1962); 38 C.F.R. § 19.133(a) (Jan. 22, 1964); 38 C.F.R. § 19.157(a) (Jan. 1, 1980); 38 C.F.R. § 20.700(a) (Feb. 3, 1992) (Appendix 2).

the purpose of receiving argument by a representative.” 38 C.F.R. § 20.700(b). Again, these provisions only refer to a single hearing.

Subsection 20.717 provides for a new hearing, upon motion, “[i]n the event that a hearing has not been recorded in whole or in part due to equipment failure or other cause, or the official transcript of the hearing is lost or destroyed, and the recording upon which it was based is no longer available[.]” 38 C.F.R. § 20.717(a). Subsection 20.717 derives its authority from 38 U.S.C. §§ 7102, 7105(a), 7107. See 38 C.F.R. § 20.717. Such a motion must “be in writing and must specify why prejudice would result from failure to provide a new hearing.” *Id.* The motion for a new hearing under such circumstances must be made within 120 days from a final Board decision, or within a “reasonable period” after an appeal to this Court, it must be filed with the Director, Management and Administration (01E), and the subsection discusses factors to be considered when ruling on a request for the new hearing, including the extent of the transcript loss and the reasonableness in delay in moving for a new hearing. See 38 C.F.R. § 20.717(b)-(d). This regulation provides for a new Board hearing only in very particular circumstances.

Subsection 20.1304 relates, in part, to “request for personal hearing . . . following certification of an appeal to the [Board].” See 38 C.F.R. § 20.1304; see also 38 C.F.R. § 3.103(c)(1) (listing subsection 20.1304 as limiting that regulation). This subsection discusses the 90-day period following mailing of notice that an appeal has been certified to the Board, or until the date of a Board

decision, whichever comes first, during which they may submit a request for “a personal hearing.” See 38 C.F.R. § 20.1304(a). The Board “will not accept a request . . . for a personal hearing” submitted following the expiration of that period, “except when the appellant demonstrates on motion that there was good cause for the delay.” See 38 C.F.R. § 20.1304(b)(1).

The regulation lists examples of good cause as including, but not limited to: illness of the appellant or representative, death of a representative, illness or incapacity of a representative that renders it impractical for the appellant to continue with that representative, withdrawal of a representative, discovery of evidence not available prior to the expiration of the period, and the delay of transfer of evidence to the Board. See *id.* Any such motion must be in writing, include the name of the Veteran, the name of the claimant or appellant or a substitute claimant or appellant, the VA file number, and an explanation of why the request for a personal hearing could not be accomplished in a timely manner. See *id.* If good cause is not shown, the request for a personal hearing will be referred to the agency of original jurisdiction upon completion of the Board’s action on the pending appeal without any action by the Board concerning the request. See 38 C.F.R. § 20.1304(b)(1)(i).

Therefore, there is no non-constitutional authority in statute or regulation that directs more than a single Board hearing on appeal on request. The relevant statute and regulations consistently use the singular “a.” Regulations do provide for a request for a Board hearing outside the appropriate timeframe, but

those requests must be supported by a showing of good cause. See 38 C.F.R. § 20.1304(b). Moreover, the statute and regulations demonstrate that the purpose of a Board hearing is to introduce evidence, not argument, and also that aspects of the hearing process are at the Secretary's discretion, and are resource-dependent. See *e.g.* 38 C.F.R. §§ 3.103(c)(1), (2); 20.700(b).

II. The Secretary interprets the relevant statute and regulations as entitling claimants to one Board hearing on request; the provision of subsequent Board hearing is discretionary.

The Secretary interprets the relevant statute and regulations as entitling claimants to one Board hearing on request; the provision of subsequent Board hearings is discretionary.

The Court reviews *de novo* the legal question whether the intent of Congress is unambiguously expressed in a statute, or whether Congress left a gap for VA to fill. See *Chevron v. Nat'l Resources Def. Council, Inc.*, 467 U.S. 837, 842–43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *Lane v. Principi*, 339 F.3d 1331, 1339 (Fed.Cir.2003) (“[I]nterpretation of a statute or regulation is a question of law. . . .”). If the meaning of the statute is clear from its plain language, that meaning controls the question and that is the end of the matter. See *Chevron*, 467 U.S. at 842–43 (“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. . . .”); *Tropf v. Nicholson*, 20 Vet.App. 317, 320 (2006). Similarly, the “interpretation of a . . . regulation is a

question of law” that the Court reviews “de novo.” *Lane*, 339 F.3d at 1339. The starting point in interpreting a regulation is its plain language, for “if the meaning of the regulation is clear from its language, that is ‘the end of the matter.’” *Tropf*, 20 Vet.App. at 320 (quoting *Brown v. Gardner*, 513 U.S. 115, 120, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994)).

The canons of statutory construction apply with similar force to agency regulations and require interpretation of words in their context with an eye to the law as a whole. See *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221, 112 S.Ct. 570, 116 L.Ed.2d 578 (1991) (holding that, when interpreting a statute or regulation, courts must read the provisions of the law as a whole and in context); *Imazio Nursery, Inc. v. Dania Greenhouses*, 69 F.3d 1560, 1564 (Fed. Cir. 1995) (holding that all parts of a statute must be construed together without according undue importance to a single or isolated portion); *Meeks v. West*, 12 Vet.App. 352, 354 (1999) (“[E]ach part or section [of a statute] should be construed in connection with every other part or section so as to produce a harmonious whole.” (quoting 2A N. SINGER SUTHERLAND ON STATUTORY CONSTRUCTION § 46.05 (5th ed. 1992)) (second alteration in original)), *aff'd*, 216 F.3d 1363 (Fed.Cir.2000).

Where the plain language is ambiguous, the Court must consider the reasonableness of the Secretary's regulatory interpretation. *Mason v. Shinseki*, 26 Vet.App. 1, 6 (2012). An agency's interpretation of its own regulations is entitled to substantial deference by the Court. See *United States v. Cleveland*

Indians Baseball Co., 532 U.S. 200, 121 S.Ct. 1433, 149 L.Ed.2d 401 (2001); *Auer v. Robbins*, 519 U.S. 452, 461–62, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997). This high degree of deference applies even when that interpretation is first advanced during litigation. *Reizenstein v. Shinseki*, 583 F.3d 1331, 1335 (Fed. Cir. 2009) (citing *Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 400 F.3d 1352, 1364 (Fed. Cir. 2005)). “[C]ourts should defer to an agency's interpretation of its own ambiguous regulation so long as that interpretation is not inconsistent with the language of the regulation or otherwise plainly erroneous and represents the agency's considered view on the matter.” *Mulder v. Gibson*, 27 Vet.App. 10, 16 (2014) (citing *Smith v. Nicholson*, 451 F.3d 1344, 1349 (Fed. Cir. 2006) (citing *Auer*, 519 U.S. at 461–62)).

The relevant statute, 38 U.S.C. § 7107(b),(d) and (e), discusses the right to “a” hearing, with “a” being singular. See 38 U.S.C. § 7107(b),(d),(e). The language is plain, and consistent with the Secretary’s interpretation, and should therefore control. See *Chevron*, 467 U.S. at 842–43.

All the relevant regulations use “a” in the singular when discussing providing a claimant with a hearing. See 38 C.F.R. §§ 3.103(c); 20.700; 20.1304. The plain meaning is clear, and that is “the end of the matter.” *Tropf*, 20 Vet.App. at 320.

The regulatory context also supports an interpretation wherein a claimant is entitled to one Board hearing, with other Board hearings upon request being discretionary. Section 20.1304 discusses limitations on the timing for requesting

a personal hearing before the Board. See 38 C.F.R. § 20.1304; *King*, 502 U.S. at 221; *Imazio Nursery, Inc.*, 69 F.3d at 1564; *Meeks*, 12 Vet.App. at 354. This limitation is acknowledged in the text of 38 C.F.R. § 3.103(c)(1). See 38 C.F.R. § 3.103(c)(1). In this context, it is clear that even the right to a single hearing is subject to limitation. If a claimant makes a request for his or her *first* hearing before the Board, and that request falls outside the limits imposed by section 20.1304, the request will not be acted upon (that is to say, granted) by the Board absent a showing of good cause, which is defined by regulation. See 38 C.F.R. § 20.1304(b). The context of the regulatory scheme therefore supports limitation on the request for a first hearing. Nothing in the regulatory scheme supports the right to a second Board hearing on request, and it certainly does not support an unlimited right to a second Board hearing on request.

Furthermore, should the Court find that the language of the regulations is ambiguous, which it should not, the Secretary interprets the language in the relevant regulations as providing a right to a single hearing on request. This interpretation is entitled to substantial deference. *Auer*, 519 U.S. at 461–62; *Reizenstein*, 583 F.3d at 1335. This interpretation is reasonable, and not inconsistent with either the language of the regulation or plainly erroneous, and the Court should therefore uphold it. See *Mulder*, 27 Vet.App. at 16.

III. Appellant's regulatory interpretation leads to absurd results.

Appellant argues in his Response to the Court's Order of March 7, 2016 (App. Mem.), that the plain language of section 3.103(c) entitles him to a hearing at any time on any issue. See App. Mem. at 4, 7 ("The [VLJ] impermissibly interpreted VA regulations concerning a [V]eteran's right to a hearing at anytime (*sic*) on any issue."); see *generally* App. Mem. This interpretation, if adopted by the Court, would allow claimants to request hearings at will, and be entitled to them without limitation. See *id.* This argument is the embodiment of *reducto ad absurdum*, and the Court should reject it. The Court has an "affirmative duty to avoid a literal interpretation of regulatory language that would produce 'an illogical and absurd result.'" *Mitchell v. Shinseki*, 25 Vet.App. 32, 43 (2011) (quoting *Zang v. Brown*, 8 Vet.App. 246, 252-53 (1995)).

The Board currently has 67,500 requests for hearings. See Declaration of David C. Spickler, Deputy Vice Chairman, Board of Veterans Appeals (Declaration) dated Apr. 29, 2016 (Appendix 3). It has 75 full-time Veterans Law Judges available to conduct these hearings, and during the past three fiscal years it conducted between 10,500 and 12,500 hearings each year. See *id.* Assuming, *arguendo*, that the Board were to stop accepting new requests for hearings, it would still take over five years to clear this backlog of hearings.

Albeit in a different context, namely of a petition for extraordinary relief regarding the Board's authority to stay proceedings, this Court has held that "The

general authority of the Secretary to interpret and apply the law and of the Board to dispose of appeals in a timely manner authorizes the Secretary to manage the Board in its dispositions of cases and to consider the relevant law in its control of the dispositions of appeals pending on the Board's docket and to do so with economy of time and effort." See generally *Ramsey v. Nicholson*, 20 Vet.App. 16, 27 (2006). The Court's analysis in *Ramsey* considered two relevant statutes, namely 38 U.S.C. §§ 501, 7107. See *Ramsey*, 20 Vet.App. at 27-37. In making its eventual finding in *Ramsey*, the Court acknowledged that well-settled caselaw states that "agencies have discretion to develop case management techniques that make best use of their limited resources." *Id.* at 28 (citing, *inter alia*, *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538-39, 90 S.Ct. 1288, 25 L.Ed.2d 547 (1970) ("[The agency] is entitled to a measure of discretion in administering its own procedural rules in such a manner as it deems necessary to resolve quickly and correctly urgent [] problems."); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 544, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978) ("Absent constitutional constraints or extremely compelling circumstances the 'administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." ' ") (quoting *FCC v. Schreiber*, 381 U.S. 279, 290, 85 S.Ct. 1459, 14 L.Ed.2d 383 (1965) (quoting *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 143, 60 S.Ct. 437, 84 L.Ed. 656 (1940))); *Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 544, 98 S.Ct. 1197 ("[A] very basic tenet of

administrative law [is] that agencies should be free to fashion their own rules of procedure.”)). The Court also discussed testimony from Senator Rockefeller given at the time section 7107 was amended to include hearings. See *id* at 33-34. Senator Rockefeller noted that the purpose of the legislation was to allow the Board, “‘to begin to reduce its pending back log and improve its decisionmaking timeliness,’ and to allow the Board ‘to become more productive.’” *Id* at 33 citing 140 CONG. REC. S4757, S4759 (Apr. 21, 1994). The Court in *Ramsey* eventually denied the petitioner’s asserted plain language meaning of section 7107(a) because it “would dictate unthinking reliance on docket order to manage a complex, pro-[V]eteran adjudicatory process, thus leading to absurd results and interruption of the statutory scheme to treat all [V]eterans’ claims fairly and efficiently.” *Id.* at 32.

Appellant’s assertion that he has a right to a second Board hearing “at anytime (*sic*) for any reason”, App. Mem. at 7, would throw a massive wrench into a system that is already backlogged, and severely hamper the Board’s ability to fairly manage its docket with economy of time and effort. Furthermore, it would be directly contrary to the purpose of section 7107, which was to make the Board more productive and allow it to improve its decision making timeliness. See *Ramsey*, 20 Vet.App. at 33. The Court should therefore reject Appellant’s proffered interpretation.

The relevant statutes and regulations are clear on their face and do not provide for a right to a second hearing at any time upon request, the Secretary’s

interpretation is reasonable, and Appellant's interpretation produces an absurd result.

WHEREFORE, Appellee respectfully responds to the Court's March 7, 2016, Order.

Respectfully submitted,

LEIGH A. BRADLEY
General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Carolyn F. Washington
CAROLYN F. WASHINGTON
Deputy Chief Counsel

/s/ Nathan Paul Kirschner
NATHAN PAUL KIRSCHNER
Appellate Attorney
Office of the General Counsel (027D)
U.S. Dept. of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, DC 20420
(202) 632-6959
Telecommuting: (414) 256-1891

Attorneys for Appellee,
Secretary of Veterans Affairs

APPENDIX 1

38 CFR 3.103(c)

38 CFR 3.103(c)
7/25/72 (37 FR 14780)
retroactively effective 07/18/72

38 CFR 3.103(c)
revised 05/11/90 (55 FR 13522)

38 CFR 3.103(c)
revised 06/14/90 (55 FR 20144)
corrected 06/21/90 (55 FR 25307)
retroactively effective 06/14/90

38 CFR 3.103(c)
revised 03/26/93 (58 FR 16359)

38 CFR 3.103(c)
revised 12/10/01 (66 FR 56613)

38 CFR 3.103(c)
revised 08/23/11 (76 FR 52572)
retroactively repealed (77 FR 23128) and (77
FR 70686)

38 CFR 3.103(c)
revised 06/18/12 (77 FR 23128)

38 CFR 3.103(c)
revised 8/23/11 (77 FR 70686)
retroactively applicable to 8/23/11

RULES AND REGULATIONS

Ascending boats, while waiting their turn to enter, must keep out far enough to give boats leaving the lock free passage between them and the pile clusters or riverbank.

(h) *Entrance to and exit from locks.* In case two or more boats or tows are to enter for the same lockage, their order of entry shall be determined by the lock officer or his authorized agent. No boat shall attempt to run ahead of another while in a lock. The boat that enters first shall have precedence in exit.

(i) *Unnecessary delay at locks.* (1) Vessels must not obstruct navigation by unnecessary delay in entering or leaving locks. Masters and pilots will be held to a strict accountability in this respect. Boats or other craft failing to enter locks with reasonable promptness after being signaled to do so will lose their turn.

(2) Boats arriving in the entrance to the locks with their tows so shaped as not to facilitate locking, or in a leaky condition, may, in the discretion of the lockmaster, lose their turn.

(3) Leaky boats may be excluded from the locks until they are put in shape to be safely passed.

(j) *Mooring in locks.* Steamboats and other craft, when in the locks, shall be moored where directed by the lock officer, by bow, stern, and spring lines to the snubbing posts or hooks provided for that purpose. Tying boats to the lock ladders is strictly prohibited.

(k) *Handling of boats and rafts.* The captains in charge of tows and those in charge of rafts must provide sufficient men to move barges and rafts in and out of the locks without unnecessary delay.

(l) *Protection of lock gates.* Boats will not be permitted to enter or leave the locks until the lock gates are fully in the gate recesses and the lock officer has directed the boat to start.

(m) *Damage to locks or other structures.* This section shall not affect the liability of the owners and operators of boats for any damage caused by their operations to locks or other structures. The sides of all craft passing through locks must be free from projections of any kind or sharp corners which might injure the walls. Steamboats must be provided with suitable fenders. One man shall be kept at the head of every tow until it has cleared the lock and guide walls. He shall use fender to protect walls and use pike pole to help pass drift or ice while in the vicinity of lock.

(n) *Handling machinery.* None but employees of the United States for the purpose will be allowed to move any valves, gate, or other machinery belonging to the locks, but the lockmaster or his assistant may call for assistance from the master of any boat using the locks, should such aid be necessary, and when rendering such assistance the men so employed shall be strictly under the orders of the lockmaster or his assistant.

(o) *Refuse in locks.* The plating of any ashes, refuse, or obstructions in the entrance of locks or in the locks, or on the walls thereof, is prohibited.

(p) *Commercial statistics.* Masters or clerks of boats shall furnish in writing

to lock officers such statistics of passengers and cargoes as may be required.

(q) *Trespass on lock property.* (1) The landing of freight or baggage on the lock walls or lock grounds will not be allowed, except for the use of the Government or its employees.

(2) Trespass on lock property or injury to the entrance, banks, cribs, locks, fences, trees, houses, shops, or other property of the United States pertaining to the locks is strictly prohibited.

(r) *Penalties.* In addition to the penalties prescribed by the Act of Congress previously quoted, boats which fail to comply with paragraphs (a) to (q) of this section will be refused lockage until they are complied with.

(s) *Lights.* (1) Except when submerged, each lock and adjacent pier of the dam will be lighted from sunset to sunrise without regard to the moon. A white light on the pier and a red light on the lock will indicate that the dam is navigable between the lights and the lock is not. A red light on the pier and a white light on the lock will indicate that the lock is navigable and the dam is not. A white light on both pier and lock will indicate that both dam and lock are navigable, the dam between the lights only. A red light on both pier and lock are navigable, the dam between the dam is navigable. Red and white lights on the lock will be exposed on the river wall at its junction with the dam. The downstream end of the river wall will be marked by a green light.

(2) When lock and piers are submerged, and for locks where the river configuration will permit, a white light will be exposed on the bank, both above and below the lock, the two lights defining a line crossing the dam at the middle point of the navigation pass. In other cases, when locks and piers are submerged, two red lights will be exposed, one above the other, on the bank at the upstream end of the land wall of the lock.

(t) *Raising or lowering dams.* When a dam is being raised or lowered all passing craft must use the lock until signaled that the pass is clear, and descending boats or tows desiring to go through the navigation pass must remain above the head of the lock until signaled to proceed.

(u) *Avoidance of dams.* When dams are raised all boats plying in upper pools, but not intending to enter lock, are forbidden to approach nearer to dams than a line extending across the river from the pile cluster farthest upstream from lock.

(v) *Damage to construction work.* To avoid damage or hindrance by wave action to plant or structures connected with the construction or repair of locks and dams, during the time when such work is in actual progress, steamboats should regulate their speed between the lower line of such work (including plant) and a point 500 yards above the upper line of work. Between such limits, ascending boats will reduce their speed to not exceed 3 miles per hour, and descending boats will reduce their

speed to 3 miles in excess of the current, which may be exceeded if the wheel is idle.

(w) *Complaints.* Complaints or other communications relating to the navigation of the Ouachita-Black River System or the maintenance and operation of the locks, dams, and bridges should be addressed to the U.S. Army Engineer District, Vicksburg, Vicksburg, Miss.

(x) *Vessels to carry regulations.* A copy of the regulations of this section will be furnished to masters of boats on application to lock officers.

[Regs. July 5, 1972, 1622-01 (Ouachita and Black Rivers, Arkansas-Louisiana) DAEN-OWO-N] (Sec. 7, 40 Stat. 286; 33 U.S.C. 1)

For the Adjutant General.

R. B. BELNAP,
Special Advisor to TAG.

[FR Doc.72-11445 Filed 7-24-72;8:51 am]

Title 38—PENSIONS, BONUSES, AND VETERANS' RELIEF

Chapter I—Veterans Administration

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

DUE PROCESS AND APPELLATE RIGHTS

On page 10745 of the FEDERAL REGISTER of May 27, 1972, there was published a notice of proposed rule making to issue a regulation concerning due process and appellate rights. Interested persons were given 30 days in which to submit comments, suggestions, or objections regarding the proposed regulations.

No written objections have been received and the proposed regulation is hereby adopted without change and is set forth below.

Effective date. This VA regulation is effective the date of approval.

Approved: July 18, 1972.

By direction of the Administrator.

[SEAL] FRED B. RHODES,
Deputy Administrator.

Section 3.103 of Part 3 of Title 38 is amended to read as follows:

§ 3.103 Due process—procedural and appellate rights with regard to disability and death benefits and related relief.

(a) *Statement of policy.* Proceedings before the Veterans Administration are ex parte in nature. It is the obligation of the Veterans Administration to assist a claimant in developing the facts pertinent to his claim and to render a decision which grants him every benefit that can be supported in law while protecting the interests of the Government. This principle and the other provisions of this section apply to all claims for benefits and relief and decisions thereon within the purview of this part.

Title 39—POSTAL SERVICE

Chapter I—U.S. Postal Service

PART 126—MAIL ADDRESSED TO MILITARY POST OFFICES OVERSEAS

Conditions Prescribed by Defense Department

Section 126.2 of Title 39, Code of Federal Regulations, is revised in order to list therein all overseas military post offices, and to update restrictions applicable to certain military post offices.

Accordingly, § 126.2 is amended to read as follows:

§ 126.2 Conditions prescribed by the Defense Department applicable to mail addressed to certain military post offices overseas.

(b) Submission of evidence. Any evidence whether documentary, testimonial, or in other form, offered by a claimant in support of a claim and any issue he may raise and contention and argument he may offer with respect thereto are to be included in the records.

(c) Hearings. Upon request a claimant is entitled to a hearing at any time on any issue involved in a claim within the purview of this part. The Veterans Administration will provide the place of hearing in the Veterans Administration office having original jurisdiction over the claim or at the Veterans Administration office nearest his home having adjudicative functions and will provide Veterans Administration personnel who have original determinative authority of such issues to be responsible for the preparation of the transcript; however, further expenses involved will be the responsibility of the claimant. The claimant is entitled to produce witnesses and all testimony will be under oath or affirmation. The purpose of such a hearing is to permit the claimant to introduce into the record in person any evidence available to him which he may consider material and any arguments and contentions with respect to the facts and applicable law which he may consider pertinent. It is the responsibility of the Veterans Administration personnel conducting the hearing to explain fully the issues and to suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to his position. It is their further responsibility to establish and preserve the record. Because of this and to assure clarity and understanding therein, questions which are directed to the claimant and to witnesses are to be framed to explore fully the basis for claimed entitlement rather than with an intent to refute evidence and to discredit testimony. In cases in which the nature, origin, or degree of disability is in issue, the claimant may request visual examination by the physician designated by the Veterans Administration as a participant in the hearing and his observations will be read into the record.

(d) Representation. Within the provisions and criteria of §§ 14.626 through 14.663 of this chapter a claimant is entitled to representation of his choice at every stage in the prosecution of a claim.

(e) Notification of decisions. The claimant will be notified of any decision affecting the payment of benefits or granting relief. Notice will include the reason for the decision and the date it will be effectuated as well as the right to a hearing subject to paragraph (c) of this section. The notification will also advise the claimant of his right to initiate an appeal by filing a Notice of Disagreement which will entitle him to a Statement of the case for his assistance in perfecting his appeal. Further, the notice will advise him of the periods in which an appeal must be initiated and perfected. (See Part 19, Subpart B of this chapter on appeals.)

[FR Doc.72-11490 Filed 7-24-72;8:56]

- 09001 B-C-Y1
09002 B-C-Y1
09003 B-C-D
09009 B-C-D
09011 B-C
09012 B-C-D
09013 B-C-D
09018 B-C-Y1
09020 B
09023
09025 B-C-D
09026 B-C-D
09028 B-C-D
09029 B-C-D
09031 B-C-D
09033 B-C-D
09034 B-C-D
09035 B-C-D
09038 B-C-D
09039 B-F-Y-R
09039 B-C-D
09040 A-B-F-Y
09045 B-C-D
09045 B-C-D
09047 B-C-D
09048 A-B-C
09050 B-C-D
09051 A-B-F-Y
09052 B-C-D
09053 B-C-D
09054 B-C-D
09055 B
09056 B-C-D
09057 B-C-D
09058 B-C-D
09059 B-C-D
09060 B-C-D
09061 B-C-D
09066 B-C-D
09067 B-C-D
09068 B-C-D
09069 B-C-D
09070 B-C-D
09074 B-C-D
09075 A-B-C
09078 B-C-D
09079 B-C-D
09080 B-C-D
09081 B-C-D
09082 B-C-D
09085
09085 B-C-D
09085 B
09090 B-C-D
09091 B-C-D
09093 B-C-D
09095 B-C-D
09098 B-C-D
09099 B-C-D
09101 B-C-D
09102 B-C-D
09107 B-C-D
09108 B-C-D
09109 B-C-D
09111 B-C-D
09114 B-C-D
09120 A-B-C-O
09121
09123 B-C-D
09125 A-B-C-O
09127 A-B-C-O
09128 B-C-D
09130 B-C-D
09131 B-C-D
09132 B-C-D
09133 A-B-F-Y
09137 B-C-D
09138 B-C-D
09139 B-C-D
09140 B-C-D
09141 B-C-D
09142 B-C-D
09144 B-C-D
09145 B-C-D
09149 B-C-D
09150 A-B-C
09154 B-C-D
09153 A-B
09159 B-C
09160 B-C-D
09161 B-C-Y1
09162 B-C-D
09164 B-C-D
09165 B-C-D
09166 B-C-D
09168 B-C-Y1
09169 B-C-D
09170 C-D-N
09171 B-C-D
09172 B-C-D
09173 B-C-D
09175 B-C-D
09176 B-C-D
09178 B-C-D
09178 B-C-D
09178 A-B-C-O
09180 B-C-D
09184 B-C-D
09185 B-C-D
09189 B-C-D
09193 A-B-C-O
09194 A-B-C-O
09205 A-B
09210 A-B-C-O
09218 A-B-C-O
09220 B-C-D
09221 B-C-Y1
09223 A
09224 A-B-F-Y
09227 B-C-D
09238 A-B-C-O
09240 B-C-Y1
09245 B-C-D
09252 B-C-D
09253 A
09254 A-B-F-Y
09277 B-C-D
09281 B-C-D
09282
09283
09284
09285
09286
09288 A-B-F-Y
09291 A
09292 B-C
09293 B-C-Y1
09294 A-B-F-Y
09305 B-C-D
09318 B-C-D
09320 A-B-F-Y
09322 B-C-D
09324 A-B-F-Y
09326 B-C-D
09330 B-C-D
09332 B-C-D
09333 B-C-D
09351 B-C-D
09352 B-C-D
09353 B-C-D
09360 B-C-D
09378 A-B-C-O
09380 A-B-F-Y
09401
09403 B-C-D
09405 A-B-C-O

- 09406
09407 B-C-D
09411 B-C-D
09451 B-C-D
09452
09501
09502
09505
09510 A-B-C-J
09511 A-B-C-J
09512 A-B-C-J
09513 A-C-D
09514 A-C-D
09515 A-B-C-J
09516 A-B-C-Y-J
09517 A-C-D
09518 A-B-C-J
09520 A-C-I
09521 A-C-Y1
09522 A-C-Y1
09523 A-C-Y1
09524 A-C-Y1
09525 A
09526
09527 A-N
09528 A
09529 A-C-Y1
09530
09531 A-B-C-F-M
09540
09544 A-B-C-X
09546
09550
09551
09552
09553
09554
09555
09556
09558
09559
09560
09571
09580 B
09584 B
09585 B
09593
09597
09598
09607 A-B-C-O
09611 B-C-D
09616 B-F-Y-R
09633 B-C-D
09639 A-B-C-O
09662
09664 N
09666 B-C-D
09667 B
09670 B-C-Y1
09672
09676 B-C-M
09677
09678 B-Y-N
09684 B-C-D
09689 B-C-Y1
09690 A
09692 B-C-D
09693 A
09696 B-C-D
09697 B-F-Y-R
09701 B-C-D
09702 B-C-D
09742 B-C-D
09743 B-C-D
09751 B-C-D
09755 A-B-C-O
09757 B-C-D
09777 A-B-C-E
09784 B-C-Y1
09801 B-C-D
09807 B-C-D
09825 B
09826 B
09827 B
09829 B
09832 B
09834 B
09837 B
09841 B-C-D
09845
09851
09860 B-C-D
09862 N
09863 B-I-L-M
09877 M
09889 B-C-F-I-M-N
09890 B-C-D-N
09897 B-L-M
09898 B-C-D
09899 B-M
09900 A-B-F-Y-L
09901 I-M
09902 B-I-M-N
09903 M
09907 B-D-F-I-M-N
09909 B-I-M-N
09901 B-M-N
09902 A-B-F-Y
09903 C-F-H-I-M-N
09905 B-Y-M
09907
09909 B-I-M
09920 A-F
09923 A-F
09924 A-F
09926 A-B
09928 A-B
09929 A-B
09930 A-B
09931 A-B
09932 A-B
09933 A-B
09934 A-B
09935 A-B
09936 A-B
09937 A-B
09938 A-B
09939 A-B
09940 A-B
09941 A-B
09942 A-B
09943 A-B
09944 A-B
09945 A-B
09946 A-B
09947 A-B
09948 A-B
09949 A-B
09950 A-B
09951 A-B
09952 A-B
09953 A-B
09954 A-B
09955 A-B
09956 A-B
09957 A-B
09958 A-B
09959 A-B
09960 A-B
09961 A-B
09962 A-B
09963 A-B
09964 A-B
09965 A-B
09966 A-B
09967 A-B
09968 A-B
09969 A-B
09970 A-B
09971 A-B
09972 A-B
09973 A-B
09974 A-B
09975 A-B
09976 A-B
09977 A-B
09978 A-B
09979 A-B
09980 A-B
09981 A-B
09982 A-B
09983 A-B
09984 A-B
09985 A-B
09986 A-B
09987 A-B
09988 A-B
09989 A-B
09990 A-B
09991 A-B
09992 A-B
09993 A-B
09994 A-B
09995 A-B
09996 A-B
09997 A-B
09998 A-B
09999 A-B
96274 K
96275 A-B
96277 K
96280 P1
96281 A-B-M
96287 A-B-H-Q
96288
96290 P1
96291 A-F
96293 P1
96294 A-F
96295 A-F
96296 A-F
96297 A-F
96298 K
96299 A-B-M
96301 A-B
96302 A-B
96303
96304
96305
96307 A-F
96308 A-F
96309 A-F
96310
96312 A-F
96313 B-H-M
96314 A-F
96315
96316 A-F
96318 A-F
96319 P1
96323 A-B-M
96324 A-B
96325 A-F
96328 A-B-M
96330
96331
96332 A-F
96333 M
96334
96335 A-B
96336 A-B-M
96337 A-F
96338 A-B-M
96339
96340 P1
96341
96342 A-B-M
96346
96347 A-F
96348 A-F
96349 A-F
96352
96356

See footnotes at end of document.

38 CFR 3.103(c)
eff: 7/18/72

Chapter I—Veterans Administration

§ 3.103

adjudicative personnel within the jurisdiction of the Department of Veterans Benefits designated by him to make findings and decisions under the applicable laws, regulations, precedents, and instructions, as to entitlement of claimants to benefits under all laws administered by the Veterans Administration governing the payment of monetary benefits to veterans and their dependents, within the jurisdiction of Compensation and Pension Service.

(b) Authority is delegated to the Chief Benefits Director to establish annual income limitations for the purposes of § 3.251(a)(2) based on service defined in § 3.8 (b), (c), or (d) at a rate in Philippine pesos equivalent to \$0.50 for each dollar.

(c) Authority is delegated to the Director, Compensation and Pension Service, and to personnel of that service designated by him to determine whether a claimant or payee has forfeited the right to gratuitous benefits pursuant to the provisions of 38 U.S.C. 3503 or 3504. See § 3.905. (38 U.S.C. 212(a))

[29 F.R. 7647, June 12, 1964, as amended at 31 FR 14455, Nov. 10, 1966; 37 FR 10442, May 23, 1972; 37 FR 19132, Sept. 19, 1972]

§ 3.101 Decisions to conform.

All decisions will conform to the laws, regulations, Administrator's decisions, and defined policies as enunciated by the Administrator. All opinions of the General Counsel which constitute a precedent are contained in Administrator's decisions or opinions which are approved by the Administrator. Conclusions reached in individual cases are frequently influenced by peculiar facts or local statutes and, consequently, will not be followed as precedents. However, where it is apparent beyond question that the situation is identical, such conclusions may be followed as a matter of consistency in the adjudication of claims under the law or regulations applicable.

[26 F.R. 1568, Feb. 24, 1961]

§ 3.102 Reasonable doubt.

It is the defined and consistently applied policy of the Veterans Administration to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved

in favor of the claimant. By reasonable doubt is meant one which exists by reason of the fact that the evidence does not satisfactorily prove or disprove the claim, yet a substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility. It is not a means of reconciling actual conflict or a contradiction in the evidence; the claimant is required to submit evidence sufficient to justify a belief in a fair and impartial mind that his claim is well grounded. Mere suspicion or doubt as to the truth of any statements submitted, as distinguished from impeachment or contradiction by evidence or known facts, is not a justifiable basis for denying the application of the reasonable doubt doctrine if the entire, complete record otherwise warrants invoking this doctrine. The reasonable doubt doctrine is also applicable even in the absence of official records, particularly if the basic incident allegedly arose under combat, or similarly strenuous conditions, and is consistent with the probable results of such known hardships.

[26 F.R. 1568, Feb. 24, 1961]

§ 3.103 Due process—procedural and appellate rights with regard to disability and death benefits and related relief.

(a) *Statement of policy.* Proceedings before the Veterans Administration are ex parte in nature. It is the obligation of the Veterans Administration to assist a claimant in developing the facts pertinent to his claim and to render a decision which grants him every benefit that can be supported in law while protecting the interests of the Government. This principle and the other provisions of this section apply to all claims for benefits and relief and decisions thereon within the purview of this part.

(b) *Submission of evidence.* Any evidence whether documentary, testimonial, or in other form, offered by a claimant in support of a claim and any issue he may raise and contention and argument he may offer with respect thereto are to be included in the records.

(c) *Hearings.* Upon request a claimant is entitled to a hearing at any time on any issue involved in a claim within the purview of this part. The Veterans Administration will provide the place of hearing in the Veterans Administration office having original jurisdiction over the

38 CFR 3.103(c)
eff: 7/18/72

§ 3.104 Title 38—Pensions, Bonuses, and Veterans' Relief

claim or at the Veterans Administration office nearest his home having adjudicative functions and will provide Veterans Administration personnel who have original determinative authority of such issues to be responsible for the preparation of the transcript; however, further expenses involved will be the responsibility of the claimant. The claimant is entitled to produce witnesses and all testimony will be under oath or affirmation. The purpose of such a hearing is to permit the claimant to introduce into the record in person any evidence available to him which he may consider material and any arguments and contentions with respect to the facts and applicable law which he may consider pertinent. It is the responsibility of the Veterans Administration personnel conducting the hearing to explain fully the issues and to suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to his position. It is their further responsibility to establish and preserve the record. Because of this and to assure clarity and understanding therein, questions which are directed to the claimant and to witnesses are to be framed to explore fully the basis for claimed entitlement rather than with an intent to refute evidence and to discredit testimony. In cases in which the nature, origin, or degree of disability is in issue, the claimant may request visual examination by the physician designated by the Veterans Administration as a participant in the hearing and his observations will be read into the record.

(d) *Representation.* Within the provisions and criteria of §§ 14.626 through 14.663 of this chapter a claimant is entitled to representation of his choice at every stage in the prosecution of a claim.

(e) *Notification of decisions.* The claimant will be notified of any decision affecting the payment of benefits or granting relief. Notice will include the reason for the decision and the date it will be effectuated as well as the right to a hearing subject to paragraph (c) of this section. The notification will also advise the claimant of his right to initiate an appeal by filing a Notice of Disagreement which will entitle him to a Statement of the case for his assistance in perfecting his appeal. Further, the notice will advise him of the periods in which an appeal must be initiated and perfected.

(See Part 19, Subpart B of this chapter on appeals.)

[37 FR 14780, July 25, 1972]

§ 3.104 Finality of decisions.

(a) The decision of a duly constituted rating agency or other agency of original jurisdiction on which an action was predicated will be final and binding upon all field offices of the Veterans Administration as to conclusions based on evidence on file at that time and will not be subject to revision on the same factual basis except by duly constituted appellate authorities or except as provided in § 3.105. See §§ 19.153 and 19.154 of this chapter.

(b) Current determinations of line of duty, character of discharge, relationship, dependency, domestic relations questions, homicide, and findings of fact of death or presumptions of death made in accordance with existing instructions, and by application of the same criteria and based on the same facts, by either an Adjudication activity or an Insurance activity are binding one upon the other in the absence of clear and unmistakable error.

[29 F.R. 1482, Jan. 29, 1964; 39 F.R. 7547, June 12, 1964]

§ 3.105 Revision of decisions.

The provisions of this section apply except where an award was based on an act of commission or omission by the payee, or with his knowledge (§ 3.500(b)); there is a change in law or a Veterans Administration issue, or a change in interpretation of law or a Veterans Administration issue (§ 3.114); or the evidence establishes that service connection was clearly illegal. The provisions with respect to the date of discontinuance of benefits are applicable to running awards. Where the award has been suspended, and it is determined that no additional payments are in order, the award will be discontinued effective date of last payment.

(a) *Error.* Previous determinations on which an action was predicated, including decisions of service connection, degree of disability, age, marriage, relationship, service, dependency, line of duty, and other issues, will be accepted as correct in the absence of clear and unmistakable error. Where evidence establishes such error, the prior decision will be reversed or amended. For the purpose of authorizing benefits, the rat-

published in the Federal Register on Wednesday, December 6, 1989 (54 FR 50387) as Treasury Decision 8275. The rules related to compliance with the new reporting requirements imposed by section 6050M for returns relating to persons receiving contracts from Federal executive agencies.

FOR FURTHER INFORMATION CONTACT: Keith E. Stanley at 202-566-3367 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The final regulations that are the subject of these corrections relate to section 6050M, which was added to the Internal Revenue Code by the Tax Reform Act of 1986.

Need for Correction

As published, the final regulations contain errors which may prove to be misleading and are in need of clarification.

Correction of Publication

Accordingly, the publication of the final regulations which were the subject of FR Doc. 89-26396, is corrected as follows:

Para. 1. On page 50369, in the preamble, first column, line 10, the language "(including into (or treated as entered)" is corrected to read "(including their contract actions treated as new contracts entered into (or treated as entered)".

§ 1.5060M [Amended]

Par. 2. On page 50370, second column, § 1.5060M-1(b)(2)(iv) should read:

(iv) *Certain schedule contracts.* For purposes of this section, any of the following contracts entered into on behalf of one or more Federal executive agencies is not a "contract" to be reported by the General Services Administration or the Department of Veteran's Affairs at the time of execution:

(A) A Federal Supply Schedule Contract entered into by the General Services Administration,

(B) An Automated Data Processing Schedule Contract entered into by the General Services Administration, or

(C) A schedule contract entered into by the Department of Veteran's Affairs. Instead, an order placed by a Federal executive agency, including the General Services Administration or the Department of Veteran's Affairs, under such a schedule contract is a "contract" for purposes of this section.

§ 1.6050M [Amended]

Par. 3. On page 50371, second column, line 4 of § 1.6050M-1(d)(5)(i)(A) which

reads "26 CFR 1.6050M-1(d)(5), to make, on the" should read "26 CFR 1.6050M-1(d)(5) to make, on the".

Par. 4. On page 50372, second column, immediately following the text of § 301.6050M-1, the language "Approved: November 6, 1989. Lawrence B. Gibbs, Commissioner of Internal Revenue." should read as follows:

Lawrence B. Gibbs,
Commissioner of Internal Revenue.

Approved: November 6, 1989.
Kenneth W. Gideon,
Assistant Secretary of the Treasury.

Dale D. Goode,
Chief, Regulations Unit, Assistant Chief Counsel (Corporate).

[FR Doc. 89-6135 Filed 4-10-90; 8:45 am]

BILLING CODE 4930-01-M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 117

[CGD9-90-02]

Drawbridge Operation Regulations; Lake Pontchartrain, LA

AGENCY: U.S. Coast Guard, DOT.

ACTION: Final rule; revocation.

SUMMARY: This amendment revokes the regulations for the Southern Railway Systems south drawspan on Lake Pontchartrain, in Orleans and St. Tammany Parishes, Louisiana, because the drawspan has been replaced with a fixed span. Notices and public procedure have been omitted from this action due to the conversion of the span.

EFFECTIVE DATE: This regulation becomes effective on May 11, 1990.

FOR FURTHER INFORMATION CONTACT: Mr. John Wachter, Bridge Administration Branch, Eighth Coast Guard District, telephone (504) 589-2065.

SUPPLEMENTARY INFORMATION: This action has no economic consequences. It merely revokes regulations that are now meaningless because they pertain to a drawbridge span that no longer exists. Consequently, this action is considered to be non-major under Executive Order 12291 and nonsignificant under Department of Transportation regulatory policies and procedures (44 FR 11034, February 26, 1979). Since there is no economic impact, a full regulatory evaluation is unnecessary. Because no notice of proposed rulemaking is required under 5 U.S.C. 553, and because this action will not have a significant impact on a substantial number of small entities, this rulemaking is exempt from

the provisions of the Regulatory Flexibility Act (5 U.S.C. 605(b)).

Drafting Information

The drafters of this regulation are Mr. John Wachter, project officer, and Commander J.A. Unzicker, project attorney.

List of Subjects in 33 CFR Part 117

Bridges.

Regulation

In consideration of the foregoing, part 117 of title 33, Code of Federal Regulations, is amended as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 49 CFR 1.49 and 33 CFR 1.05-1(g).

2. Section 117.467(a) is revised to read as follows:

§ 117.467 Lake Pontchartrain

(a) The south draw of the S11 bridge near New Orleans shall open on signal if at least 48 hours notice is given. In case of emergency, the draw shall open within 12 hours and shall be kept in condition for immediate operation until the emergency is over.

Dated: March 22, 1990.

W.F. Merila,
Rear Admiral, U.S. Coast Guard, Commander, Eighth Coast Guard District.

[FR Doc. 90-6328 Filed 4-10-90; 8:45 am]

BILLING CODE 4910-14-M

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900-AC54

Procedural Due Process

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) has amended its adjudication regulations on procedural due process for VA claimants and beneficiaries and the eligibility criteria for retroactive awards based on liberalizing laws or administrative issues. These amendments are necessary because of the need for more specificity in VA regulations on procedural due process and because of a

VA General Counsel opinion on eligibility for retroactive benefits. The effect of these amendments will be to improve and more clearly define procedural due process rights and retroactive eligibility criteria.

EFFECTIVE DATE: May 11, 1990.

FOR FURTHER INFORMATION CONTACT: Don England, Consultant, Regulations Staff, Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 233-3005.

SUPPLEMENTARY INFORMATION: On pages 37797 through 37801 of the Federal Register of September 28, 1988, VA published proposed amendments to title 38, Code of Federal Regulations, on procedural due process and the eligibility criteria for retroactive awards based on liberalizing laws or administrative issues. Interested persons were given until October 28, 1988, to submit comments, suggestions, or objections to the proposed rules.

VA received comments on the proposed rules from the Vietnam Veterans of America and the Puerto Rico Public Advocate for Veterans Affairs. The comments and recommendations with respect to each proposed amendment have been summarized and are set forth below together with the actions and/or responses of VA.

Comments and Recommendations

Section 3.103

One commenter recommended that the proposed regulation be amended to state that required notices of VA proposed and final actions be sent to a claimant at his or her last known address.

VA does not agree that inclusion of this wording in the regulation would provide any additional benefit for VA claimants with regard to their general right to notice of decisions on their claims. Barring an error or a delay in processing a notification of a change of address, all written communications to a claimant are sent to his or her last known address. Insertion of this requirement in VA regulations would not lessen the number of errors or reduce delays. For this reason no changes are being made based on this comment. Since additional protection against erroneous deprivation of benefits would not be afforded to claimants through adoption of this suggestion, the Government's burden in implementing the suggestion is not being discussed.

Both commenters recommended a requirement for VA to furnish a copy of

any notice to a claimant to the properly designated representative of the claimant.

The regulatory requirement for furnishing copies of notices to designated representatives is contained in 38 CFR 1.525(d), and inclusion in this section would be redundant. Therefore, no change is being made based on these comments.

One commenter recommended that this section include a requirement that a claimant and his or her properly designated representative be provided notification of submissions from VA regional offices to VA Central Office (VACO) for advisory opinions, administrative reviews, administrative appeals, legal opinions, and medical opinions from VA health care professionals, and that copies of such submissions and resulting replies be routinely furnished to the claimants and representatives prior to decisions being rendered. The commenter states the belief that advisory opinions from the Director, Compensation and Pension Service, are binding on regional office rating boards and Hearing Officers, and that an opportunity to examine and rebut such opinions prior to the decision is required in order to adequately provide procedural due process.

The majority of claims processed in VA regional offices are of a routine nature involving relatively simple issues of entitlement, but some claims involve extremely complex and/or novel issues and require application of a variety of laws and regulations. In some cases, due to circumstances arising from the complexity of an issue, a regional office may request an advisory opinion from VACO, a medical opinion, and/or a legal opinion. Administrative reviews and administrative appeals are actions which occur following a decision by a regional office, and therefore, have no relationship to procedural due process within the context of this section.

Advisory opinions are advisory only and, while such opinions should be given considerable weight by regional offices in reaching a determination on a particular claim, are not binding on the regional offices. The same is true of medical opinions from VA health care professionals. There is no issue of a lack of opportunity to be heard by the decisionmaker where an advisory or medical opinion has been issued because the decision making authority is retained by the regional office. VA does not believe that due process includes a requirement that such nonbinding advice be communicated to claimants and/or beneficiaries prior to an initial, appealable decision being made. VA believes the appellate process, which

provides Statements of the Case detailing the basis and rationale for a denial of benefits, affords claimants and/or beneficiaries ample opportunity to argue their views.

Information from, or copies of, these opinions or other evidence considered by VA in reaching decisions may be made available to claimants and/or duly authorized agents or representatives under the authority of 38 CFR 1.500 et seq. These regulations also apply to requests for copies of legal opinions, which are an important part of the VA decision making process, and are rendered based on facts of record at the time of the opinion. Legal opinions may be challenged following regional office decisions as part of the appellate process or through the submission of additional evidence.

Regulatory requirements for providing detailed reasons for decisions and additional procedural safeguards are also being adopted with publication of this notice concerning proposed benefit reductions. VA finds these regulatory provisions to be adequate to guard against erroneous deprivation of benefits. Marginal gains in that regard, if any, afforded to claimants by the commenter's suggestions would be far outweighed by the costs of implementation to the Government. Such costs would include employee time required to copy and mail documents to claimants and beneficiaries. In addition, decisions would be delayed pending reply or expiration of a period allowed for reply. For these reasons the recommended changes are not being adopted.

One commenter recommended requiring that VA include citations of all applicable regulations in notices of proposed or final decisions, and that the reasons for the proposed or final decision include a statement of the exact change in the claimant's circumstances on which the change is proposed or based.

VA does not agree that the recommended changes would provide any additional benefit for VA claimants with regard to their general right to notice of decisions on their claims. The recommended changes would require VA to include detailed statements and regulatory citations on favorable as well as unfavorable decisions. Clearly, there is no risk of erroneous deprivation with favorable decisions, and the suggested changes provide no additional protection to successful claimants while being extremely burdensome on the Government in terms of the impact on automated claims processing and timeliness of decisions. Implementation

the action required of the claimant or beneficiary must be taken concurrent with or prior to the filing of a request for extension of the time limit, and good cause must be shown as to why the required action could not have been taken during the original time period and could not have been taken sooner than it was. A favorable decision on the extension issue would automatically make the taking of the required action timely. Denials of such extensions would be separately appealable issues.

Section 3.110

One commenter recommended that the proposed revision be amended to specify that the beginning date of any time limit period be the date of the postmark on the envelope rather than the date on the letter of notification. The commenter states this would alleviate penalizing a claimant due to delays in mailing of the notification by VA.

All time limits established by VA regulations are computed from the date of the letter of notification. The date of the letter of notification is known by VA, whereas the date of the postmark is not. VA is of the opinion that its established time limits are generous. Even allowing for a delay of a few days for mail delivery, these limits provide ample time for claimants to perfect claims and appeals, and thus provide adequate protection against erroneous deprivation of benefits. For these reasons no changes are being made based on this comment.

Section 3.114

No comments were received regarding the proposed amendments to this section.

We appreciate the comments and suggestions of those who responded to publication of the proposed rules. The proposed rules are adopted with the amendments noted above and minor conforming amendments of a technical nature. The final rules are set forth below.

The Secretary hereby certifies that these regulatory amendments will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. The reason for this certification is that these amendments would not directly affect any small entities. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), these amendments are exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

In accordance with Executive Order 12291, Federal Regulation, the Secretary

has determined that these regulatory amendments are non-major for the following reasons:

(1) They will not have an annual effect on the economy of \$100 million or more.

(2) They will not cause a major increase in costs or prices.

(3) They will not have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Catalog of Federal Domestic Assistance program numbers are 64.100, 64.101, 64.104, 64.105, 64.106, 64.109, and 64.110.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Handicapped, Health care, Pensions, Veterans.

Approved: March 20, 1990.

Edward J. Derwinski,
Secretary of Veterans Affairs.

38 CFR part 3, Adjudication, is amended as set forth below:

PART 3—(AMENDED)

1. Section 3.103 is revised to read as follows:

§ 3.103 Procedural due process and appellate rights.

(a) *Statement of policy.* Every claimant has the right to written notice of the decision made on his or her claim, the right to a hearing, and the right of representation. Proceedings before VA are ex parte in nature, and it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government. The provisions of this section apply to all claims for benefits and relief, and decisions thereon, within the purview of this part 3.

(b) *The right to notice—(1) General.* Claimants are entitled to notice of any decision made by VA affecting the payment of benefits or the granting of relief. Such notice shall clearly set forth the decision made, any applicable effective date, the reason(s) for the decision, the right to a hearing on any issue involved in the claim, the right of representation and the right, as well as the necessary procedures and time limits, to initiate an appeal of the decision.

(2) *Pretermination/reduction notice.* Except as otherwise provided in paragraph (a)(3) of this section, no

award of compensation, pension or dependency and indemnity compensation shall be terminated, reduced or otherwise adversely affected unless the beneficiary has been notified of such adverse action and has been provided a period of 60 days in which to submit evidence for the purpose of showing that the adverse action should not be taken.

(3) *Exceptions.* Pretermination/reduction notice is not required but notice contemporaneous with the adverse action is required when:

(i) An adverse action is based solely on written, factual, unambiguous information as to income, net worth, dependency or marital status provided by the beneficiary or his/her fiduciary with knowledge or notice that such information would be used to calculate benefits, and the legal standards applied to this information are numerical in nature.

(ii) An adverse action is based upon the beneficiary's or fiduciary's failure to return a required eligibility verification report, or

(iii) Evidence reasonably indicates that a beneficiary is deceased. However, in the event that VA has received a death certificate, a terminal hospital report verifying the death of a beneficiary or a claim for VA burial benefits, no notice of termination (contemporaneous or otherwise) will be required.

(c) *The right to a hearing.* (1) Upon request a claimant is entitled to a hearing at any time on any issue involved in a claim within the purview of part 3 of this chapter. VA will provide the place of hearing in the VA office having original jurisdiction over the claim or at the VA office nearest the claimant's home having adjudicative functions, and will provide VA personnel who have original determinative authority of such issues to conduct the hearing and be responsible for establishment and preservation of the hearing record. Hearings in connection with proposed adverse actions and appeals shall be held before VA personnel having original determinative authority who did not participate in the proposed action or the decision being appealed. All expenses incurred by the claimant in connection with the hearing are the responsibility of the claimant.

(2) The claimant is entitled to produce witnesses and all testimony will be under oath or affirmation. The purpose of a hearing is to permit the claimant to introduce into the record in person any available evidence which the claimant may consider material and any

arguments and contentions with respect to the facts and applicable law which the claimant may consider pertinent. It is the responsibility of the VA personnel conducting the hearings to explain fully the issues and suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant's position. To assure clarity and completeness of the hearing record, questions which are directed to the claimant and to witnesses are to be framed to explore fully the basis for claimed entitlement rather than with an intent to refute evidence or to discredit testimony. In cases in which the nature, origin, or degree of disability is in issue, the claimant may request visual examination by a physician designated by VA and the physician's observations will be read into the record.

(d) *Submission of evidence.* Any evidence whether documentary, testimonial, or in other form, offered by the claimant in support of a claim and any issue a claimant may raise and any contention or argument a claimant may offer with respect thereto are to be included in the records.

(e) *The right to representation.* Subject to the provisions of §§ 14.826 through 14.837 of this title, claimants are entitled to representation of their choice at every stage in the prosecution of a claim.

(f) *Notification of decisions.* The claimant or beneficiary will be notified in writing of decisions affecting the payment of benefits or granting relief. Notice will include the reason for the decision and the date it will be effective as well as the right to a hearing subject to paragraph (c) of this section. The notification will also advise the claimant or beneficiary of the right to initiate an appeal by filing a Notice of Disagreement which will entitle the individual to a Statement of the Case for assistance in perfecting an appeal. Further, the notice will advise him or her of the periods in which an appeal must be initiated and perfected. (See part 19, subpart B, of this chapter, on appeals.)

2. Section 3.105 is amended by revising the last sentence in paragraph (d), paragraphs (e) and (f), and adding paragraphs (g) and (h), to read as follows:

§ 3.105 Revision of decision.

(d) Unless otherwise provided in paragraph (b) of this section, if additional evidence is not received within that period, final rating action will be taken and the award will be reduced or discontinued, if in order, effective the last day of the month in

which a 60-day period from the date of notice to the beneficiary of the final rating action expires.

(Authority: 38 U.S.C. 3012(b)(6))

(e) *Reduction in evaluation—compensation.* Where the reduction in evaluation of a service-connected disability or employability status is considered warranted and the lower evaluation would result in a reduction or discontinuance of compensation payments currently being made, a rating proposing the reduction or discontinuance will be prepared setting forth all material facts and reasons. The beneficiary will be notified at his or her latest address of record of the contemplated action and furnished detailed reasons therefor, and will be given 60 days for the presentation of additional evidence to show that compensation payments should be continued at their present level. Unless otherwise provided in paragraph (h) of this section, if additional evidence is not received within that period, final rating action will be taken and the award will be reduced or discontinued effective the last day of the month in which a 60-day period from the date of notice to the beneficiary of the final rating action expires.

(Authority: 38 U.S.C. 3012(b)(6))

(f) *Reduction in evaluation—pension.* Where a change in disability or employability warrants a reduction or discontinuance of pension payments currently being made, a rating proposing the reduction or discontinuance will be prepared setting forth all material facts and reasons. The beneficiary will be notified at his or her latest address of record of the contemplated action and furnished detailed reasons therefor, and will be given 60 days for the presentation of additional evidence to show that pension benefits should be continued at their present level. Unless otherwise provided in paragraph (h) of this section, if additional evidence is not received within that period, final rating action will be taken and the award will be reduced or discontinued effective the last day of the month in which the final rating action is approved.

(Authority: 38 U.S.C. 3012(b)(5))

(g) *Other reductions/discontinuances.* Except as otherwise specified at § 3.103(b)(3) of this part, where a reduction or discontinuance of benefits is warranted by reason of information received concerning income, net worth, dependency, or marital or other status, a proposal for the reduction or discontinuance will be prepared setting forth all material facts and reasons. The

beneficiary will be notified at his or her latest address of record of the contemplated action and furnished detailed reasons therefor, and will be given 60 days for the presentation of additional evidence to show that the benefits should be continued at their present level. Unless otherwise provided in paragraph (h) of this section, if additional evidence is not received within that period, final adverse action will be taken and the award will be reduced or discontinued effective as specified under the provisions of §§ 3.500 through 3.503 of this part.

(Authority: 38 U.S.C. 3012)

(h) *Predetermination hearings.* (1) In the advance written notice concerning proposed actions under paragraphs (d) through (g) of this section, the beneficiary will be informed that he or she will have an opportunity for a predetermination hearing, provided that a request for such a hearing is received by VA within 30 days from the date of the notice. If a timely request is received, VA will notify the beneficiary in writing of the time and place of the hearing at least 10 days in advance of the scheduled hearing date. The 10-day advance notice may be waived by agreement between VA and the beneficiary or representative. The hearing will be conducted by VA personnel who did not participate in the proposed adverse action and who will bear the decision-making responsibility. If a predetermination hearing is timely requested, benefit payments shall be continued at the previously established level pending a final determination concerning the proposed action.

(2) Following the predetermination procedures specified in this paragraph and paragraph (d), (e), (f) or (g) of this section, whichever is applicable, final action will be taken. If a predetermination hearing was not requested or if the beneficiary failed without good cause to report for a scheduled predetermination hearing, the final action will be based solely upon the evidence of record. Examples of good cause include, but are not limited to, the illness or hospitalization of the claimant or beneficiary, death of an immediate family member, etc. If a predetermination hearing was conducted, the final action will be based on evidence and testimony adduced at the hearing as well as the other evidence of record including any additional evidence obtained following the hearing pursuant to necessary development. Whether or not a predetermination hearing was conducted, a written notice of the final

accountholder's name and address were verified at the time the account was opened, or at any subsequent time, and that information was recorded on the signature card or other file or record; or by examination of a document that contains the name and address of the purchaser and normally is acceptable within the banking community as a means of identification when cashing checks for nondepositors. If the deposit account holder's identity has not been verified previously, or if the financial institution is unable to determine whether the individual's identification had been verified previously, then the financial institution shall verify the deposit account holder's identity by examination of a document that contains the name and address of the purchaser and normally is acceptable within the banking community as a means of identification when cashing checks for nondepositors, and shall record the specific identifying information on the log (e.g., State of issuance and number of driver's license). The method of verification used shall be noted on the log.

(2) If the purchaser does not have a deposit account with the financial institution:

- (i)(A) The name and address of the purchaser;
- (B) The social security number of the purchaser, or if the purchaser is an alien and does not have a social security number, then the alien identification number;
- (C) The date of birth of the purchaser;
- (D) If the individual is purchasing the instrument(s) on behalf of another person, the name of the person on whose behalf the instrument is being purchased and the account number of that third party; if there is no account number, then the name, address and social security number, as well as the taxpayer identification number, or alien identification number, of such person;
- (E) The date of purchase;
- (F) The branch where the purchase occurred;
- (G) The type(s) of instrument(s) purchased;
- (H) The serial number(s) of each of the instrument(s) purchased;
- (I) The dollar amount(s) of each of the instrument(s) purchased;
- (J) The payee(s) on each of the instrument(s) purchased (for cashier's checks and bank checks and drafts); and
- (K) The amount of the purchase in currency.

(ii) In addition, the financial institution shall verify the purchaser's name and address by examination of a document that contains the name and address of the purchaser and normally

is acceptable within the banking community as a means of identification when cashing checks for nondepositors, and shall record the specific identifying information on the log (e.g., State of issuance and number of driver's license).

(b) Contemporaneous purchases of the same or different types of instruments totaling \$3,000 or more shall be treated as one purchase. Multiple purchases during one business day totaling \$3,000 or more shall be treated as one purchase if an individual employee, director, officer, or partner of the financial institution has knowledge that these purchases have occurred. Multiple sales must be noted as such on the log.

(c) The financial institution may maintain a single centralized chronological log or it may maintain separate chronological logs by branch. A financial institution also may keep a separate chronological log for each type of instrument sold. If the financial institution maintains a separate chronological log or logs for each branch, all of the branch logs for a calendar month must be sent to a centralized location by the fifteenth (15th) day after the end of the calendar month for which the log was compiled. Financial institutions with branches in more than one State may centralize the logs by State. A list of the centralized locations and branches shall be available to the Secretary upon request.

(d) Chronological logs shall be retained by the financial institution for a period of five years.

(e) The chronological logs shall be available to the Secretary upon request at any time.

Dated: April 24, 1990.

Peter K. Numaz,
Assistant Secretary (Enforcement).
[FR Doc. 90-11229 Filed 5-14-90; 8:45 am]
BILLING CODE 4810-25-M

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Parts 3 and 19

RIN 2900-AD14

Appeals Regulations and Rules of Practice; Request for Change in Representation, Request for Personal Hearing, or Submission of Additional Evidence Following Certification of an Appeal to the Board of Veterans Appeals

AGENCY: Department of Veterans Affairs.

ACTION: Final rules.

SUMMARY: The Department of Veterans Affairs (VA) is issuing final regulatory amendments concerning the consideration of additional evidence, hearing requests, and requests for changes in representation following the certification and transfer of an appeal to the Board of Veterans Appeals (BVA). These amendments set limits on the time in which these items may be submitted and are necessary to ensure the timely processing of appeals.

EFFECTIVE DATE: These rules are effective June 14, 1990.

FOR FURTHER INFORMATION CONTACT: Mr. Jan Donsbach, Special Legal Assistant to the Chairman (O1C), Board of Veterans Appeals, Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 233-2978.

SUPPLEMENTARY INFORMATION: On July 6, 1989, VA published in the Federal Register (54 FR 28445) a notice proposing amendment of 38 CFR 19.174 to add a cutoff date following which an appellant cannot submit a request for a change in representation and an appellant and/or representative cannot submit additional evidence or a request for a personal hearing in a case which has been transferred to the BVA for appellate consideration. Provision was made for accepting evidence and requests at a later date when good cause is shown. Related revisions to 38 CFR 3.103(c), 3.156(a), and 3.160(e) were proposed to insure that effective dates for subsequent awards, if any, are preserved when evidence is submitted too late for the BVA to consider in an appeal.

VA received 12 comments on the proposed rules—two from VA employees, two from a service organization and allied legal services organizations, seven from private attorneys-at-law, and one from a County Executive.

Several commenters objected to the objective of these amendments—setting a cutoff date for submitting additional evidence and requests for a change in representation and hearings following transfer of appeals to BVA. Two voiced general opposition, but gave no reasons for their objections. Some commenters suggested that the need for the restrictions in these amendments had not been adequately addressed in view of the perceived burdens which they impose. Others expressed general concern about an abridgment of rights. One commenter asserted that the proposed regulation gave the Chairman "extraordinary power to refuse to accept any new evidence, refuse to allow a

38 CFR 3.103(c)
eff: 6/14/90

by these amendments, but it is not substantial. Essentially, it involves only their consideration of additional evidence and hearing testimony submitted too late for the BVA to consider. They must reconsider their position in the light of evidence initially submitted while a case is at the BVA anyway, unless this right is waived by the appellant. (See current § 19.174.)

One commenter suggested that, instead of requiring that good cause be shown for the late submission of evidence or requests for changes in representation or hearings, the rule be rewritten to provide for a motion for an extension of time to take these steps. This suggestion was not adopted. There would be little or no practical difference in the approach suggested. This commenter also suggested that the cutoff date be measured from the date that the appellate record was received by BVA, rather than from the time that the appellant is given notice of the transfer of the appellate record to BVA. This suggestion was not adopted either. The method adopted enables appellants and their representatives to easily determine the exact cutoff date, inasmuch as they are always informed of the transfer of the appellate record to BVA. The proposed method does not. This commenter voiced concern about perceived problems in associating requests with the record, when the requests are submitted soon after notice of transfer of the record to the BVA has been given, because the request might be received at the BVA while the file was still in transit. In BVA's experience, proper association of these early requests with the appropriate file is rarely a problem.

Concerning this commenter's suggestion that these amendments will serve to encourage representatives to file protective requests for hearings and that this would add to BVA's workload due to the scheduling of hearings which do not materialize, the BVA does not believe that this will be a significant problem. As noted previously, a great deal of time is provided to make the choice of whether or not to request a hearing and the occurrence of events very late in the appellate process which make a hearing desirable for the first time is rare. In those unusual cases, these amendments provide a mechanism for obtaining a hearing. Thus, it will generally be unnecessary for appellants and their representatives to file protective hearing requests. Based on past experience, the BVA has every reason to believe that the vast majority of representatives will act responsibly

and will not file frivolous hearing requests.

This commenter also expressed lengthy views about perceived limitations on the ability of representatives to withdraw from a case imposed by these revisions. These revisions focus on when an appellant may change representatives, not when a representative may withdraw. The language in 38 CFR 19.174 has been altered to make this clearer. In addition, withdrawal of a representative has been added to the list of examples of good cause for a late change in representation. The same commenter raised questions about restrictions on hearings in which the appellant is not present. That issue, while related, is not the subject of this rule. That issue will be clarified in the future in addressing comments concerning other proposed rules. (See 54 FR 34334)

The Secretary hereby certifies that these regulatory amendments will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. Pursuant to 5 U.S.C. 605(b), these regulatory amendments are therefore exempt from the initial and final regulatory flexibility analyses requirements of sections 603 and 604. They will have no significant direct impact on small entities (i.e., small businesses, small private and nonprofit organizations, and small governmental jurisdictions) inasmuch as they concern the appeals of individual appellants before BVA.

VA has also determined that these regulatory amendments are nonmajor in accordance with Executive Order 12291. They will not have an adverse economic impact on or increase costs to consumers, individual industries, Federal, State, and local government agencies, or geographic regions.

There is no Catalog of Federal Domestic Assistance program number involved with these regulatory amendments.

List of Subjects

38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Veterans

38 CFR Part 19

Administrative practice and procedure, Claims, Veterans

Approved: April 17, 1990.
Edward J. Derwinski,
Secretary of Veterans Affairs.

38 CFR parts 3 and 19 are amended as follows:

PART 3—[AMENDED]

1. In § 3.103, the first sentence of paragraph (c) is revised and an authority citation is added to read as follows:

§ 3.103 *Due process—procedural and appellate rights with regard to disability and death benefits and related relief.*

(c) *Hearings.* Upon request, a claimant is entitled to a hearing at any time on any issue involved in a claim within the purview of this part, subject to the limitations described in § 19.174 of this chapter with respect to hearings in claims which have been certified to the Board of Veterans Appeals for appellate review. * * *

(Authority: 38 U.S.C. 210(c))

2. In § 3.156, paragraph (a) is revised and an authority citation is added to read as follows:

§ 3.156 *New and material evidence.*

(a) New and material evidence received prior to the expiration of the appeal period, or prior to the appellate decision if a timely appeal has been filed (including evidence received prior to an appellate decision and referred to the agency of original jurisdiction by the Board of Veterans Appeals without consideration in that decision in accordance with the provisions of § 19.174(c)(1) of this chapter), will be considered as having been filed in connection with the claim which was pending at the beginning of the appeal period.

(Authority: 38 U.S.C. 210(c))

3. In § 3.160, paragraph (e) is revised and an authority citation is added to read as follows:

§ 3.160 *Status of claims.*

(e) *Reopened claim.* Any application for a benefit received after final disallowance of an earlier claim, or any application based on additional evidence or a request for a personal hearing submitted more than 90 days following notification to the appellant of the certification of an appeal and transfer of applicable records to the Board of Veterans Appeals which was not considered by the Board in its decision and was referred to the agency of original jurisdiction for consideration.

Discussion of Regulation

The event requiring this regulation will begin at 8:45 p.m. on July 4, 1990 approximately 15 minutes prior to the fireworks display 100 yards west of Buoy #2 in Rowayton, CT. This Safety Zone is needed to protect any transiting commercial or recreational marine traffic from the possible hazards associated with the fireworks display in this entrance channel area.

This regulation is issued pursuant to U.S.C. 1225 and 1231 as set out in the authority citation for all of part 165.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Security measures, Vessels, Waterways.

Regulation**PART 165—[AMENDED]**

In consideration of the foregoing, subpart C of part 165 of title 33, Code of Federal Regulations, is amended as follows:

1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1225 and 1231; 50 U.S.C. 191; 49 CFR 1.46 and 33 CFR 1.05-1(g), 6.04-1, 6.04-6, and 160.5.

2. A new 33 CFR 165.T1069 is added to read as follows:

§ 165.T1069 Safety zone: Rowayton Civic Association fireworks.

(a) *Location.* The following area is a safety zone: All waters within a 1,000 ft radius of the Barge "C33" (the fireworks launching platform) approximately 100 yards west of Buoy #2 in Rowayton, CT. The launching platform will be moved into and then anchored in position (41-03'18" N, 073-26'41" W.). The safety zone will be closed to all marine traffic from 8:45 p.m. until the completion of the display at approximately 11:00 p.m.

(b) *Effective date.* This regulation becomes effective on July 4, 1990 at 8:45 p.m. approximately 15 minutes prior to the display. It terminates upon completion of the display at approximately 11:00 p.m. July 4, 1990, unless terminated sooner by the Captain of the Port. The rain date for this event is July 8, 1990 at the same time.

(c) *Regulations.* (1) In accordance with the general regulations in § 165.23 of this part, entry into this zone is prohibited unless authorized by the Captain of the Port or his on scene representatives.

Dated: June 14, 1990.

T.H. Collins,

Captain, U.S. Coast Guard, Captain of the Port Long Island Sound.

[FR Doc. 90-14380 Filed 6-20-90; 8:45 am]

BILLING CODE 4910-14-M

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION**36 CFR Part 1284**

RIN 3095-AA47

Temporary Exhibition of Privately-Owned Material in the National Archives Building

AGENCY: National Archives and Records Administration (NARA).

ACTION: Final rule.

SUMMARY: NARA is publishing rules governing the temporary exhibition of privately-owned documents, paintings, and other objects at the National Archives Building that are not part of a NARA-produced exhibit. The policy embodied in these rules is being established because of limited space and other NARA resources for display of items at the National Archives Building.

EFFECTIVE DATE: June 21, 1990.

FOR FURTHER INFORMATION CONTACT: John Constance or Nancy Allard at 202-501-5110 (FTS 241-5110).

SUPPLEMENTARY INFORMATION: NARA published a notice of proposed rulemaking on April 11, 1990 (55 FR 13553). No comments were received. Accordingly, the proposed rule is being adopted without change.

This rule is not a major rule for the purposes of Executive Order 12291 of February 17, 1981. As required by the Regulatory Flexibility Act, it is hereby certified that this rule will not have a significant impact on small business entities.

List of Subjects in 36 CFR Part 1284

Archives and records.

For the reasons set forth in the preamble, chapter XII of title 36, Code of Federal Regulations, is amended by adding part 1284 to subchapter G to read as follows:

PART 1284—EXHIBITS

Sec.

1284.1 Scope of part.

1284.20 Temporary exhibition of privately-owned material.

Authority: 44 U.S.C. 2104(a).

§ 1284.1 Scope of part.

This part sets forth policies and procedures concerning the exhibition of materials at the National Archives Building.

§ 1284.20 Temporary exhibition of privately-owned material.

(a) Documents, paintings, or other objects belonging to private individuals

or organizations normally will not be accepted for display at the National Archives Building except as part of a NARA-produced exhibit.

(b) NARA may accept for temporary special exhibit at the National Archives Building privately-owned documents or other objects under the following conditions:

(1) The material to be displayed relates to the institutional history of the National Archives and Records Administration or its predecessor organizations, the National Archives Establishment and the National Archives and Records Service;

(2) Exhibition space is available in the building that the NARA Office of Public Programs and the Document Conservation Branch judge to be appropriate in terms of security, light level, climate control, and available exhibition-cases or other necessary fixtures; and

(3) NARA has resources (such as exhibit and security staff) available to produce the special exhibit.

(c) The Assistant Archivist for Public Programs (NE), in conjunction with the NARA General Counsel when appropriate, shall review all offers to display privately-owned material and shall negotiate the terms of exhibition for offers that can be accepted. The lender shall provide evidence of title to and authenticity of the item(s) to be displayed before any loan agreement is executed.

(d) The Assistant Archivist shall inform the offeror of NARA's decision within 60 days.

Dated: May 21, 1990.

Don W. Wilson,

Archivist of the United States.

[FR Doc. 90-14293 Filed 6-20-90; 8:45 am]

BILLING CODE 7515-01-M

DEPARTMENT OF VETERANS AFFAIRS**38 CFR Part 3**

RIN 2900-AC54 and 2900-AD14

Procedural Due Process; Appeals Regulations and Rules of Practice; Request for Change in Representation, Request for Personal Hearing, or Submission of Additional Evidence Following Certification of an Appeal to the Board of Veterans Appeals

AGENCY: Department of Veterans Affairs.

ACTION: Final rules; Correction.

SUMMARY: On April 11, 1990, on pages 13522-13529 of the Federal Register, the

Department of Veterans Affairs published a final rule on procedural due process for VA claimants and beneficiaries and the eligibility criteria for retroactive awards based on liberalizing laws or administrative issues. This final rule included a revision to 38 CFR part 3, § 3.103 (page 13527). A subsequent revision to § 3.103, paragraph (c), appearing in another final rule as described below was published in the Federal Register on May 15, 1990. Due to editorial errors it is necessary to publish a correction so as to avoid any confusion.

On May 15, 1990, on pages 20144-20150 of the Federal Register, the Department of Veterans Affairs published a final rule to amend its appeals regulations concerning the consideration of additional evidence, hearing requests and requests for changes in representation following the certification and transfer of an appeal to the Board of Veterans Appeals. The revision to 38 CFR part 3, § 3.103, paragraph (c) (page 21048) supersedes the revision published on April 11, 1990, but was incorrectly published.

In the amendatory language and the revision to 38 CFR part 3, § 3.103, paragraph (c) (page 20148), three editorial errors were made. The amendatory paragraph stated that the first sentence of paragraph (c) is revised. In fact, it is newly designated paragraph (c)(1), as published on page 13527 of the Federal Register dated April 11, 1990, that is being revised. In addition, the title of paragraph (c)(1) and the words in the first sentence "within the purview of this part" were inadvertently changed. The title is "The right to a hearing" and the words in the first sentence "within the purview of part 3 of this chapter" are correct as published on page 13527 of the Federal Register dated April 11, 1990. The title of § 3.103 is correct as it appears in both the Federal Register dated May 15, 1990, (page 20148), and in the current edition (revised as of September 1, 1989) of title 38, Code of Federal Regulations.

To avoid any confusion, VA is printing the correct newly designated paragraph (c)(1) to § 3.103.

VA regrets the errors that are corrected by this notice.

FOR FURTHER INFORMATION CONTACT: Don England, (202) 233-3005; Jan Donsbach, (202) 233-2978.

Dated: June 14, 1990.

Charles A. Fountaine, III,
Records Management Service.

PART 3—AMENDED

1. In 38 CFR part 3, § 3.103, newly designated paragraph (c)(1) as published on page 13527 of the Federal Register

dated April 11, 1990, and as published as paragraph (c) on page 20148 of the Federal Register dated May 15, 1990, is correctly designated as paragraph (c)(1) and the first sentence is revised to read as follows:

§ 3.103 Due process—procedural and appellate rights with regard to disability and death benefits and related relief.

(c) *The right to a hearing.* (1) Upon request, a claimant is entitled to a hearing at any time on any issue involved in a claim within the purview of part 3 of this chapter, subject to the limitations described in § 19.174 of this chapter with respect to hearings in claims which have been certified to the Board of Veterans Appeals for appellate review. * * *

[FR Doc. 90-14296 Filed 6-20-90; 8:45 am]
BILLING CODE 8320-01-8

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 64

(Docket No. FEMA 6877)

List of Communities Eligible for Sale of Flood Insurance; Alabama et al.

AGENCY: Federal Emergency Management Agency.

ACTION: Final rule.

SUMMARY: This rule lists communities participating in the National Flood Insurance Program (NFIP). These communities have applied to the program and have agreed to enact certain floodplain management measures. The communities' participation in the program authorizes the sale of flood insurance to owners of property located in the communities listed.

EFFECTIVE DATES: The dates listed in the third column of the table.

ADDRESSES: Flood insurance policies for property located in the communities listed can be obtained from any licensed property insurance agent or broker serving the eligible community, or from the National Flood Insurance Program (NFIP) at: Post Office Box 457, Lanham, Maryland 20708, Phone: (800) 638-7418.

FOR FURTHER INFORMATION CONTACT: Frank H. Thomas, Assistant Administrator, Office of Loss Reduction, Federal Insurance Administration, (202) 646-2717, Federal Center Plaza, 500 C Street SW., room 417, Washington, DC 20472.

SUPPLEMENTARY INFORMATION: The National Flood Insurance Program (NFIP), enables property owners to purchase flood insurance at rates made reasonable through a Federal subsidy. In return, communities agree to adopt and administer local floodplain management measures aimed at protecting lives and new construction from future flooding. Since the communities on the attached list have recently entered the NFIP, subsidized flood insurance is now available for property in the community.

In addition, the Director of the Federal Emergency Management Agency has identified the special flood hazard areas in some of these communities by publishing a Flood Hazard Boundary Map. The date of the flood map, if one has been published, is indicated in the fourth column of the table. In the communities listed where a flood map has been published, Section 102 of the Flood Disaster Protection Act of 1973, as amended, requires the purchase of flood insurance as a condition of Federal or federally related financial assistance for acquisition or construction of buildings in the special flood hazard area shown on the map.

The Director finds that the delayed effective dates would be contrary to the public interest. The Director also finds that notice and public procedure under 5 U.S.C. 553(b) are impracticable and unnecessary.

The Catalog of Domestic Assistance Number for this program is 83.100 "Flood Insurance."

Pursuant to the provisions of 5 U.S.C. 605(b), the Administrator, Federal Insurance Administration, to whom authority has been delegated by the Director, Federal Emergency Management Agency, hereby certifies that this rule, if promulgated will not have a significant economic impact on a substantial number of small entities. This rule provides routine legal notice stating the community's status in the NFIP and imposes no new requirements or regulations on participating communities.

List of Subjects in 44 CFR Part 64

Flood insurance, Floodplains.

PART 64—(AMENDED)

1. The authority citation for part 64 continues to read as follows:

Authority: 42 U.S.C. 4001 et. seq., Reorganization Plan No. 3 of 1978, E.O. 12127

2. Section 64.6 is amended by adding in alphabetical sequence new entries to the table.

Department of Veterans Affairs

§ 3.103

cases will not be required to be followed as precedents in subsequent cases.

(Authority: 38 U.S.C. 210)

[54 FR 5613, Feb. 6, 1989]

§ 3.102 Reasonable doubt.

It is the defined and consistently applied policy of the Department of Veterans Affairs to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. By reasonable doubt is meant one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim. It is a substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility. It is not a means of reconciling actual conflict or a contradiction in the evidence; the claimant is required to submit evidence sufficient to justify a belief in a fair and impartial mind that the claim is well grounded. Mere suspicion or doubt as to the truth of any statements submitted, as distinguished from impeachment or contradiction by evidence or known facts, is not justifiable basis for denying the application of the reasonable doubt doctrine if the entire, complete record otherwise warrants invoking this doctrine. The reasonable doubt doctrine is also applicable even in the absence of official records, particularly if the basic incident allegedly arose under combat, or similarly strenuous conditions, and is consistent with the probable results of such known hardships.

(Authority: 38 U.S.C. 210(c))

[50 FR 34458, Aug. 26, 1985]

§ 3.103 Procedural due process and appellate rights.

(a) *Statement of policy.* Every claimant has the right to written notice of the decision made on his or her claim, the right to a hearing, and the right of

representation. Proceedings before VA are ex parte in nature, and it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government. The provisions of this section apply to all claims for benefits and relief, and decisions thereon, within the purview of this part 3.

(b) *The right to notice—(1) General.* Claimants are entitled to notice of any decision made by VA affecting the payment of benefits or the granting of relief. Such notice shall clearly set forth the decision made, any applicable effective date, the reason(s) for the decision, the right to a hearing on any issue involved in the claim, the right of representation and the right, as well as the necessary procedures and time limits, to initiate an appeal of the decision.

(2) *Pretermination/reduction notice.* Except as otherwise provided in paragraph (b)(3) of this section, no award of compensation, pension or dependency and indemnity compensation shall be terminated, reduced or otherwise adversely affected unless the beneficiary has been notified of such adverse action and has been provided a period of 60 days in which to submit evidence for the purpose of showing that the adverse action should not be taken.

(3) *Exceptions.* Pretermination/reduction notice is not required but notice contemporaneous with the adverse action is required when:

(i) An adverse action is based solely on written, factual, unambiguous information as to income, net worth, dependency or marital status provided by the beneficiary or his/her fiduciary with knowledge or notice that such information would be used to calculate benefits, and the legal standards applied to this information are numerical in nature,

(ii) An adverse action is based upon the beneficiary's or fiduciary's failure to return a required eligibility verification report, or

(iii) Evidence reasonably indicates that a beneficiary is deceased. However, in the event that VA has received a death certificate, a terminal hospital

ff: 6/14/90

§ 3.104

38 CFR Ch. I (7-1-90 Edition)

report verifying the death of a beneficiary or a claim for VA burial benefits, no notice of termination (contemporaneous or otherwise) will be required.

(c) *The right to a hearing.* (1) Upon request, a claimant is entitled to a hearing at any time on any issue involved in a claim within the purview of part 3 of this chapter, subject to the limitations described in § 19.174 of this chapter with respect to hearings in claims which have been certified to the Board of Veterans Appeals for appellate review. VA will provide the place of hearing in the VA office having original jurisdiction over the claim or at the VA office nearest the claimant's home having adjudicative functions, and will provide VA personnel who have original determinative authority of such issues to conduct the hearing and be responsible for establishment and preservation of the hearing record. Hearings in connection with proposed adverse actions and appeals shall be held before VA personnel having original determinative authority who did not participate in the proposed action or the decision being appealed. All expenses incurred by the claimant in connection with the hearing are the responsibility of the claimant.

(2) The claimant is entitled to produce witnesses and all testimony will be under oath or affirmation. The purpose of a hearing is to permit the claimant to introduce into the record in person any available evidence which the claimant may consider material and any arguments and contentions with respect to the facts and applicable law which the claimant may consider pertinent. It is the responsibility of the VA personnel conducting the hearings to explain fully the issues and suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant's position. To assure clarity and completeness of the hearing record, questions which are directed to the claimant and to witnesses are to be framed to explore fully the basis for claimed entitlement rather than with an intent to refute evidence or to discredit testimony. In cases in which the nature, origin, or degree of disability is in issue, the

claimant may request visual examination by a physician designated by VA and the physician's observations will be read into the record.

(Authority: 38 U.S.C. 210(c))

(d) *Submission of evidence.* Any evidence whether documentary, testimonial, or in other form, offered by the claimant in support of a claim and any issue a claimant may raise and any contention or argument a claimant may offer with respect thereto are to be included in the records.

(e) *The right to representation.* Subject to the provisions of §§ 14.626 through 14.637 of this title, claimants are entitled to representation of their choice at every stage in the prosecution of a claim.

(f) *Notification of decisions.* The claimant or beneficiary will be notified in writing of decisions affecting the payment of benefits or granting relief. Notice will include the reason for the decision and the date it will be effective as well as the right to a hearing subject to paragraph (c) of this section. The notification will also advise the claimant or beneficiary of the right to initiate an appeal by filing a Notice of Disagreement which will entitle the individual to a Statement of the Case for assistance in perfecting an appeal. Further, the notice will advise him or her of the periods in which an appeal must be initiated and perfected. (See part 19, subpart B, of this chapter, on appeals.)

[55 FR 13527, Apr. 11, 1990; 55 FR 17530, Apr. 25, 1990, as amended at 55 FR 20148, May 15, 1990; 55 FR 25308, June 21, 1990]

§ 3.104 Finality of decisions.

(a) The decision of a duly constituted rating agency or other agency of original jurisdiction on which an action was predicated will be final and binding upon all field offices of the Department of Veterans Affairs as to conclusions based on evidence on file at that time and will not be subject to revision on the same factual basis except by duly constituted appellate authorities or except as provided in § 3.105. See §§ 19.153 and 19.154 of this chapter.

(b) Current determinations of line of duty, character of discharge, relation-

the result of a service-connected disease or injury (38 CFR 3.310(a)).

By enacting Public Law 98-542, Congress clearly intended to establish an avenue for VA to compensate veterans for disabilities or deaths caused by ionizing radiation exposure, since existing statutes and regulations had proven inadequate for that purpose. Just as clearly, 38 CFR 3.311(b), which implements the radiation provisions of Public Law 98-542, does not preclude awards of service connection under §§ 3.303, 3.304, 3.306, or 3.307, since it is applied only after service connection under those regulations has already been precluded because a condition manifested itself beyond the time frames they impose.

As to the commenter's concern that this amendment would preclude application of the reasonable doubt provisions of § 3.102, we believe those concerns are unfounded because the reasonable doubt provisions are applied at several stages throughout the adjudication of ionizing radiation claims. The initial application of the provisions of § 3.102 occurs when the Secretary, after receiving the advice of the VACEH, determines whether it is at least as likely as not that a significant statistical association exists between a specific condition and exposure to ionizing radiation (38 CFR 1.17 (d) and (f)). When the ionizing radiation dose estimates provided by the Department of Defense are reported as a range of doses to which the veteran may have been exposed, VA applies the provisions of § 3.102 again by using the highest estimated level as the basis for subsequent determinations. VA applies the benefit of doubt provisions of § 3.102 yet again when the Under Secretary for Health renders an opinion as to whether it is as likely as not that a veteran's radiogenic disease resulted from the level of ionizing radiation to which he or she was exposed during military service.

For the reasons set forth above, VA believes that the proposed amendment to § 3.311(b) is not only consistent with the Secretary's authority under 38 U.S.C. 501(a), but also with the provisions of Public Law 98-542.

VA appreciates the comment submitted in response to both proposed rules, which are now combined and adopted with minor technical amendments.

The Secretary hereby certifies that this regulatory amendment 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. The reason for this certification is that

this amendment would not directly affect any small entities. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

In accordance with Executive Order 12291, Federal Regulation, the Secretary has determined that this regulatory amendment is non-major for the following reasons:

(1) It will not have an annual effect on the economy of \$100 million or more.

(2) It will not cause a major increase in costs or prices.

(3) It will not have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Catalog of Federal Domestic Assistance program numbers are 64.109 and 64.110.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Handicapped, Health care, Pensions, Veterans.

Approved: March 3, 1993.

Jesse Brown,

Secretary of Veterans Affairs.

For the reasons set out in the preamble, 38 CFR part 3 is amended as set forth below:

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

1. The authority citation for part 3, subpart A, continues to read as follows:

Authority: 105 Stat. 388; 38 U.S.C. 501(a), unless otherwise noted.

2. In § 3.311(b)(2)(xvi), remove the word "and"; in § 3.311(b)(2)(xvii), remove the mark "...", and add, in its place, the mark "·";

3. In § 3.311b, add paragraphs (b)(2)(xviii) and (b)(2)(xix), and revise paragraph (h) to read as follows:

§ 3.311b Claims based on exposure to ionizing radiation.

· · · · ·

(b) · · · ·

(2) · · · ·

(xviii) Ovarian cancer; and

(xix) Parathyroid adenoma.

· · · · ·

(h) Service connection under other provisions. Nothing in this section will be construed to prevent the establishment

of service connection for any disease or injury shown to have been incurred or aggravated during active service in accordance with §§ 3.304, 3.306, 3.307, or 3.309. However, service connection will not be established under this section, or any other section except for §§ 3.309(d) or 3.310(a), on the basis of exposure to ionizing radiation and the subsequent development of any disease not specified in paragraph (b)(2) of this section.

[FR Doc. 93-6928 Filed 3-25-93; 8:45 am] BILLING CODE 8320-01-U

38 CFR Part 3

RIN 2900-AF81

Procedural Due Process and Appellate Rights

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) has amended its adjudication regulations concerning procedural due process and appellate rights. This amendment is necessary because the previous regulations limit locations at which VA may hold claimant hearings. The intended effect of this amendment is to allow the Veterans Benefits Administration (VBA) greater flexibility in providing hearing locations for claimants desiring a hearing.

EFFECTIVE DATE: This amendment is effective March 28, 1993.

FOR FURTHER INFORMATION CONTACT: John Bisset, Jr., Consultant, Regulations Staff, Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., DC 20420, (202) 233-3005.

SUPPLEMENTARY INFORMATION: VA published a proposal to amend 38 CFR 3.103(c)(1) to allow VBA greater flexibility in providing hearing locations for claimants desiring a hearing in the Federal Register of June 30, 1992 (57 FR 29052-53). Interested persons were invited to submit written comments, suggestions or objections on or before July 30, 1992. We received one comment from the Paralyzed Veterans of America.

The commenter, while agreeing that the proposed amendment to hold hearings at additional sites would be a convenience to certain claimants, suggested that the practice could be detrimental to the claimant's interest if the services of his or her representative or veterans service organization would be unavailable. For this reason, the

commenter recommended that VA's notices of the place of the hearing include notice as to the availability of the appointed representative and of an alternate site that may be more agreeable to both the claimant and his or her representative.

This amendment to § 3.103(c)(1) allows VA the flexibility to provide hearings at any VA facility or other federal building at which suitable hearing facilities are available, at the option of VA and subject to available resources. The claimant would always have the option to request that the hearing be conducted at the VA regional office having jurisdiction over the claim or at the VA regional office nearest the claimant's home.

VA will exercise its option to offer a hearing at a site other than a VA regional office only after assessing the circumstances and the availability of resources, which may vary significantly from office to office. Hearings will most likely be offered at locations where concentrations of claimants have requested hearings, and service organizations may elect to send a representative to those sites. VA policy is to notify the claimant and his or her representative (38 CFR 1.525(d)) of the date, time and location of the hearing, and whether the claimant's representative will be available is best determined by the claimant and his or her representative after they have been notified of a hearing at an alternate site. While we do not object to notifying claimants that the hearing may be held at the regional office, we believe it is more appropriate to handle this matter procedurally rather than by regulation.

In order to more clearly emphasize that hearings at remote sites will be offered solely at VA's option, we have slightly modified the regulatory language. VA appreciates the comment submitted in response to the proposed rule, which is now adopted with the described amendment.

The Secretary hereby certifies that this regulatory amendment 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. The reason for this certification is that this amendment would not directly affect any small entities. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

In accordance with Executive Order 12291, Federal Regulation, the Secretary has determined that this regulatory

amendment is non-major for the following reasons:

- (1) It will not have an annual effect on the economy of \$100 million or more.
- (2) It will not cause a major increase in costs or prices.
- (3) It will not have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Catalog of Federal Domestic Assistance program numbers are 64.100, 64.101, 64.104, 64.105, 64.106, 64.109 and 64.110.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Handicapped, Health care, Pensions, Veterans.

Approved: March 3, 1993.

Jesse Brown, Secretary of Veterans Affairs.

For the reasons set out in the preamble, 38 CFR part 3 is amended as set forth below:

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

1. The authority citation for part 3, subpart A, continues to read as follows:

Authority: 105 Stat. 388; 38 U.S.C. 501(a), unless otherwise noted.

§ 3.103 [Amended]

2. In § 3.103(c)(1), the first sentence, remove the numbers "19.174", and add, in their place, the numbers "20.1304".

3. In § 3.103(c)(1), the second sentence, after the words "claimant's home having adjudicative functions," add the words "or, subject to available resources and solely at the option of VA, at any other VA facility or federal building at which suitable hearing facilities are available." Remove the words "and will provide VA personnel" and add, in their place, the words "VA will provide personnel".

[FR Doc. 93-6929 Filed 3-25-93; 8:45 am] BILLING CODE 5320-01-U

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 2

[ET Docket No. 91-280; FCC 93-29]

Low-Earth Orbit Satellites Below 1 GHz

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This Report and Order allocates VHF and UHF radio spectrum for mobile-satellite services (MSS) using low-Earth satellites (LEOs). This action responds to decisions made at the 1992 World Administrative Radio Conference (WARC-92) and to petitions for Rule Making filed by Orbital Communications Corporation (ORBCOMM), STARSYS Inc. (STARSYS), and Volunteers in Technical Assistance (VITA). This allocation will be used to provide data messaging and position determination services using non-voice non-geostationary satellites. Provision of such services using LEOs is expected to be cost effective compared to providing comparable services using geostationary satellites.

DATES: April 26, 1993.

FOR FURTHER INFORMATION CONTACT: Ray LaForge, Office of Engineering and Technology, telephone (202) 653-8117.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order in ET Docket No. 91-280 adopted on January 14, 1993, and released on February 5, 1993. The complete text of this Report and Order is available for inspection and copying during normal business hours in the FCC Public Reference Center (room 239), 1919 M Street, NW., Washington, DC. The complete text of this Report and Order also may be purchased from the Commission's duplication contractor, International Transcription Service, Inc., 2100 M Street, NW., suite 140, Washington DC 20036, (202) 857-3800.

Summary of Report and Order

1. The Commission concludes that demand warrants allocation of spectrum in the VHF/UHF bands for provision of data messaging and position determination services using LEOs. For these purposes the Commission allocates for LEO-MSS the 137-137.025, 137.175-137.825, and 400.15-401 MHz bands (space-to-Earth) on a primary basis; the 137.025-137.175 and 137.825-138 MHz bands (space-to-Earth) on a secondary basis; and the 148-150.05 and 399.9-400.05 MHz bands (Earth-to-space) on a primary basis. Allocation of these bands is consistent with international frequency allocations made at the World Administrative Radio Conference in March, 1992 (WARC-92). The Commission also adopts specific conditions governing use of these bands for LEO-MSS to avoid interference to existing users. Further, the Commission awards a pioneer's preference to VITA.

§ 3.101

within the jurisdiction of Compensation and Pension Service.

(b) Authority is delegated to the Chief Benefits Director to establish annual income limitations for the purposes of § 3.251(a)(2) based on service defined in § 3.8 (b), (c), or (d) at a rate in Philippine pesos equivalent to \$0.50 for each dollar.

(c) Authority is delegated to the Director, Compensation and Pension Service, and to personnel of that service designated by him to determine whether a claimant or payee has forfeited the right to gratuitous benefits or to remit a prior forfeiture pursuant to the provisions of 38 U.S.C. 6103 or 6104. See § 3.905.

(Authority: 38 U.S.C. 512(a))

[29 FR 7547, June 12, 1964, as amended at 31 FR 14455, Nov. 10, 1966; 37 FR 10442, May 23, 1972; 53 FR 3207, Feb. 4, 1988]

§ 3.101 Decisions to conform.

All decisions will conform to the statutes and regulations of the Department of Veterans Affairs and to the precedent opinions of the General Counsel. Unless designated as precedent opinions under § 14.507(b) of this chapter, legal opinions in individual cases will not be required to be followed as precedents in subsequent cases.

(Authority: 38 U.S.C. 501)

[54 FR 5613, Feb. 6, 1989]

§ 3.102 Reasonable doubt.

It is the defined and consistently applied policy of the Department of Veterans Affairs to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. By reasonable doubt is meant one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim. It is a substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility. It is not a means of

38 CFR Ch. I (7-1-93 Edition)

reconciling actual conflict or a contradiction in the evidence; the claimant is required to submit evidence sufficient to justify a belief in a fair and impartial mind that the claim is well grounded. Mere suspicion or doubt as to the truth of any statements submitted, as distinguished from impeachment or contradiction by evidence or known facts, is not justifiable basis for denying the application of the reasonable doubt doctrine if the entire, complete record otherwise warrants invoking this doctrine. The reasonable doubt doctrine is also applicable even in the absence of official records, particularly if the basic incident allegedly arose under combat, or similarly strenuous conditions, and is consistent with the probable results of such known hardships.

(Authority: 38 U.S.C. 501)

[50 FR 34458, Aug. 26, 1985]

§ 3.103 Procedural due process and appellate rights.

(a) *Statement of policy.* Every claimant has the right to written notice of the decision made on his or her claim, the right to a hearing, and the right of representation. Proceedings before VA are ex parte in nature, and it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government. The provisions of this section apply to all claims for benefits and relief, and decisions thereon, within the purview of this part 3.

(b) *The right to notice—(1) General.* Claimants and their representatives are entitled to notice of any decision made by VA affecting the payment of benefits or the granting of relief. Such notice shall clearly set forth the decision made, any applicable effective date, the reason(s) for the decision, the right to a hearing on any issue involved in the claim, the right of representation and the right, as well as the necessary procedures and time limits, to initiate an appeal of the decision.

(2) *Pretermination/reduction notice.* Except as otherwise provided in paragraph (b)(3) of this section, no award

eff: 3/26/93

Department of Veterans Affairs

§ 3.103

of compensation, pension or dependency and indemnity compensation shall be terminated, reduced or otherwise adversely affected unless the beneficiary has been notified of such adverse action and has been provided a period of 60 days in which to submit evidence for the purpose of showing that the adverse action should not be taken.

(3) *Exceptions.* Pretermination/reduction notice is not required but notice contemporaneous with the adverse action is required when:

(i) An adverse action is based solely on written, factual, unambiguous information as to income, net worth, dependency or marital status provided by the beneficiary or his/her fiduciary with knowledge or notice that such information would be used to calculate benefits, and the legal standards applied to this information are numerical in nature.

(ii) An adverse action is based upon the beneficiary's or fiduciary's failure to return a required eligibility verification report, or

(iii) Evidence reasonably indicates that a beneficiary is deceased. However, in the event that VA has received a death certificate, a terminal hospital report verifying the death of a beneficiary or a claim for VA burial benefits, no notice of termination (contemporaneous or otherwise) will be required.

(c) *The right to a hearing.* (1) Upon request, a claimant is entitled to a hearing at any time on any issue involved in a claim within the purview of part 3 of this chapter, subject to the limitations described in § 20.1304 of this chapter with respect to hearings in claims which have been certified to the Board of Veterans Appeals for appellate review. VA will provide the place of hearing in the VA office having original jurisdiction over the claim or at the VA office nearest the claimant's home having adjudicative functions, or, subject to available resources and solely at the option of VA, at any other VA facility or federal building at which suitable hearing facilities are available. VA will provide personnel who have original determinative authority of such issues to conduct the hearing and be responsible for establishment and preservation of the hearing record. Hearings in con-

nection with proposed adverse actions and appeals shall be held before VA personnel having original determinative authority who did not participate in the proposed action or the decision being appealed. All expenses incurred by the claimant in connection with the hearing are the responsibility of the claimant.

(2) The claimant is entitled to produce witnesses and all testimony will be under oath or affirmation. The purpose of a hearing is to permit the claimant to introduce into the record in person any available evidence which the claimant may consider material and any arguments and contentions with respect to the facts and applicable law which the claimant may consider pertinent. It is the responsibility of the VA personnel conducting the hearings to explain fully the issues and suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant's position. To assure clarity and completeness of the hearing record, questions which are directed to the claimant and to witnesses are to be framed to explore fully the basis for claimed entitlement rather than with an intent to refute evidence or to discredit testimony. In cases in which the nature, origin, or degree of disability is in issue, the claimant may request visual examination by a physician designated by VA and the physician's observations will be read into the record.

(Authority: 38 U.S.C. 501)

(d) *Submission of evidence.* Any evidence whether documentary, testimonial, or in other form, offered by the claimant in support of a claim and any issue a claimant may raise and any contention or argument a claimant may offer with respect thereto are to be included in the records.

(e) *The right to representation.* Subject to the provisions of §§ 14.626 through 14.637 of this title, claimants are entitled to representation of their choice at every stage in the prosecution of a claim.

(f) *Notification of decisions.* The claimant or beneficiary and his or her representative will be notified in writing of decisions affecting the payment

§ 3.104

38 CFR Ch. I (7-1-93 Edition)

of benefits or granting relief. Notice will include the reason for the decision and the date it will be effective as well as the right to a hearing subject to paragraph (c) of this section. The notification will also advise the claimant or beneficiary of the right to initiate an appeal by filing a Notice of Disagreement which will entitle the individual to a Statement of the Case for assistance in perfecting an appeal. Further, the notice will advise him or her of the periods in which an appeal must be initiated and perfected. (See part 20 of this chapter, on appeals.)

[55 FR 13527, Apr. 11, 1990; 55 FR 17530, Apr. 25, 1990, as amended at 55 FR 20148, May 15, 1990; 55 FR 25308, June 21, 1990; 57 FR 86993, Dec. 2, 1992; 58 FR 16360, Mar. 26, 1993]

§ 3.104 Finality of decisions.

(a) A decision of a duly constituted rating agency or other agency of original jurisdiction shall be final and binding on all field offices of the Department of Veterans Affairs as to conclusions based on the evidence on file at the time VA issues written notification in accordance with 38 U.S.C. 5104. A final and binding agency decision shall not be subject to revision on the same factual basis except by duly constituted appellate authorities or except as provided in § 3.105 of this part.

(b) Current determinations of line of duty, character of discharge, relationship, dependency, domestic relations questions, homicide, and findings of fact of death or presumptions of death made in accordance with existing instructions, and by application of the same criteria and based on the same facts, by either an Adjudication activity or an Insurance activity are binding one upon the other in the absence of clear and unmistakable error.

[29 FR 1462, Jan. 29, 1964, as amended at 29 FR 7547, June 12, 1964; 56 FR 65846, Dec. 19, 1991]

§ 3.105 Revision of decisions.

The provisions of this section apply except where an award was based on an act of commission or omission by the payee, or with his or her knowledge (§ 3.500(b)); there is a change in law or a Department of Veterans Affairs issue, or a change in interpreta-

tion of law or a Department of Veterans Affairs issue (§ 3.114); or the evidence establishes that service connection was clearly illegal. The provisions with respect to the date of discontinuance of benefits are applicable to running awards. Where the award has been suspended, and it is determined that no additional payments are in order, the award will be discontinued effective date of last payment.

(a) *Error.* Previous determinations which are final and binding, including decisions of service connection, degree of disability, age, marriage, relationship, service, dependency, line of duty, and other issues, will be accepted as correct in the absence of clear and unmistakable error. Where evidence establishes such error, the prior decision will be reversed or amended. For the purpose of authorizing benefits, the rating or other adjudicative decision which constitutes a reversal of a prior decision on the grounds of clear and unmistakable error has the same effect as if the corrected decision had been made on the date of the reversed decision. Except as provided in paragraphs (d) and (e) of this section, where an award is reduced or discontinued because of administrative error or error in judgment, the provisions of § 3.500(b)(2) will apply.

(b) *Difference of opinion.* Whenever an adjudicative agency is of the opinion that a revision or an amendment of a previous decision is warranted, a difference of opinion being involved rather than a clear and unmistakable error, the proposed revision will be recommended to Central Office.

(c) *Character of discharge.* A determination as to character of discharge or line of duty which would result in discontinued entitlement is subject to the provisions of paragraph (d) of this section.

(d) *Severance of service connection.* Subject to the limitations contained in §§ 3.114 and 3.957, service connection will be severed only where evidence establishes that it is clearly and unmistakably erroneous (the burden of proof being upon the Government). (Where service connection is severed because of a change in or interpretation of a law or Department of Veterans Affairs issue, the provisions of

Authority: 16 U.S.C. 3, 472, 551, 668dd, 3101-3126; 18 U.S.C. 3551-3586; 43 U.S.C. 1733.

Dated: October 19, 2001.

Kenneth E. Thompson,
Subsistence Program Leader, USDA-Forest Service.

Dated: October 19, 2001.

Thomas H. Boyd,
Acting Chair, Federal Subsistence Board.
[FR Doc. 01-28102 Filed 11-8-01; 8:45 am]
BILLING CODE 3410-11-P; 4310-55-P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900-AK25

Written and Oral Information or Statements Affecting Entitlement to Benefits

AGENCY: Department of Veterans Affairs.
ACTION: Final rule.

SUMMARY: This document amends the Department of Veterans Affairs (VA) adjudication regulations to eliminate the requirement that beneficiaries advise VA of changes affecting entitlement to benefits *in writing*. This allows VA to increase or decrease benefit payments based on information submitted orally or by e-mail, facsimile, or other electronic means and makes it easier for beneficiaries to submit information that they must provide. This document also amends our notice requirements to allow VA to reduce or terminate benefit payments based on information reported orally without issuing a 60-day advance notice, but only under certain conditions that ensure that claimants are not deprived of benefits without adequate notice. This will reduce the amounts of any overpayments created by these actions.

DATES: Effective Date: December 10, 2001.

FOR FURTHER INFORMATION CONTACT: Donald England, Chief, Policy and Regulations Staff (211A), Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273-7210. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On April 20, 2001, we published in the *Federal Register* (66 FR 20220-23) a proposed rule to amend the adjudication regulations to permit contemporaneous notice of benefit reductions based on orally-provided evidence of changes in income, marital status or the number of

dependents, affecting their entitlement to benefits, and to establish safeguards to ensure that VA adjusts benefit payments based only on information provided by the beneficiary (or his or her fiduciary) and that the information provided is documented for VA records.

We requested interested persons to submit comments on or before June 19, 2001. We received no comments. Based on the rationale set forth in the proposed rule and in this document, we are adopting the proposed rule as a final rule without substantive change, except that we are adding statements explaining that the information collections are approved by the Office of Management and Budget (OMB) under control number 2900-0624.

Paperwork Reduction Act

VA submitted the information collection provisions contained in this final rule to OMB for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520). The action concerning information collection is to change the allowable means of collection of information. We requested interested parties to submit comments on the collection of information provisions to OMB by June 19, 2001. No comments were submitted. OMB has approved the information collection provisions under control number 2900-0624.

OMB assigns a control number for each collection of information it approves. VA may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Executive Order 12866

This document has been reviewed by the Office of Management and Budget under Executive Order 12866.

Regulatory Flexibility Act

The Secretary hereby certifies that this regulatory amendment 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. This amendment would not directly affect any small entities. Only individuals could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program numbers are 64.104, 64.105, 64.109, and 64.110.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Radioactive materials, Veterans, Vietnam.

Approved: September 13, 2001.

Anthony J. Principi,
Secretary of Veterans Affairs.

For the reasons set out in the preamble, 38 CFR part 3 is amended as set forth below:

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

2. Section 3.103 is amended by:

A. Revising paragraph (b)(2) heading and revising paragraphs (b)(3) introductory text and (b)(3)(i).

B. Removing "is" from paragraphs (b)(3)(ii), (b)(3)(iv), (b)(3)(v) and (b)(3)(vi).

C. Removing the comma at the end of paragraphs (b)(3)(ii), (b)(3)(iii) and (b)(3)(iv), and adding, in its place, a period.

D. Removing ", or" at the end of paragraph (b)(3)(v) and adding, in its place, a period.

E. Adding paragraph (b)(4).

F. Revising the authority citation at the end of the section.

The addition and revisions read as follows:

§ 3.103 Procedural due process and appellate rights.

* * * * *

(b) * * *

(2) *Advance notice and opportunity for hearing.* * * *

(3) *Exceptions.* In lieu of advance notice and opportunity for a hearing, VA will send a written notice to the beneficiary or his or her fiduciary at the same time it takes an adverse action under the following circumstances:

(i) An adverse action based solely on factual and unambiguous information or statements as to income, net worth, or dependency or marital status that the beneficiary or his or her fiduciary provided to VA in writing or orally (under the procedures set forth in § 3.217(b)), with knowledge or notice that such information would be used to calculate benefit amounts.

* * * * *

(4) *Restoration of benefits.* VA will restore retroactively benefits that were reduced, terminated, or otherwise

adversely affected based on oral information or statements if within 30 days of the date on which VA issues the notification of adverse action the beneficiary or his or her fiduciary asserts that the adverse action was based upon information or statements that were inaccurate or upon information that was not provided by the beneficiary or his or her fiduciary. This will not preclude VA from taking subsequent action that adversely affects benefits.

Authority: 38 U.S.C. 501, 1115, 1506, 5104.

3. In § 3.204(a)(1), the word "written" is removed; and the information collection requirements parenthetical is added immediately preceding the authority citation at the end of the section to read as follows:

§ 3.204 Evidence of dependents and age.

* * * * *

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900-0624.)

* * * * *

4. A new § 3.217 is added preceding the undesignated center heading "Dependency, Income and Estate":

§ 3.217 Submission of statements or information affecting entitlement to benefits.

(a) For purposes of this part, unless specifically provided otherwise, the submission of information or a statement that affects entitlement to benefits by e-mail, facsimile, or other written electronic means, will satisfy a requirement or authorization that the statement or information be submitted in writing.

Note to paragraph (a): Section 3.217(a) merely concerns the submission of information or a statement in writing. Other requirements specified in this part, such as a requirement to use a specific form, to provide specific information, to provide a signature, or to provide a certified statement, must still be met.

(b) For purposes of this part, unless specifically provided otherwise, VA may take action affecting entitlement to benefits based on oral or written information or statements provided to VA by a beneficiary or his or her fiduciary. However, VA may not take action based on oral information or statements unless the VA employee receiving the information meets the following conditions:

(1) During the conversation in which the information or statement is provided, the VA employee:

(i) Identifies himself or herself as a VA employee who is authorized to receive the information or statement (these are VA employees authorized to

take actions under §§ 2.3 or 3.100 of this chapter);

(ii) Verifies the identity of the provider as either the beneficiary or his or her fiduciary by obtaining specific information about the beneficiary that can be verified from the beneficiary's VA records, such as Social Security number, date of birth, branch of military service, dates of military service, or other information; and

(iii) Informs the provider that the information or statement will be used for the purpose of calculating benefit amounts; and

(2) During or following the conversation in which the information or statement is provided, the VA employee documents in the beneficiary's VA records the specific information or statement provided, the date such information or statement was provided, the identity of the provider, the steps taken to verify the identity of the provider as being either the beneficiary or his or her fiduciary, and that he or she informed the provider that the information would be used for the purpose of calculating benefit amounts.

Authority: 38 U.S.C. 501, 1115, 1506, 5104.

5. Section § 3.256(a) introductory text is amended by removing "in writing"; and the information collection requirements parenthetical at the end of the section is revised to read as follows:

§ 3.256 Eligibility reporting requirements.

* * * * *

(The Office of Management and Budget has approved the information collection requirements in this section under control numbers 2900-0101 and 2900-0624.)

* * * * *

6. Section § 3.277(b) introductory text is amended by removing "in writing"; and the information collection requirements parenthetical at the end of the section is revised to read as follows:

§ 3.277 Eligibility reporting requirements.

* * * * *

(The Office of Management and Budget has approved the information collection requirements in this section under control numbers 2900-0101 and 2900-0624.)

* * * * *

[FR Doc. 01-28157 Filed 11-8-01; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900-AK98

Extension of the Presumptive Period for Compensation for Gulf War Veterans' Undiagnosed Illnesses

AGENCY: Department of Veterans Affairs.

ACTION: Interim final rule with request for comments.

SUMMARY: The Department of Veterans Affairs (VA) is amending its adjudication regulations regarding compensation for disabilities resulting from undiagnosed illnesses suffered by Persian Gulf War veterans. This amendment is necessary to extend the period within which such disabilities must become manifest to a compensable degree in order for entitlement for compensation to be established. The intended effect of this amendment is to ensure that veterans with compensable disabilities due to undiagnosed illnesses that may be related to active service in the Southwest Asia theater of operations during the Persian Gulf War may qualify for benefits.

DATES: Effective date: November 9, 2001. Comment date: Comments must be received by VA on or before January 8, 2002.

ADDRESSES: Mail or hand deliver written comments to: Director, Office of Regulations Management (02D), Department of Veterans Affairs, 810 Vermont Ave., NW, Room 1154, Washington, DC 20420; or fax comments to (202) 273-9289; or electronic mail (e-mail) comments to OGCRegulations@mail.va.gov.

Comments should indicate that they are submitted in response to "RIN 2900-AK98." All written comments received will be available for public inspection at the above address in the Office of Regulations Management, Room 1158, between the hours of 8 a.m. and 4 p.m., Monday through Friday (except holidays).

FOR FURTHER INFORMATION CONTACT: Randy A. McKeivitt, Consultant, Regulations Staff, Compensation and Pension Service, Veterans Benefits Administration, 810 Vermont Avenue, NW., Washington, DC 20420, telephone (202) 273-7138.

SUPPLEMENTARY INFORMATION: In response to the needs and concerns of veterans of the Persian Gulf War (Gulf War), Congress enacted the "Persian Gulf War Veterans' Benefits Act," Title I of the "Veterans' Benefits Improvements Act of 1994," Pub. L.

Department of Veterans Affairs

§ 3.103

Affairs governing the payment of monetary benefits to veterans and their dependents, within the jurisdiction of Compensation and Pension Service.

(b) Authority is delegated to the Director, Compensation and Pension Service, and to personnel of that service designated by him to determine whether a claimant or payee has forfeited the right to gratuitous benefits or to remit a prior forfeiture pursuant to the provisions of 38 U.S.C. 6103 or 6104. See § 3.905.

(Authority: 38 U.S.C. 512(a))

[29 FR 7547, June 12, 1964, as amended at 31 FR 14455, Nov. 10, 1966; 37 FR 10442, May 23, 1972; 53 FR 3207, Feb. 4, 1988; 60 FR 18355, Apr. 11, 1995; 61 FR 20727, May 8, 1996]

§ 3.102 Reasonable doubt.

It is the defined and consistently applied policy of the Department of Veterans Affairs to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. By reasonable doubt is meant one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim. It is a substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility. It is not a means of reconciling actual conflict or a contradiction in the evidence. Mere suspicion or doubt as to the truth of any statements submitted, as distinguished from impeachment or contradiction by evidence or known facts, is not justifiable basis for denying the application of the reasonable doubt doctrine if the entire, complete record otherwise warrants invoking this doctrine. The reasonable doubt doctrine is also applicable even in the absence of official records, particularly if the basic incident allegedly arose under combat, or similarly strenuous conditions, and is

consistent with the probable results of such known hardships.

(Authority: 38 U.S.C. 501)

[50 FR 34458, Aug. 26, 1985, as amended at 66 FR 45630, Aug. 29, 2001]

§ 3.103 Procedural due process and appellate rights.

(a) *Statement of policy.* Every claimant has the right to written notice of the decision made on his or her claim, the right to a hearing, and the right of representation. Proceedings before VA are ex parte in nature, and it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government. The provisions of this section apply to all claims for benefits and relief, and decisions thereon, within the purview of this part 3.

(b) *The right to notice—(1) General.* Claimants and their representatives are entitled to notice of any decision made by VA affecting the payment of benefits or the granting of relief. Such notice shall clearly set forth the decision made, any applicable effective date, the reason(s) for the decision, the right to a hearing on any issue involved in the claim, the right of representation and the right, as well as the necessary procedures and time limits, to initiate an appeal of the decision.

(2) *Advance notice and opportunity for hearing.* Except as otherwise provided in paragraph (b)(3) of this section, no award of compensation, pension or dependency and indemnity compensation shall be terminated, reduced or otherwise adversely affected unless the beneficiary has been notified of such adverse action and has been provided a period of 60 days in which to submit evidence for the purpose of showing that the adverse action should not be taken.

(3) *Exceptions.* In lieu of advance notice and opportunity for a hearing, VA will send a written notice to the beneficiary or his or her fiduciary at the same time it takes an adverse action under the following circumstances:

(i) An adverse action based solely on factual and unambiguous information

§ 3.103

38 CFR Ch. I (7-1-02 Edition)

or statements as to income, net worth, or dependency or marital status that the beneficiary or his or her fiduciary provided to VA in writing or orally (under the procedures set forth in § 3.217(b)), with knowledge or notice that such information would be used to calculate benefit amounts.

(ii) An adverse action based upon the beneficiary's or fiduciary's failure to return a required eligibility verification report.

(iii) Evidence reasonably indicates that a beneficiary is deceased. However, in the event that VA has received a death certificate, a terminal hospital report verifying the death of a beneficiary or a claim for VA burial benefits, no notice of termination (contemporaneous or otherwise) will be required.

(iv) An adverse action based upon a written and signed statement provided by the beneficiary to VA renouncing VA benefits (see § 3.106 on renouncement).

(v) An adverse action based upon a written statement provided to VA by a veteran indicating that he or she has returned to active service, the nature of that service, and the date of reentry into service, with the knowledge or notice that receipt of active service pay precludes concurrent receipt of VA compensation or pension (see § 3.654 regarding active service pay).

(vi) An adverse action based upon a garnishment order issued under 42 U.S.C. 659(a).

(Authority: 38 U.S.C. 501(a))

(4) *Restoration of benefits.* VA will restore retroactively benefits that were reduced, terminated, or otherwise adversely affected based on oral information or statements if within 30 days of the date on which VA issues the notification of adverse action the beneficiary or his or her fiduciary asserts that the adverse action was based upon information or statements that were inaccurate or upon information that was not provided by the beneficiary or his or her fiduciary. This will not preclude VA from taking subsequent action that adversely affects benefits.

(c) *The right to a hearing.* (1) Upon request, a claimant is entitled to a hearing at any time on any issue involved

in a claim within the purview of part 3 of this chapter, subject to the limitations described in § 20.1304 of this chapter with respect to hearings in claims which have been certified to the Board of Veterans Appeals for appellate review. VA will provide the place of hearing in the VA office having original jurisdiction over the claim or at the VA office nearest the claimant's home having adjudicative functions, or, subject to available resources and solely at the option of VA, at any other VA facility or federal building at which suitable hearing facilities are available. VA will provide one or more employees who have original determinative authority of such issues to conduct the hearing and be responsible for establishment and preservation of the hearing record. Hearings in connection with proposed adverse actions and appeals shall be held before one or more VA employees having original determinative authority who did not participate in the proposed action or the decision being appealed. All expenses incurred by the claimant in connection with the hearing are the responsibility of the claimant.

(2) The purpose of a hearing is to permit the claimant to introduce into the record, *in person*, any available evidence which he or she considers material and any arguments or contentions with respect to the facts and applicable law which he or she may consider pertinent. All testimony will be under oath or affirmation. The claimant is entitled to produce witnesses, but the claimant and witnesses are expected to be present. The Veterans Benefits Administration will not normally schedule a hearing for the sole purpose of receiving argument from a representative. It is the responsibility of the VA employee or employees conducting the hearings to explain fully the issues and suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant's position. To assure clarity and completeness of the hearing record, questions which are directed to the claimant and to witnesses are to be framed to explore fully the basis for claimed entitlement rather than with an intent to refute evidence or to discredit testimony. In cases in

Department of Veterans Affairs

§ 3.105

which the nature, origin, or degree of disability is in issue, the claimant may request visual examination by a physician designated by VA and the physician's observations will be read into the record.

(Authority: 38 U.S.C. 501)

(d) *Submission of evidence.* Any evidence whether documentary, testimonial, or in other form, offered by the claimant in support of a claim and any issue a claimant may raise and any contention or argument a claimant may offer with respect thereto are to be included in the records.

(e) *The right to representation.* Subject to the provisions of §§14.626 through 14.637 of this title, claimants are entitled to representation of their choice at every stage in the prosecution of a claim.

(f) *Notification of decisions.* The claimant or beneficiary and his or her representative will be notified in writing of decisions affecting the payment of benefits or granting relief. All notifications will advise the claimant of the reason for the decision; the date the decision will be effective; the right to a hearing subject to paragraph (c) of this section; the right to initiate an appeal by filing a Notice of Disagreement which will entitle the individual to a Statement of the Case for assistance in perfecting an appeal; and the periods in which an appeal must be initiated and perfected (See part 20 of this chapter, on appeals). Further, any notice that VA has denied a benefit sought will include a summary of the evidence considered.

(Authority: 38 U.S.C. 501, 1115, 1506, 5104.)

[55 FR 13527, Apr. 11, 1990; 55 FR 17530, Apr. 25, 1990, as amended at 55 FR 20148, May 15, 1990; 55 FR 25308, June 21, 1990; 57 FR 56393, Dec. 2, 1992; 58 FR 16360, Mar. 26, 1993; 58 FR 59366, Nov. 9, 1993; 59 FR 6218, Feb. 10, 1994; 59 FR 6901, Feb. 14, 1994; 66 FR 56613, Nov. 9, 2001]

§ 3.104 Finality of decisions.

(a) A decision of a duly constituted rating agency or other agency of original jurisdiction shall be final and binding on all field offices of the Department of Veterans Affairs as to conclusions based on the evidence on file at the time VA issues written notification

in accordance with 38 U.S.C. 5104. A final and binding agency decision shall not be subject to revision on the same factual basis except by duly constituted appellate authorities or except as provided in § 3.105 and § 3.2600 of this part.

(b) Current determinations of line of duty, character of discharge, relationship, dependency, domestic relations questions, homicide, and findings of fact of death or presumptions of death made in accordance with existing instructions, and by application of the same criteria and based on the same facts, by either an Adjudication activity or an Insurance activity are binding one upon the other in the absence of clear and unmistakable error.

[29 FR 1462, Jan. 29, 1964, as amended at 29 FR 7547, June 12, 1964; 56 FR 65846, Dec. 19, 1991; 66 FR 21874, May 2, 2001]

§ 3.105 Revision of decisions.

The provisions of this section apply except where an award was based on an act of commission or omission by the payee, or with his or her knowledge (§ 3.500(b)); there is a change in law or a Department of Veterans Affairs issue, or a change in interpretation of law or a Department of Veterans Affairs issue (§ 3.114); or the evidence establishes that service connection was clearly illegal. The provisions with respect to the date of discontinuance of benefits are applicable to running awards. Where the award has been suspended, and it is determined that no additional payments are in order, the award will be discontinued effective date of last payment.

(a) *Error.* Previous determinations which are final and binding, including decisions of service connection, degree of disability, age, marriage, relationship, service, dependency, line of duty, and other issues, will be accepted as correct in the absence of clear and unmistakable error. Where evidence establishes such error, the prior decision will be reversed or amended. For the purpose of authorizing benefits, the rating or other adjudicative decision which constitutes a reversal of a prior decision on the grounds of clear and unmistakable error has the same effect as if the corrected decision had been

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023-01 and Commandant Instruction M16475.ID, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321-4370f), and have concluded this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2-1, paragraph (34)(g), of the Instruction. This rule involves the establishment of a RNA. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under ADDRESSES.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05-1, 6.04-1, 6.04-6, 160.5; Pub. L. 107-295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T01-0727 to read as follows:

§ 165.T01-0727 Regulated Navigation Area; Arthur Kill, NY and NJ.

(a) *Regulated Area.* The following area is a regulated navigation area: all waters of the North of Shooters Island Reach, Elizabethport Reach, and Gulfport Reach in the Arthur Kill; bounded in the northeast by a line drawn from position 40° 38'48.637" N, 074° 09'18.204" W; to a point in position 40°38'37.815" N, 074° 09'20.245" W; and bounded in the southwest by a line drawn from position 40° 37'15.643" N, 074° 12'15.927" W; to a point in position 40° 37'15.779" N, 074° 12'08.0622" W. All geographic coordinates are North American Datum of 1983 (NAD 83).

(b) Regulations.

(1) The general regulations contained in 33 CFR 165.13 apply.

(2) All vessels must remain at least 150 feet from all drilling and blasting equipment; if a vessel must pass within 150 feet of drilling and blasting equipment for reasons of safety, they shall contact the dredge and/or blasting barge on Channel 13.

(3) No vessel shall enter or transit any work area where drill barges and/or dredges are located without the permission of Vessel Traffic Service New York (VTSNY) Director.

(4) No vessel may be underway within 1,500 feet of the blasting area during blasting operations.

(5) No vessel shall enter an area of drilling or blasting when they are advised by the drilling barge or VTSNY that a misfire or hang fire has occurred.

(6) Vessel Movement Reporting System (VMRS) users are prohibited from meeting or overtaking other vessels when transiting alongside an active work area where dredging and drilling equipment are being operated.

(7) Each vessel transiting in the vicinity of a work area where dredges are located is required to do so at reduced speed to maintain maneuverability while minimizing the effects of wake and surge.

(8) The VTSNY Director may impose additional requirements through VTS measures, as per 33 CFR 161.11.

(c) *Effective Period.* This rule is effective from 8 a.m. on August 12, 2011 until 5 p.m. on April 1, 2014.

Dated: 12 Aug 2011.

J.B. McPherson,

Captain, U.S. Coast Guard, Commander, First Coast Guard District, Acting.

[FR Doc. 2011-21460 Filed 8-22-11; 8:45 am]

BILLING CODE 9110-04-P

DEPARTMENT OF VETERANS AFFAIRS**38 CFR Parts 3 and 20**

RIN 2900-A006

Rules Governing Hearings Before the Agency of Original Jurisdiction and the Board of Veterans' Appeals; Clarification

AGENCY: Department of Veterans Affairs.
ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending its hearing regulations to clarify that the provisions regarding hearings before the Agency of Original Jurisdiction (AOJ) do not apply to hearings before the Board of Veterans' Appeals (Board).

DATES: *Effective Date:* This rule is effective August 23, 2011.

Regulatory Flexibility Act

The initial and final regulatory flexibility analysis requirements of sections 603 and 604 of the Regulatory Flexibility Act, 5 U.S.C. 601–612, are not applicable to this rule because a notice of proposed rulemaking is not required for this rule. Even so, the Secretary of Veterans Affairs 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, 5 U.S.C. 601–612. This rule will affect only individual VA beneficiaries and will not directly affect small entities. Therefore, pursuant to 5 U.S.C. 605(b), this final rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Order 12866—Regulatory Planning and Review

Executive Order 12866 directs agencies to assess all 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, and other advantages; distributive impacts; and equity). The Executive Order classifies a “significant regulatory action,” requiring review by the Office of Management and Budget (OMB) unless OMB waives such review, as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action planned or taken by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof, or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

VA has examined the economic, interagency, legal, and policy implications of this rulemaking and has concluded that it is not a significant regulatory action under the Executive Order.

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 an 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 given year. This rule would have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance Numbers and Titles

The Catalog of Federal Domestic Assistance program numbers and titles for this rule are 64.100, Automobiles and Adaptive Equipment for Certain Disabled Veterans and Members of the Armed Forces; 64.101, Burial Expenses Allowance for Veterans; 64.102, Compensation for Service-Connected Deaths for Veterans’ Dependents; 64.103, Life Insurance for Veterans; 64.104, Pension for Non-Service-Connected Disability for Veterans; 64.105, Pension to Veterans Surviving Spouses, and Children; 64.106, Specially Adapted Housing for Disabled Veterans; 64.109, Veterans Compensation for Service-Connected Disability; 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death; 64.114, Veterans Housing—Guaranteed and Insured Loans; 64.115, Veterans Information and Assistance; 64.116, Vocational Rehabilitation for Disabled Veterans; 64.117, Survivors and Dependents Educational Assistance; 64.118, Veterans Housing—Direct Loans for Certain Disabled Veterans; 64.119, Veterans Housing—Manufactured Home Loans; 64.120, Post-Vietnam Era Veterans’ Educational Assistance; 64.124, All-Volunteer Force Educational Assistance; 64.125, Vocational and Educational Counseling for Servicemembers and Veterans; 64.126, Native American Veteran Direct Loan Program; 64.127, Monthly Allowance for Children of Vietnam Veterans Born with Spina Bifida; and 64.128, Vocational Training and Rehabilitation for Vietnam Veterans’ Children with Spina Bifida or Other Covered Birth Defects.

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. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, approved this document on August 16, 2011, for publication.

List of Subjects**38 CFR Part 3**

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Radioactive materials, Veterans, Vietnam.

38 CFR Part 20

Administrative practice and procedure, Claims, Veterans.

Dated: August 18, 2011.

Robert C. McFetridge,

Director of Regulation Policy and Management, Office of the General Counsel, Department of Veterans Affairs.

For the reasons set forth in the preamble, VA amends 38 CFR parts 3 and 20 as follows:

PART 3—ADJUDICATION**Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation**

- 1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

- 2. Amend § 3.103 by:
 - a. Revising the last sentence of paragraph (a) and adding a new sentence after the last sentence.
 - b. Revising paragraph (c)(1).
 The revisions read as follows:

§ 3.103 Procedural due process and appellate rights.

(a) * * * The provisions of this section apply to all claims for benefits and relief, and decisions thereon, within the purview of this part 3, except that the provisions of this section governing hearings apply only to hearings conducted before the VA office having original jurisdiction over the claim. Hearings before the Board of Veterans’ Appeals are governed by part 20 of this chapter.

* * * * *

(c) * * * (1) Upon request, a claimant is entitled to a hearing at any time on any issue involved in a claim within the purview of part 3 of this chapter. VA will provide the place of hearing in the VA office having original jurisdiction over the claim or at the VA office nearest the claimant’s home having adjudicative functions, or, subject to available resources and solely at the option of VA, at any other VA facility or federal building at which suitable hearing facilities are available. VA will provide one or more employees of the VA office having original jurisdiction over the claim to conduct the hearing and to be responsible for establishment

and preservation of the hearing record. Hearings in connection with proposed adverse actions and appeals shall be held before one or more employees of the VA office having original jurisdiction over the claim who did not participate in the proposed action or the decision being appealed. All expenses incurred by the claimant in connection with the hearing are the responsibility of the claimant.

PART 20—BOARD OF VETERANS' APPEALS: RULES OF PRACTICE

- 3. The authority citation for part 20 continues to read as follows:
Authority: 38 U.S.C. 501(a) and as noted in specific sections.

Subpart H—Hearings on Appeal

- 4. Revise § 20.706 to read as follows:

§ 20.706 Rule 706. Functions of the presiding Member.

The presiding Member is responsible for the conduct of the hearing, in accordance with the provisions of subpart H of this part, administering the oath or affirmation, and ruling on questions of procedure. The presiding Member will assure that the course of the hearing remains relevant to the issue, or issues, on appeal and that there is no cross-examination of the parties or witnesses. The presiding Member will take such steps as may be necessary to maintain good order at hearings and may terminate a hearing or direct that

the offending party leave the hearing if an appellant, representative, or witness persists in disruptive behavior. The presiding Member is not bound by the procedures described in § 3.103(c) of this chapter, as those procedures only apply to hearings before the agency of original jurisdiction.

- 5. Amend APPENDIX A TO PART 20—CROSS-REFERENCES table by:
 - a. Removing entries “20.1”; “38 CFR 3.103(a)”; and “Statement of policy.”
 - b. Revising entry 20.1304 to read as follows:

APPENDIX A TO PART 20—CROSS-REFERENCES

Sec.	Cross-reference	Title of cross-referenced material or comment
20.1304	38 CFR 20.700–20.717	See also rehearings.

[FR Doc. 2011–21513 Filed 8–22–11; 8:45 am]
 BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 63

RIN 2900–AN73

Health Care for Homeless Veterans Program

AGENCY: Department of Veterans Affairs.
ACTION: Final rule.

SUMMARY: This final rule establishes regulations for contracting with community-based treatment facilities in the Health Care for Homeless Veterans (HCHV) program of the Department of Veterans Affairs (VA). The HCHV program assists certain homeless veterans in obtaining treatment from non-VA community-based providers. The final rule formalizes VA’s policies and procedures in connection with this program and clarifies that veterans with substance use disorders may qualify for the program.

DATES: *Effective Date:* September 22, 2011.

FOR FURTHER INFORMATION CONTACT: Robert Hallett, Healthcare for Homeless Veterans Manager, c/o Bedford VA Medical Center, 200 Springs Road, Bldg.

12, Bedford, MA 01730; (781) 687–3187 (this is not a toll free number).

SUPPLEMENTARY INFORMATION: The HCHV program is authorized by 38 U.S.C. 2031, under which VA may provide outreach as well as “care, treatment, and rehabilitative services (directly or by contract in community-based treatment facilities, including halfway houses)” to “veterans suffering from serious mental illness, including veterans who are homeless.” One of VA’s National priorities is a renewed effort to end homelessness for veterans. For this reason, we are establishing regulations that are consistent with the current administration of this program.

The primary mission of the HCHV program is to use outreach efforts to contact and engage veterans who are homeless and suffering from serious mental illness or a substance use disorder. Many of the veterans for whom the HCHV program is designed have not previously used VA medical services or been enrolled in the VA health care system.

Through the HCHV program, VA identifies homeless veterans with serious mental illness and/or substance use disorder, usually through medical intervention, and offers community-based care to those whose conditions are determined, clinically, to be managed sufficiently that the individuals can participate in such care. We have assisted homeless veterans

with substance use disorders through this program because, based on our practical understanding and experience, the vast majority of homeless veterans have substance use disorders. Treating substance use as a mental disorder is consistent with the generally accepted “disease model” of alcoholism and drug addiction treatment, as well as the modern use of medical intervention to treat the condition. We believe that if a substance use disorder is a contributing cause of homelessness, then that disorder is serious; therefore, it is consistent to include such veterans in a program designed for “veterans suffering from serious mental illness, including veterans who are homeless.” 38 U.S.C. 2031(a).

Veterans who are identified and who choose to participate in this form of care as part of their treatment plan are then referred by VA to an appropriate non-VA community-based provider. In some cases, VA will continue to actively medically manage the veteran’s condition, while in other cases a VA clinician may determine that a veteran can be sufficiently managed through utilization of non-medical resources, such as 12-step programs.

To provide the community-based care, the HCHV program contracts with non-VA community-based providers, such as halfway houses, to provide to these veterans housing and mental health and/or substance use disorder

§3.103 Procedural due process and appellate rights.

(a) *Statement of policy.* Every claimant has the right to written notice of the decision made on his or her claim, the right to a hearing, and the right of representation. Proceedings before VA are ex parte in nature, and it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government. The provisions of this section apply to all claims for benefits and relief, and decisions thereon, within the purview of this part 3, except that the provisions of this section governing hearings apply only to hearings conducted before the VA office having original jurisdiction over the claim. Hearings before the Board of Veterans' Appeals are governed by part 20 of this chapter.

(b) *The right to notice:*

(1) *General.* Claimants and their representatives are entitled to notice of any decision made by VA affecting the payment of benefits or the granting of relief. Such notice shall clearly set forth the decision made, any applicable effective date, the reason(s) for the decision, the right to a hearing on any issue involved in the claim, the right of representation and the right, as well as the necessary procedures and time limits, to initiate an appeal of the decision.

(2) *Advance notice and opportunity for hearing.* Except as otherwise provided in paragraph (b)(3) of this section, no award of compensation, pension or dependency and indemnity compensation shall be terminated, reduced or otherwise adversely affected unless the beneficiary has been notified of such adverse action and has been provided a period of 60 days in which to submit evidence for the purpose of showing that the adverse action should not be taken.

(3) *Exceptions.* In lieu of advance notice and opportunity for a hearing, VA will send a written notice to the beneficiary or his or her fiduciary at the same time it takes an adverse action under the following circumstances:

(i) An adverse action based solely on factual and unambiguous information or statements as to income, net worth, or dependency or marital status that the beneficiary or his or her fiduciary provided to VA in writing or orally (under the procedures set forth in §3.217(b)), with knowledge or notice that such information would be used to calculate benefit amounts.

(ii) An adverse action based upon the beneficiary's or fiduciary's failure to return a required eligibility verification report.

(iii) Evidence reasonably indicates that a beneficiary is deceased. However, in the event that VA has received a death certificate, a terminal hospital report verifying the death of a beneficiary or a claim for VA burial benefits, no notice of termination (contemporaneous or otherwise) will be required.

(iv) An adverse action based upon a written and signed statement provided by the beneficiary to VA renouncing VA benefits (see §3.106 on renouncement).

(v) An adverse action based upon a written statement provided to VA by a veteran indicating that he or she has returned to active service, the nature of that service, and the date of reentry into service, with the knowledge or notice that receipt of active service pay precludes concurrent receipt of VA compensation or pension (see §3.654 regarding active service pay).

38 CFR 3.103(C)

eff: 8/23/11

3.103-2

§3.103—Procedural due process and appellate rights

3.103-2

retroactively repealed

(vi) An adverse action based upon a garnishment order issued under 42 U.S.C. 659(a). (Authority: 38 U.S.C. 501(a))

(77 FR 23128)

(4) *Restoration of benefits.* VA will restore retroactively benefits that were reduced, terminated, or otherwise adversely affected based on oral information or statements if within 30 days of the date on which VA issues the notification of adverse action the beneficiary or his or her fiduciary asserts that the adverse action was based upon information or statements that were inaccurate or upon information that was not provided by the beneficiary or his or her fiduciary. This will not preclude VA from taking subsequent action that adversely affects benefits.

ε
(77 FR 70686)

(c) *The right to a hearing.*

(1) Upon request, a claimant is entitled to a hearing at any time on any issue involved in a claim within the purview of part 3 of this chapter. VA will provide the place of hearing in the VA office having original jurisdiction over the claim or at the VA office nearest the claimant's home having adjudicative functions, or, subject to available resources and solely at the option of VA, at any other VA facility or federal building at which suitable hearing facilities are available. VA will provide one or more employees of the VA office having original jurisdiction over the claim to conduct the hearing and to be responsible for establishment and preservation of the hearing record. Hearings in connection with proposed adverse actions and appeals shall be held before one or more employees of the VA office having original jurisdiction over the claim who did not participate in the proposed action or the decision being appealed. All expenses incurred by the claimant in connection with the hearing are the responsibility of the claimant.

(2) The purpose of a hearing is to permit the claimant to introduce into the record, *in person*, any available evidence which he or she considers material and any arguments or contentions with respect to the facts and applicable law which he or she may consider pertinent. All testimony will be under oath or affirmation. The claimant is entitled to produce witnesses, but the claimant and witnesses are expected to be present. The Veterans Benefits Administration will not normally schedule a hearing for the sole purpose of receiving argument from a representative. It is the responsibility of the VA employee or employees conducting the hearings to explain fully the issues and suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant's position. To assure clarity and completeness of the hearing record, questions which are directed to the claimant and to witnesses are to be framed to explore fully the basis for claimed entitlement rather than with an intent to refute evidence or to discredit testimony. In cases in which the nature, origin, or degree of disability is in issue, the claimant may request visual examination by a physician designated by VA and the physician's observations will be read into the record. (Authority: 38 U.S.C. 501(a))

(d) *Submission of evidence.* Any evidence whether documentary, testimonial, or in other form, offered by the claimant in support of a claim and any issue a claimant may raise and any contention or argument a claimant may offer with respect thereto are to be included in the records.

(e) *The right to representation.* Subject to the provisions of §§14.626 through 14.637 of this title, claimants are entitled to representation of their choice at every stage in the prosecution of a claim.

(f) *Notification of decisions.* The claimant or beneficiary and his or her representative will be notified in writing of decisions affecting the payment of benefits or granting relief. All notifications will advise the claimant of the reason for the decision; the date the decision will be effective; the right to a hearing subject to paragraph (c) of this section; the right to initiate an appeal by filing a Notice of Disagreement which will entitle the individual to a Statement of the Case for assistance in perfecting an appeal; and the periods in which an appeal must be initiated and perfected (See part 20 of this chapter, on appeals). Further, any notice that VA has denied a benefit sought will include a summary of the evidence considered. (Authority: 38 U.S.C. 501, 1115, 1506, 5104)

[55 FR 13527, Apr. 11, 1990; 55 FR 17530, Apr. 25, 1990, as amended at 55 FR 20148, May 15, 1990; 55 FR 25308, June 21, 1990; 57 FR 56993, Dec. 2, 1992; 58 FR 16359, Mar. 26, 1993; 58 FR 59366, Nov. 9, 1993; 59 FR 6218, Feb. 10, 1994; 59 FR 6901, Feb. 14, 1994; 66 FR 56613, Nov. 9, 2001; 76 FR 52574, Aug. 23, 2011]

Supplement *Highlights* references: 7(2), 9(3), 10(2), 10(3), 48(1), 97(1).

the enforcement period for the regulated area as well as any changes in the planned schedule.

Dated: March 27, 2012.

D.J. Rose,
Captain, U.S. Coast Guard, Captain of the Port Mobile.

[FR Doc. 2012-0375 Filed 4-17-12; 8:45 am]

BILLING CODE 0110-04-P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Parts 3 and 20

RIN 2900-AO43

Rules Governing Hearings Before the Agency of Original Jurisdiction and the Board of Veterans' Appeals; Repeal of Prior Rule Change

AGENCY: Department of Veterans Affairs.
ACTION: Direct final rule.

SUMMARY: The Department of Veterans Affairs (VA) is taking final action to amend its hearing regulations to repeal a prior amendment that specified that the provisions regarding hearings before the Agency of Original Jurisdiction (AOJ) do not apply to hearings before the Board of Veterans' Appeals (Board). This action is being taken because of VA's decision that the prior amendment should have followed the notice-and-comment procedure of the Administrative Procedure Act (APA).

DATES: This rule is effective June 18, 2012, without further notice, unless VA receives a significant adverse comment by May 18, 2012. If adverse comment is received, VA will publish a timely withdrawal of the rule in the Federal Register.

ADDRESSES: Written comments may be submitted through www.Regulations.gov; by mail or hand-delivery to the Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Ave. NW., Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to "RIN 2900-AO43—Rules Governing Hearings Before the Agency of Original Jurisdiction and the Board of Veterans' Appeals; Repeal of Prior Rule Change." Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m. Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment (this is not a toll-free number). In addition, during the comment period,

comments may be viewed online through the Federal Docket Management System (FDMS) at www.Regulations.gov.

FOR FURTHER INFORMATION CONTACT: Laura H. Eskenazi, Principal Deputy Vice Chairman, Board of Veterans' Appeals (01C2), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 632-4603. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On August 23, 2011, VA issued a final rule, "Rules Governing Hearings Before the Agency of Original Jurisdiction and the Board of Veterans' Appeals; Clarification," 76 FR 52572 (RIN 2900-AO06), revising VA's regulations to specify that the provisions governing hearings in 38 CFR 3.103 only apply to hearings conducted before the AOJ and that the provisions in part 20 govern hearings before the Board. The revision was made because of a decision by the United States Court of Appeals for Veterans Claims (Court) in *Bryant v. Shinseki*, 23 Vet. App. 488 (2010), which applied the provisions of § 3.103(c)(2) to a Board hearing. The *Bryant* Court held that the provisions of § 3.103(c)(2) require a "Board hearing officer" to "fully explain the issues still outstanding that are relevant and material to substantiating the claim" and to "suggest that a claimant submit evidence on an issue material to substantiating the claim when the record is missing any evidence on that issue or when the testimony at the hearing raises an issue for which there is no evidence in the record." *Id.* at 496-97.

RIN 2900-AO06, among other things, altered the language upon which the *Bryant* Court relied. VA has determined that RIN 2900-AO06 should have followed the notice-and-comment procedure of 5 U.S.C. 553(b) and (c) of the APA. Accordingly, in this direct-final rule, VA is repealing the amendments made by RIN 2900-AO06.

Based on the rationale set forth in this preamble, VA amends, in part 3, § 3.103(a) and (c)(1), and, in part 20, § 20.706 and Appendix A, to return the regulations to the language in effect before August 23, 2011.

Administrative Procedure Act

VA believes this rule is non-controversial, anticipates that this rule will not result in any significant adverse comment, and therefore is issuing it as a direct final rule.

For purposes of the direct final rulemaking, a significant adverse comment is one that explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or why it would

be ineffective or unacceptable without a change. In determining whether an adverse comment is significant and warrants withdrawing a direct final rule, we will consider whether the comment raises an issue serious enough to warrant a substantive response in a notice-and-comment process in accordance with section 553 of the APA (5 U.S.C. 553). Comments that are frivolous, insubstantial, or outside the scope of the rule will not be considered adverse under this procedure. For example, a comment recommending an additional change to the rule will not be considered a significant comment unless the comment states why the rule would be ineffective without the additional change.

Under direct final rule procedures, if no significant adverse comment is received within the comment period, the rule will become effective on the date specified above. After the close of the comment period, VA will publish a document in the Federal Register indicating that no significant adverse comment was received and confirming the effective date of the rule.

However, if any significant adverse comment is received, VA will publish in the Federal Register a notice acknowledging receipt of a significant adverse comment and withdrawing the direct final rule. We will then publish in the Federal Register a proposed rule document, which will be substantially identical to this direct final rule and will serve as a proposal for the amendments in this direct final rule. Any comments received in response to the direct final rule will be treated as comments regarding the proposed rule. VA will consider such comments in developing a subsequent final rule.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this regulatory amendment will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. This rulemaking will not directly affect any small entities. Only VA beneficiaries will be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Orders 12866 and 13563

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. Executive Order 12866 (Regulatory Planning and Review) defines a "significant regulatory action," which requires review by the Office of Management and Budget (OMB), as "any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order."

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined and it has been determined not to be a significant regulatory action under Executive Order 12866.

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 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 given year. This rule will 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 program numbers and titles for this rule are 64.027, Post-9/11 Veterans Educational Assistance;

64.028, Post-9/11 Veterans Educational Assistance; 64.032, Montgomery GI Bill Selected Reserve; Reserve Educational Assistance Program; 64.100, Automobiles and Adaptive Equipment for Certain Disabled Veterans and Members of the Armed Forces; 64.101, Burial Expenses Allowance for Veterans; 64.103, Life Insurance for Veterans; 64.104, Pension for Non-Service-Connected Disability for Veterans; 64.105, Pension to Veterans Surviving Spouses, and Children; 64.106, Specially Adapted Housing for Disabled Veterans; 64.109, Veterans Compensation for Service-Connected Disability; 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death; 64.114, Veterans Housing-Guaranteed and Insured Loans; 64.115, Veterans Information and Assistance; 64.116, Vocational Rehabilitation for Disabled Veterans; 64.117, Survivors and Dependents Educational Assistance; 64.118, Veterans Housing-Direct Loans for Certain Disabled Veterans; 64.119, Veterans Housing-Manufactured Home Loans; 64.120, Post-Vietnam Era Veterans' Educational Assistance; 64.124, All-Volunteer Force Educational Assistance; 64.125, Vocational and Educational Counseling for Servicemembers and Veterans; 64.126, Native American Veteran Direct Loan Program; 64.127, Monthly Allowance for Children of Vietnam Veterans Born with Spina Bifida; and 64.128, Vocational Training and Rehabilitation for Vietnam Veterans' Children with Spina Bifida or Other Covered Birth Defects.

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. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, approved this document on April 10, 2012, for publication.

List of Subjects**38 CFR Part 3**

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Radioactive materials, Veterans, Vietnam.

38 CFR Part 20

Administrative practice and procedure, Claims, Veterans.

Dated: April 13, 2012.

Robert C. McFetridge,
Director of Regulation Policy and
Management, Office of the General Counsel,
Department of Veterans Affairs.

For the reasons set forth in the preamble, VA amends 38 CFR parts 3 and 20 as follows:

PART 3—ADJUDICATION**Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation**

- 1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

- 2. Amend § 3.103 by:

- a. Removing the last two sentences of paragraph (a) and adding, in its place, "The provisions of this section apply to all claims for benefits and relief, and decisions thereon, within the purview of this part 3."

- b. Revising paragraph (c)(1).

The revision reads as follows:

§ 3.103 Procedural due process and appellate rights.

* * * * *

(c) * * * (1) Upon request, a claimant is entitled to a hearing at any time on any issue involved in a claim within the purview of part 3 of this chapter, subject to the limitations described in § 20.1304 of this chapter with respect to hearings in claims which have been certified to the Board of Veterans' Appeals for appellate review. VA will provide the place of hearing in the VA office having original jurisdiction over the claim or at the VA office nearest the claimant's home having adjudicative functions, or, subject to available resources and solely at the option of VA, at any other VA facility or federal building at which suitable hearing facilities are available. VA will provide one or more employees who have original determinative authority of such issues to conduct the hearing and be responsible for establishment and preservation of the hearing record. Hearings in connection with proposed adverse actions and appeals shall be held before one or more VA employees having original determinative authority who did not participate in the proposed action or the decision being appealed. All expenses incurred by the claimant in connection with the hearing are the responsibility of the claimant.

* * * * *

[Home Page](#) > [Executive Branch](#) > [Code of Federal Regulations](#) > [Electronic Code of Federal Regulations](#)

Electronic Code of Federal Regulations

e-CFR

TM

e-CFR Data is current as of June 18, 2012

Title 38: Pensions, Bonuses, and Veterans' Relief

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation Administrative

[Browse Previous](#) | [Browse Next](#)

§ 3.103 Procedural due process and appellate rights.

(a) *Statement of policy.* Every claimant has the right to written notice of the decision made on his or her claim, the right to a hearing, and the right of representation. Proceedings before VA are ex parte in nature, and it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government. The provisions of this section apply to all claims for benefits and relief, and decisions thereon, within the purview of this part 3.

(b) *The right to notice* —(1) *General.* Claimants and their representatives are entitled to notice of any decision made by VA affecting the payment of benefits or the granting of relief. Such notice shall clearly set forth the decision made, any applicable effective date, the reason(s) for the decision, the right to a hearing on any issue involved in the claim, the right of representation and the right, as well as the necessary procedures and time limits, to initiate an appeal of the decision.

(2) *Advance notice and opportunity for hearing.* Except as otherwise provided in paragraph (b)(3) of this section, no award of compensation, pension or dependency and indemnity compensation shall be terminated, reduced or otherwise adversely affected unless the beneficiary has been notified of such adverse action and has been provided a period of 60 days in which to submit evidence for the purpose of showing that the adverse action should not be taken.

(3) *Exceptions.* In lieu of advance notice and opportunity for a hearing, VA will send a written notice to the beneficiary or his or her fiduciary at the same time it takes an adverse action under the following circumstances:

(i) An adverse action based solely on factual and unambiguous information or statements as to income, net worth, or dependency or marital status that the beneficiary or his or her fiduciary provided to VA in writing or orally (under the procedures set forth in §3.217(b)), with knowledge or notice that such information would be used to calculate benefit amounts.

(ii) An adverse action based upon the beneficiary's or fiduciary's failure to return a required eligibility verification report.

(iii) Evidence reasonably indicates that a beneficiary is deceased. However, in the event that VA has received a death certificate, a terminal hospital report verifying the death of a beneficiary or a claim for VA burial benefits, no notice of termination (contemporaneous or otherwise) will be required.

(iv) An adverse action based upon a written and signed statement provided by the beneficiary to VA renouncing VA benefits (see §3.106 on renouncement).

(v) An adverse action based upon a written statement provided to VA by a veteran indicating that he or she has returned to active service, the nature of that service, and the date of reentry into service, with

the knowledge or notice that receipt of active service pay precludes concurrent receipt of VA compensation or pension (see §3.654 regarding active service pay).

(vi) An adverse action based upon a garnishment order issued under 42 U.S.C. 659(a).

(Authority: 38 U.S.C. 501(a))

(4) *Restoration of benefits.* VA will restore retroactively benefits that were reduced, terminated, or otherwise adversely affected based on oral information or statements if within 30 days of the date on which VA issues the notification of adverse action the beneficiary or his or her fiduciary asserts that the adverse action was based upon information or statements that were inaccurate or upon information that was not provided by the beneficiary or his or her fiduciary. This will not preclude VA from taking subsequent action that adversely affects benefits.

(c) *The right to a hearing.* (1) Upon request, a claimant is entitled to a hearing at any time on any issue involved in a claim within the purview of part 3 of this chapter, subject to the limitations described in §20.1304 of this chapter with respect to hearings in claims which have been certified to the Board of Veterans' Appeals for appellate review. VA will provide the place of hearing in the VA office having original jurisdiction over the claim or at the VA office nearest the claimant's home having adjudicative functions, or, subject to available resources and solely at the option of VA, at any other VA facility or federal building at which suitable hearing facilities are available. VA will provide one or more employees who have original determinative authority of such issues to conduct the hearing and be responsible for establishment and preservation of the hearing record. Hearings in connection with proposed adverse actions and appeals shall be held before one or more VA employees having original determinative authority who did not participate in the proposed action or the decision being appealed. All expenses incurred by the claimant in connection with the hearing are the responsibility of the claimant.

(2) The purpose of a hearing is to permit the claimant to introduce into the record, *in person*, any available evidence which he or she considers material and any arguments or contentions with respect to the facts and applicable law which he or she may consider pertinent. All testimony will be under oath or affirmation. The claimant is entitled to produce witnesses, but the claimant and witnesses are expected to be present. The Veterans Benefits Administration will not normally schedule a hearing for the sole purpose of receiving argument from a representative. It is the responsibility of the VA employee or employees conducting the hearings to explain fully the issues and suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant's position. To assure clarity and completeness of the hearing record, questions which are directed to the claimant and to witnesses are to be framed to explore fully the basis for claimed entitlement rather than with an intent to refute evidence or to discredit testimony. In cases in which the nature, origin, or degree of disability is in issue, the claimant may request visual examination by a physician designated by VA and the physician's observations will be read into the record.

(Authority: 38 U.S.C. 501)

(d) *Submission of evidence.* Any evidence whether documentary, testimonial, or in other form, offered by the claimant in support of a claim and any issue a claimant may raise and any contention or argument a claimant may offer with respect thereto are to be included in the records.

(e) *The right to representation.* Subject to the provisions of §§14.626 through 14.637 of this title, claimants are entitled to representation of their choice at every stage in the prosecution of a claim.

(f) *Notification of decisions.* The claimant or beneficiary and his or her representative will be notified in writing of decisions affecting the payment of benefits or granting relief. All notifications will advise the claimant of the reason for the decision; the date the decision will be effective; the right to a hearing subject to paragraph (c) of this section; the right to initiate an appeal by filing a Notice of Disagreement which will entitle the individual to a Statement of the Case for assistance in perfecting an appeal; and the periods in which an appeal must be initiated and perfected (See part 20 of this chapter, on appeals). Further, any notice that VA has denied a benefit sought will include a summary of the evidence considered.

(Authority: 38 U.S.C. 501, 1115, 1506, 5104)

[55 FR 13527, Apr. 11, 1990; 55 FR 17530, Apr. 25, 1990, as amended at 55 FR 20148, May 15, 1990; 55 FR 25308, June 21, 1990; 57 FR 56993, Dec. 2, 1992; 58 FR 16360, Mar. 26, 1993; 58 FR 59366, Nov. 9, 1993; 59 FR 6218, Feb. 10, 1994; 59 FR 6901, Feb. 14, 1994; 66 FR 56613, Nov. 9, 2001; 76 FR 52574, Aug. 23, 2011; 77 FR 23129, Apr. 18, 2012]

we do discuss the effects of this rule elsewhere in this preamble.

7. Taking of Private Property

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

8. Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

9. Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

10. Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

11. Energy Effects

This action is not a "significant energy action" under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.

12. Technical Standards

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

13. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023-01 and Commandant Instruction M16475.ID, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321-4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves the establishment of a safety zone and,

therefore it is categorically excluded from further review under paragraph 34(g) of Figure 2-1 of the Commandant Instruction. An environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under ADDRESSES. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR parts 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

- 1. The authority citation for Part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 46 U.S.C. Chapters 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05-1, 6.04-1, 6.04-6, and 160.5; Pub. L. 107-295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

- 2. Add § 165.T09-0904 to read as follows:

§ 165.T09-0904 Safety Zone; Bridge Demolition Project, Indiana Harbor Canal, East Chicago, Indiana.

(a) *Location.* The safety zone will encompass all waters of the Indiana Harbor Canal in the vicinity of the Cline Avenue Bridge at approximate position 41°39'4.3" N and 87°27'54.3" W (NAD 83).

(b) *Effective and Enforcement Period.* This rule is effective between 6:00 a.m. until 9:00 a.m. on December 1, 2012. This rule will be enforced between 6:00 a.m. until 9:00 a.m. on December 1, 2012.

(c) *Regulations.* (1) In accordance with the general regulations in § 165.23 of this part, entry into, transiting, or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port, Sector Lake Michigan or his designated on-scene representative.

(2) This safety zone is closed to all vessel traffic, except as may be permitted by the Captain of the Port, Sector Lake Michigan or his designated on-scene representative.

(3) The "on-scene representative" of the Captain of the Port, Sector Lake Michigan is any Coast Guard commissioned, warrant or petty officer who has been designated by the Captain

of the Port, Sector Lake Michigan to act on his behalf.

(4) Vessel operators desiring to enter or operate within the safety zone shall contact the Captain of the Port, Sector Lake Michigan or his on-scene representative to obtain permission to do so. The Captain of the Port, Sector Lake Michigan or his on-scene representative may be contacted via VHF Channel 16. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the Captain of the Port, Sector Lake Michigan, or his on-scene representative.

Dated: November 15, 2012.

M.W. Sibley,

Captain, U. S. Coast Guard, Captain of the Port, Sector Lake Michigan.

[FR Doc. 2012-28693 Filed 11-26-12; 8:45 am]

BILLING CODE 9110-04-P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Parts 3 and 20

RIN 2900-AO43

Rules Governing Hearings Before the Agency of Original Jurisdiction and the Board of Veterans' Appeals; Repeal of Prior Rule Change

AGENCY: Department of Veterans Affairs.

ACTION: Final rule; confirmation of effective date and addition of applicability date.

SUMMARY: The Department of Veterans Affairs (VA) published a direct final rule amending its hearing regulations to repeal a prior amendment that specified that the provisions regarding hearings before the Agency of Original Jurisdiction (AOJ) do not apply to hearings before the Board of Veterans' Appeals (Board). VA received no significant adverse comment concerning this rule. This document confirms that the direct final rule became effective on June 18, 2012. Additionally, in the preamble of the direct final rule, VA did not provide an applicability date. This document provides an applicability date.

DATES: *Effective Date:* This final rule is effective June 18, 2012.

Applicability Date: This final rule shall apply to decisions issued by the Board on or after August 23, 2011.

FOR FURTHER INFORMATION CONTACT: Laura H. Eskenazi, Principal Deputy Vice Chairman, Board of Veterans' Appeals (01C), Department of Veterans Affairs, 810 Vermont Avenue NW.,

Washington, DC 20420, (202) 632-4603. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On April 18, 2012, VA published in the *Federal Register*, 77 FR 23128, a direct final rule to amend, in 38 CFR part 3, § 3.103(a) and (c)(1), and, in 38 CFR part 20, § 20.706 and Appendix A to repeal amendments made by RIN 2900-AO06, "Rules Governing Hearings Before the Agency of Original Jurisdiction and the Board of Veterans' Appeals; Clarification," a final rule that had been published in the *Federal Register* on August 23, 2011. As discussed in the preamble to the direct final rule, RIN 2900-AO06 altered language upon which the United States Court of Appeals for Veterans Claims (Veterans Court) relied in *Bryant v. Shinseki*, 23 Vet. App. 488 (2010), which applied the provisions of § 3.103(c)(2) to a Board hearing. The *Bryant* Court held that the provisions of § 3.103(c)(2) require a "Board hearing officer" to "fully explain the issues still outstanding that are relevant and material to substantiating the claim" and to "suggest that a claimant submit evidence on an issue material to substantiating the claim when the record is missing any evidence on that issue or when the testimony at the hearing raises an issue for which there is no evidence in the record." *Id.* at 496-97.

VA determined that RIN 2900-AO06 should have followed the notice-and-comment procedure of 5 U.S.C. 553(b) and (c) of the Administrative Procedure Act and published the direct final rule to return the regulations to the language in effect before August 23, 2011. The direct final rule provided a 30-day comment period that ended on May 18, 2012. No significant adverse comment was received. VA received only one comment on May 17, 2012, from the National Organization of Veterans' Advocates, Inc. (NOVA). In pertinent part, NOVA stated, "[T]he full, retroactive repeal of the invalid [amendments made by RIN 2900-AO06] should move forward regardless of whether the 'VA receives a significant adverse comment by May 18, 2012.' * * * VA has a responsibility to repeal the rule as quickly as possible. Doing so will help ensure that any veterans harmed by the invalid rule will be able to obtain appropriate relief." Accordingly, under the direct final rule procedures that were described in RIN 2900-AO43, the direct final rule became effective on June 18, 2012, because no significant adverse comment was received within the comment period.

We take this opportunity to address three points made by NOVA in its

comment. NOVA criticized the direct final rule procedure because it was "conditional rather than mandatory." As we anticipated when we published the direct final rule, no significant adverse comment was received by VA, and the direct final rule became effective on June 18, 2012. Accordingly, NOVA's concern about the action being conditional is moot.

NOVA also urged that the "repeal of [the amendments made by RIN 2900-AO06 be] retroactive to August 23, 2011." In the direct final rule, we stated that we were "repealing" those amendments but provided only an effective date—June 18, 2012. We did not provide an applicability date. Accordingly, in this document we have added, in the **DATES** section above, an *Applicability Date* paragraph, stating, "This final rule shall apply to decisions issued by the Board on or after August 23, 2011."

Finally, NOVA also encouraged VA to "clarify that any veteran who suffered any harm as a result of the invalid rule is now entitled to obtain relief." In this regard, appellants have a statutory right to appeal a Board decision to the Veterans Court within 120 days after the date on which the appellant is notified of the Board's decision. See 38 U.S.C. 7266(a). Additionally, VA regulations permit appellants whose claims have been denied by the Board to file with the Board at any time a motion for reconsideration of the decision. See 38 CFR 20.1001. If the Chairman of the Board denies a motion for reconsideration, that denial and the underlying Board decision may be appealed to the Veterans Court if a timely appeal was previously filed with the Veterans Court with respect to that underlying Board decision. See *Mayer v. Brown*, 37 F.3d 618, 620 (Fed. Cir. 1994), *overruled in part by Bailey v. West*, 160 F.3d 1360 (Fed. Cir. 1998) (en banc). Also, the Board's decision may be appealed to the Veterans Court if the appellant filed the motion for reconsideration not later than 120 days after being notified of the Board's decision and then appeals to the Veterans Court not later than 120 days after reconsideration is denied. *Rosler v. Derwinski*, 1 Vet. App. 241, 249 (1991); see also *Linville v. West*, 165 F.3d 1382, 1385-86 (Fed. Cir. 1999). Additionally, the 120-day period to appeal a Board decision to the Veterans Court is subject to the doctrine of equitable tolling within certain parameters. See *Bove v. Shinseki*, 25 Vet. App. 136, 140 (2011). These procedures provide adequate avenues of relief to any claimants who may have been adversely affected by the repealed rule.

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. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, Department of Veterans Affairs, approved this document on November 20, 2012, for publication.

Dated: November 20, 2012.

Robert C. McFetridge,

Director, Regulation Policy and Management,
Office of the General Counsel, Department
of Veterans Affairs.

[FR Doc. 2012-28621 Filed 11-26-12; 8:45 am]

BILLING CODE 8320-01-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R04-OAR-2011-0809; FRL-9754-5]

Approval and Promulgation of Implementation Plans; Florida; Section 128 and 110(a)(2)(E)(ii) and (G) Infrastructure Requirements for the 1997 8-hour Ozone National Ambient Air Quality Standards; Correction

AGENCY: Environmental Protection
Agency (EPA).

ACTION: Final rule, correction.

SUMMARY: EPA published in the *Federal Register* of July 30, 2012, a final rule approving portions of the State Implementation Plan (SIP) revision submitted by the State of Florida, through the Florida Department of Environmental Protection (FDEP) on May 24, 2012, as demonstrating that the State met the SIP requirements of the Clean Air Act (CAA or the Act) for the 1997 8-hour ozone national ambient air quality standards (NAAQS). In that final rule, EPA approved Florida's infrastructure submission, provided to EPA on May 24, 2012, which included state statutes to be incorporated into the SIP to address infrastructure requirements regarding state boards and emergency powers. While EPA discussed in the final rulemaking that it was taking action to approve certain state statutes into the Florida SIP to address the state board requirements and emergency powers, EPA inadvertently did not list these state statutes in the regulatory text of the July 30, 2012, final rule. Accordingly, this rulemaking corrects that inadvertent regulatory text omission.

Department of Veterans Affairs

§ 3.103

ADMINISTRATIVE

§ 3.100 Delegations of authority.

(a) Authority is delegated to the Under Secretary for Benefits and to supervisory or adjudicative personnel within the jurisdiction of the Veterans Benefits Administration designated by the Under Secretary to make findings and decisions under the applicable laws, regulations, precedents, and instructions, as to entitlement of claimants to benefits under all laws administered by the Department of Veterans Affairs governing the payment of monetary benefits to veterans and their dependents, within the jurisdiction of Compensation and Pension Service.

(b) Authority is delegated to the Director, Compensation and Pension Service, and to personnel of that service designated by him to determine whether a claimant or payee has forfeited the right to gratuitous benefits or to remit a prior forfeiture pursuant to the provisions of 38 U.S.C. 6103 or 6104. See § 3.905.

(Authority: 38 U.S.C. 512(a))

[29 FR 7547, June 12, 1964, as amended at 31 FR 14455, Nov. 10, 1966; 37 FR 10442, May 23, 1972; 53 FR 3207, Feb. 4, 1988; 60 FR 16355, Apr. 11, 1995; 61 FR 20727, May 8, 1996]

§ 3.102 Reasonable doubt.

It is the defined and consistently applied policy of the Department of Veterans Affairs to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. By reasonable doubt is meant one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim. It is a substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility. It is not a means of reconciling actual conflict or a contradiction in the evidence. Mere suspicion or doubt as to the truth of any statements submitted, as distinguished from impeachment or contradiction by

evidence or known facts, is not justifiable basis for denying the application of the reasonable doubt doctrine if the entire, complete record otherwise warrants invoking this doctrine. The reasonable doubt doctrine is also applicable even in the absence of official records, particularly if the basic incident allegedly arose under combat, or similarly strenuous conditions, and is consistent with the probable results of such known hardships.

(Authority: 38 U.S.C. 501)

[50 FR 34458, Aug. 26, 1985, as amended at 66 FR 45630, Aug. 29, 2001]

§ 3.103 Procedural due process and appellate rights.

(a) *Statement of policy.* Every claimant has the right to written notice of the decision made on his or her claim, the right to a hearing, and the right of representation. Proceedings before VA are ex parte in nature, and it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government. The provisions of this section apply to all claims for benefits and relief, and decisions thereon, within the purview of this part 3.

(b) *The right to notice—(1) General.* Claimants and their representatives are entitled to notice of any decision made by VA affecting the payment of benefits or the granting of relief. Such notice shall clearly set forth the decision made, any applicable effective date, the reason(s) for the decision, the right to a hearing on any issue involved in the claim, the right of representation and the right, as well as the necessary procedures and time limits, to initiate an appeal of the decision.

(2) *Advance notice and opportunity for hearing.* Except as otherwise provided in paragraph (b)(3) of this section, no award of compensation, pension or dependency and indemnity compensation shall be terminated, reduced or otherwise adversely affected unless the beneficiary has been notified of such adverse action and has been provided a period of 60 days in which to submit evidence for the purpose of showing



§ 3.103

38 CFR Ch. I (7-1-12 Edition)

that the adverse action should not be taken.

(3) *Exceptions.* In lieu of advance notice and opportunity for a hearing, VA will send a written notice to the beneficiary or his or her fiduciary at the same time it takes an adverse action under the following circumstances:

(i) An adverse action based solely on factual and unambiguous information or statements as to income, net worth, or dependency or marital status that the beneficiary or his or her fiduciary provided to VA in writing or orally (under the procedures set forth in § 3.217(b)), with knowledge or notice that such information would be used to calculate benefit amounts.

(ii) An adverse action based upon the beneficiary's or fiduciary's failure to return a required eligibility verification report.

(iii) Evidence reasonably indicates that a beneficiary is deceased. However, in the event that VA has received a death certificate, a terminal hospital report verifying the death of a beneficiary or a claim for VA burial benefits, no notice of termination (contemporaneous or otherwise) will be required.

(iv) An adverse action based upon a written and signed statement provided by the beneficiary to VA renouncing VA benefits (see § 3.106 on renouncement).

(v) An adverse action based upon a written statement provided to VA by a veteran indicating that he or she has returned to active service, the nature of that service, and the date of reentry into service, with the knowledge or notice that receipt of active service pay precludes concurrent receipt of VA compensation or pension (see § 3.654 regarding active service pay).

(vi) An adverse action based upon a garnishment order issued under 42 U.S.C. 659(a).

(Authority: 38 U.S.C. 501(a))

(4) *Restoration of benefits.* VA will restore retroactively benefits that were reduced, terminated, or otherwise adversely affected based on oral information or statements if within 30 days of the date on which VA issues the notification of adverse action the beneficiary or his or her fiduciary asserts

that the adverse action was based upon information or statements that were inaccurate or upon information that was not provided by the beneficiary or his or her fiduciary. This will not preclude VA from taking subsequent action that adversely affects benefits.

(c) *The right to a hearing.* (1) Upon request, a claimant is entitled to a hearing at any time on any issue involved in a claim within the purview of part 3 of this chapter, subject to the limitations described in § 20.1304 of this chapter with respect to hearings in claims which have been certified to the Board of Veterans' Appeals for appellate review. VA will provide the place of hearing in the VA office having original jurisdiction over the claim or at the VA office nearest the claimant's home having adjudicative functions, or, subject to available resources and solely at the option of VA, at any other VA facility or federal building at which suitable hearing facilities are available. VA will provide one or more employees who have original determinative authority of such issues to conduct the hearing and be responsible for establishment and preservation of the hearing record. Hearings in connection with proposed adverse actions and appeals shall be held before one or more VA employees having original determinative authority who did not participate in the proposed action or the decision being appealed. All expenses incurred by the claimant in connection with the hearing are the responsibility of the claimant.

(2) The purpose of a hearing is to permit the claimant to introduce into the record, *in person*, any available evidence which he or she considers material and any arguments or contentions with respect to the facts and applicable law which he or she may consider pertinent. All testimony will be under oath or affirmation. The claimant is entitled to produce witnesses, but the claimant and witnesses are expected to be present. The Veterans Benefits Administration will not normally schedule a hearing for the sole purpose of receiving argument from a representative. It is the responsibility of the VA employee or employees conducting the hearings to explain fully the issues and suggest the submission of evidence



Department of Veterans Affairs

§ 3.105

which the claimant may have overlooked and which would be of advantage to the claimant's position. To assure clarity and completeness of the hearing record, questions which are directed to the claimant and to witnesses are to be framed to explore fully the basis for claimed entitlement rather than with an intent to refute evidence or to discredit testimony. In cases in which the nature, origin, or degree of disability is in issue, the claimant may request visual examination by a physician designated by VA and the physician's observations will be read into the record.

(Authority: 38 U.S.C. 501)

(d) *Submission of evidence.* Any evidence whether documentary, testimonial, or in other form, offered by the claimant in support of a claim and any issue a claimant may raise and any contention or argument a claimant may offer with respect thereto are to be included in the records.

(e) *The right to representation.* Subject to the provisions of §§ 14.626 through 14.637 of this title, claimants are entitled to representation of their choice at every stage in the prosecution of a claim.

(f) *Notification of decisions.* The claimant or beneficiary and his or her representative will be notified in writing of decisions affecting the payment of benefits or granting relief. All notifications will advise the claimant of the reason for the decision; the date the decision will be effective; the right to a hearing subject to paragraph (c) of this section; the right to initiate an appeal by filing a Notice of Disagreement which will entitle the individual to a Statement of the Case for assistance in perfecting an appeal; and the periods in which an appeal must be initiated and perfected (See part 20 of this chapter, on appeals). Further, any notice that VA has denied a benefit sought will in-

clude a summary of the evidence considered.

(Authority: 38 U.S.C. 501, 1115, 1506, 5104)

[55 FR 13527, Apr. 11, 1990; 55 FR 17530, Apr. 25, 1990, as amended at 55 FR 20148, May 15, 1990; 55 FR 25308, June 21, 1990; 57 FR 56393, Dec. 2, 1992; 58 FR 16360, Mar. 26, 1993; 58 FR 58386, Nov. 9, 1993; 59 FR 6218, Feb. 10, 1994; 69 FR 6901, Feb. 14, 1994; 66 FR 56813, Nov. 9, 2001; 76 FR 52574, Aug. 23, 2011; 77 FR 23129, Apr. 18, 2012]

§ 3.104 Finality of decisions.

(a) A decision of a duly constituted rating agency or other agency of original jurisdiction shall be final and binding on all field offices of the Department of Veterans Affairs as to conclusions based on the evidence on file at the time VA issues written notification in accordance with 38 U.S.C. 5104. A final and binding agency decision shall not be subject to revision on the same factual basis except by duly constituted appellate authorities or except as provided in § 3.105 and § 3.2600 of this part.

(b) Current determinations of line of duty, character of discharge, relationship, dependency, domestic relations questions, homicide, and findings of fact of death or presumptions of death made in accordance with existing instructions, and by application of the same criteria and based on the same facts, by either an Adjudication activity or an Insurance activity are binding one upon the other in the absence of clear and unmistakable error.

[29 FR 1462, Jan. 29, 1964, as amended at 29 FR 7547, June 12, 1964; 66 FR 65846, Dec. 19, 1991; 68 FR 21974, May 2, 2001]

§ 3.105 Revision of decisions.

The provisions of this section apply except where an award was based on an act of commission or omission by the payee, or with his or her knowledge (§ 3.500(b)); there is a change in law or a Department of Veterans Affairs issue, or a change in interpretation of law or a Department of Veterans Affairs issue (§ 3.114); or the evidence establishes that service connection was clearly illegal. The provisions with respect to the date of discontinuance of benefits are applicable to running awards. Where the award has been suspended, and it is determined that no additional



APPENDIX 2

38 CFR 20.700(a)

VA Pamphlet, BVA Rules of Practice
Rule 14
07/12/41

VA Pamphlet 1-1, BVA Rules of Practice
Rule 14
revised 06/23/50

VA Pamphlet 1-1, BVA Rules of Practice
Rule 15
revised 08/22/62

38 CFR 19.133(a)
revised 01/22/64 (TS 4)

38 CFR 19.157(a)
revised 01/01/80 (48 FR 6961)

38 CFR 20.700(a)
revised 03/04/92 (57 FR 4088)

VA Pamphlet, BVA Rules of Practice
Rule 14

RULES OF PRACTICE
BOARD OF VETERANS' APPEALS

SEAL

*Gen. Records
removing history from
Sec. 1 - Rules of Practice
B.V.A.; sending to
Miss Isaacson.*

Approved by the
Administrator of
Veterans' Affairs

July 12, 1941

*e j
5/9/61*

VA Pamphlet, BVA Rules of Practice

Rule 14

eff: 7/12/41

- Rule 13. Additional evidence in support of an appeal should be submitted to the office having custody of the case file. The filing of additional evidence after receipt of notice of an adverse decision does not extend the time limit for filing an appeal. Appellants or accredited representatives of recognized service organizations are expected to submit requested evidence, leads, or certifications promptly.
- Rule 14. After all available evidence in support of an appeal has been submitted to the office of original jurisdiction and the case is certified to the Board of Veterans' Appeals, a hearing will be allowed, if desired by the claimant or his representative, either before the agency of original jurisdiction, which will conduct the hearing for the Board of Veterans' Appeals, or before the Board of Veterans' Appeals at Washington, D. C. If the hearing is held before the agency of original jurisdiction, it will be in lieu of a hearing before the Board of Veterans' Appeals.
- Rule 15. Whether a hearing is held in a field office of the Veterans Administration or before the Board of Veterans' Appeals at Washington, D. C., it is to be understood that such hearings must be held without any expense to the Government.

VA PAMPHLET 1-1

RULES OF PRACTICE
BOARD OF VETERANS APPEALS



Approved by
The Administrator of Veterans Affairs
1950

VA Pamphlet 1-1, BVA Rules of Practice

Rule 14

eff: 6/23/50

4

Rule 12.—In each application for review on appeal, the name and service of the veteran on account of whose service the claim is based must be stated, together with the number of the claim and the date of the action from which the appeal is taken. The appeal must state the issue clearly and point out the alleged mistake or error in the decision from which the appeal is taken; for example, if the appeal is for service connection, the disabilities which are believed to be of service origin should be named and the reasons supporting the claimant's contentions should be set forth. Appeals which are defective because specific assignments of mistake of fact or error of law have not been submitted may be dismissed.

Rule 13.—Additional evidence in support of an appeal should be submitted to the office having custody of the case file. The filing of additional evidence after receipt of notice of an adverse decision does not extend the time limit for filing an appeal. Appellants, accredited representatives of recognized service organizations, attorneys, and agents are expected to submit requested evidence, leads, or certifications promptly.

Rule 14.—After all available evidence in support of an appeal has been submitted to the VA office of original jurisdiction and the case is otherwise ready for certification to the Board of Veterans Appeals, a hearing will be allowed if desired by the claimant or his duly authorized representative. Such hearing may be held before a section of the Board of Veterans Appeals; or a rating board (or other appropriate personnel) either of the VA office having original jurisdiction over the claim or of the VA regional or district office in which the hearing is desired, acting as a hearing agency for the Board of Veterans Appeals. A complete typewritten transcript will be made of every hearing conducted.

Rule 15.—Whether a hearing is held in a field office of the Veterans Administration or before the Board of Veterans

VA Pamphlet 1-1, BVA Rules of Practice
Rule 15

VA Pamphlet 1-1



Board of
Veterans Appeals

**RULES OF
PRACTICE**

Approved by Administrator
of Veterans Affairs
1962

VA Pamphlet 1-1, BVA Rules of Practice
Rule 15
eff: 8/22/62

Rule 14. Docketing of Applications for Review on Appeal

(a) Applications for review on appeal shall be docketed and considered in the order in which they are received, except that for sufficient cause shown the Board may advance a case on the docket.

(b) Cases returned to the Board following remand for further development of the evidence shall assume their original place on the docket.

HEARINGS

Rule 15. General

A hearing shall be granted where a claimant or his representative expresses a desire to personally appear before the Board. The purpose of such hearing will be to receive argument or testimony relevant and material to the appellate issue. The decision will be made by the section after review of the entire record, including the hearing transcript. No decision will be announced at the time of the hearing.

Rule 16. Place of Hearing

A hearing may be held in one of the following places, at the option of the claimant:

- (a) Before a section of the Board in Washington, D.C.
- (b) Before a traveling section of the Board, if practicable.
- (c) Before appropriate personnel in the VA office having original jurisdiction over the claim, acting as a hearing agency for the Board of Veterans Appeals.
- (d) Before appropriate personnel in the regional office nearest the claimant's residence, acting as a hearing agency for the Board of Veterans Appeals.

Rule 17. Conduct of Hearings

- (a) Hearings conducted by or for the Board are ex parte in nature and nonadversary. Cross-examination by parties to the hearing will not be permitted.
- (b) Hearings before the Board will be presided over by the Chief Member of the section which will make the decision in the case.
- (c) In the event of prolonged absence or inability of one of the hearing members to be present at the time of the promulgation of the decision, a substitute will be designated to participate in the decision.
- (d) In a field office, the hearing shall be presided over by the person designated to act as Chairman for that purpose.
- (e) The proceedings shall be informal and the Board (or other personnel acting as hearing agency for the Board) shall not be limited by legal rules of evidence, but shall maintain reasonable bounds of relevancy and materiality.

Advance dist. by memo. 1-30-64^{above} (re publication in Federal Register 1-29-64).

Veterans Administration
Washington, D.C. 20420

January 22, 1964

VA REGULATIONS

APPEALS--Transmittal Sheet 4

Remove pages

1-9R and 2-9R

3-7R and 4-7R

5-6R and 6-6R, 7-6R, 8-6R, 9-6R,
10-6R, 11-8R, 12-8R, 13-9R, 14-9R

Insert pages

1-i
1-10R and 2-10R
3-i and 3-ii
3-iii and 3-iv
3-8R and 4-8R
5-7R and 6-7R
7-7R and 8-7R
9-7R and 10-7R
11-9R and 12-9R
13-10R and 14-10R
15 and 16
17 and 18
19 and 20
21

Paragraphs revised

9800
9800.1
9801
9804
9810

(See explanation
for renumbering)

Paragraphs added

9901 through 9956

Paragraphs canceled

9801.1
9801.2
9801.3
9801.4
9801.5
9802
9803
9805
9807
9808
9809

EXPLANATION

The purpose of the following comment on the changes included in this amendment of VA Regulations is to inform all concerned why the changes are being made. This comment is not regulatory.

The appellate regulations issued by the Board of Veterans Appeals have been contained in the 9800 series of the VA Regulations. The Board's Rules of Practice have been published in VA Pamphlet 1-1 and VA Manual MI-1.

In the past, the departments administering benefits have included provisions relating to appeals in their sections of the VA Regulations. The primary purpose of this revision is to consolidate all appellate provisions in the "Appeals" section, eliminating them from other sections, except for

*See att. to
S.C. 3-11-69*

necessary references. Substantive revisions and editorial changes have been made as necessary. Those regulations of a general nature are incorporated in the VA Regulations 9800 series, entitled "Appeals--General," and those governing practice before the Board are incorporated in the Rules of Practice, which are published in the VA Regulations 9900 series, entitled "Appeals--Rules of Practice."

APPEALS--General

Paragraph 9801. VA Regulation 9300 renumbered. No change in text.

Paragraph 9802. VA Regulation 9800.1 renumbered. No change in text.

Paragraph 9803. VA Regulation 9801 renumbered and revised to include restatement of VA Regulation 5076(B) relating to the subject matter of appeals from determinations of the Chief Attorney under 38 U.S.C. 3203(b)(3).

Paragraph 9804. Restatement of VA Regulation 1103(G).

Paragraph 9805. VA Regulation 9810 renumbered. No change in text.

APPEALS--Rules of Practice (VA Regulations 9900 Series)

The Rules of Practice, Board of Veterans Appeals, published in VA Pamphlet 1-1 (1962 edition), have been revised to reflect the new appellate procedure provided by Public Law 87-666, which was effective January 1, 1963. Regulatory provisions governing the obtaining of independent medical opinions provided by Public Law 87-671 have also been included. In addition, the Rules of Practice published herein reflect consolidation of VA Regulations governing appellate rights and practice before the Board, to facilitate their use within the VA and to assist service organizations, attorneys and other persons outside the VA.

The Rules of Practice, Board of Veterans Appeals, will be published in a revised edition of VA Pamphlet 1-1.

Revisions and rescissions to regulations dealing with other programs resulting from these changes are being separately published.

Paragraph 9955. Restatement of rule 29, VA Pamphlet 1-1 (1962 edition). If additional evidence is filed and it is determined that such evidence does not change the factual basis so as to warrant a change in the prior

VA Regulations
Appeals--Transmittal Sheet 4--Continued

decision, the statement of the case on appeal from that determination is inherently limited to the issue of whether the additional evidence established a new factual basis.

See the following:

Compensation and Pension--Transmittal Sheets 306 and 307
Insurance--Transmittal Sheet 97
Chief Attorneys--Transmittal Sheet 22
Medical--Transmittal Sheet 47
Vocational Rehabilitation and Training--Transmittal Sheet 202

RESCISSION: VA Pamphlet 1-1 (1962 edition).

By direction of the Administrator:


W. J. DRIVER
Deputy Administrator

Distribution: DVB Publications Code 0081
FD All other same as VA Regulations for Appeals

9932

VA Regulations
Appeals--Transmittal Sheet 4

who is a citizen of the United States or a resident of the United States or one of the possessions, may be recognized as a representative for a particular claim, unless that person has been barred from practice before the VA. (38 U.S.C. 3403)] (Jan. 22, 1964)

Formerly in 1103(B)

[(B) Designation. The designation must be by power of attorney which stipulates that no fee or compensation of any nature will be charged or paid for the services. The designation will be by VA Form 2-22a, Power of Attorney, or its equivalent.] (Jan. 22, 1964)

[9932 (§19.132). RULE 32. GENERAL

(A) One Representative. Only one attorney, agent or service organization shall be recognized at any one time. (38 U.S.C. 4005(b)(2)) (Jan. 22, 1964) *Was in 1103(73) + 9801.2*

[(B) Change of Status From Wife to Widow. A power of attorney submitted by the wife of a veteran may continue in effect after she becomes a widow.] (Jan. 22, 1964)

[(C) Recognition of Power of Attorney After Death of Veteran. A service organization which has power of attorney to represent a veteran may, in the event of death of the veteran, be recognized for a reasonable period thereafter, but not as representative of a survivor claimant who has appointed another representative.] (Jan. 22, 1964)

[HEARINGS]

[9933 (§19.133). RULE 33. GENERAL

(A) Right to a Hearing. A hearing on appeal shall be granted where a claimant or his representative expresses a desire to appear in person. (38 U.S.C. 4002)] (Jan. 22, 1964) *Was in 4801.3*

[(B) Purpose of Hearing. The purpose of a hearing is to receive argument or testimony relevant and material to the appellate issue.] (Jan. 22, 1964)

[(C) Nonadversary Proceedings. Hearings conducted by and for the Board are ex parte in nature and nonadversary. Cross-examination by parties to the hearing will not be permitted. Proceedings will not be limited by legal rules of evidence, but reasonable bounds of relevancy and materiality will be maintained.] (Jan. 22, 1964) *1-12-64 rec'd 5-OK*

14-10R

See index cards on VARs for annotations. *index to Regs*

Source: All Sources : Federal Legal - U.S. : Federal Register
Terms: 48 fr 6961 (Edit Search)

48 FR 6961

VETERANS ADMINISTRATION

AGENCY: Veterans Administration.

38 CFR Part 19

Appeals Regulations; Rules of Practice

48 FR 6961

February 17, 1983

ACTION: Final regulations.

SUMMARY: The Veterans Administration is amending the Appeals Regulations of the Board of Veterans Appeals to add a new regulation regarding appellate jurisdiction of determinations of the Department of Medicine and Surgery. The Board of Veterans Appeals Rules of Practice have also been revised in order to clarify existing practices before the Board of Veterans Appeals.

EFFECTIVE DATE: January 1, 1980.

FOR FURTHER INFORMATION CONTACT: Mr. Jan Donsbach (01C), Special (Legal) Assistant to the Chairman, Board of Veterans Appeals, 810 Vermont Avenue N.W., Washington, D.C. 20420 (202-389-2978).

TEXT:

SUPPLEMENTARY INFORMATION: On pages 56093-56104 of the Federal Register of August 22, 1980, there was published a notice of proposed rulemaking to amend Part 19.

Interested persons were given 30 days in which to submit comments regarding the proposal. The Veterans Administration received many suggestions. The comments and our action on those comments are listed below. We have first addressed those comments of a general nature which do not relate to a specific rule or appeals regulation. The comments relating to specific rules or regulations follow thereafter.

One organization expressed the opinion that the proposed additional rules have the effect of strengthening the insulation of the Veterans Administration from outside advocacy. In formulating these new rules, as well as revising existing rules, the aim was to clarify as much as possible the existing procedures for appeals. The proposed rules were developed to assist representatives who were not employed by major service organizations and who have not had many years of experience practicing before the Board in presenting their appeals before the Board and also to assist those appellants who specifically did not desire representation. Contrary to the commenter's opinion, these rules will encourage greater participation by all advocates.

A group criticized the rules for being too technical and legalistic and claimed that they created more formal and complex procedures. This was believed to work to the disadvantage of unrepresented appellants. There is little complex legal terminology used in the rules. Confusing terminology was defined and clarified, as suggested by some commenters. Furthermore, Rule 1(c) guarantees that the Rules of Practice will be interpreted in a manner most favorable to the appellant.

One group suggested that a rule be added requiring that claimants be notified that the filing of a notice of disagreement might result in reduced benefits and that the Board of Veterans Appeals does not traditionally reduce benefits. This comment could be viewed as influencing the claimant as to whether to appeal and is not proper subject matter for these rules. This area relates in particular to those subjects normally discussed between claimant and representative.

Comments were received requesting that processing times for preparation of hearing transcripts and decisions be added to the rules. In an effort to decrease the processing time of an appeal where a hearing

List of Subjects in 38 CFR Part 19

Administrative practice and procedure, Claims, Veterans.

Approved: February 4, 1983.

By direction of the Administrator.

Everett Alvarez, Jr.,

Deputy Administrator.

Title 38, CFR, Part 19 is revised to read as follows:

PART 19 -- BOARD OF VETERANS APPEALS

Subpart A -- Appeals -- General

Sec.

19.1 Appellate jurisdiction.

19.2 Subject matter of appeals.

19.3 Appellate jurisdiction of determinations of the Department of Medicine and Surgery.

19.4 Restriction as to change in payments pending determination of administrative appeals.

19.5 Delegation of authority to Chairman and Vice Chairman, Board of Veterans Appeals.

19.6 Disclosure of information.

Subpart B -- Appeals -- Rules of Practice

General

19.101 Rule 1; Authority, scope of rules, and construction.

19.102 Rule 2; Effective date.

19.103 Rule 3; Governing criteria.

19.104 Rule 4; Finality of decisions.

Docketing

19.105 Rule 5; Docketing of appeals.

19.106 Rule 6; Advance on the docket.

38 CFR 19.157(a)

eff: 1/1/80

organization, attorney, agent or other person properly designated to represent the appellant. (38 U.S.C. 4005(b)(2))

(b) *Change of status from spouse to surviving spouse.* A power of attorney or designation of representation submitted by the spouse of a veteran may continue in effect after the veteran's death. (38 U.S.C. 3402-3404)

(c) *Recognition of representation after the death of the veteran.* A recognized organization, attorney, agent or person properly designated to represent a veteran may, in the event of the death of the veteran, be recognized as the representative of the survivors for a reasonable period thereafter, but not as representative of a survivor who has appointed another representative. (38 U.S.C. 3403-3404)

(d) *Reasonable period.* For purposes of paragraph (c) of this section, a reasonable period may be considered as that which would enable a potential appellant to recover sufficiently from the emotional stress and strain caused by the veteran's death so as to enable him/her to exercise his/her right to representation. (38 U.S.C. 3402-3404)

Cross-References: Inspection of records by or disclosure of information to recognized representatives of organizations and recognized attorneys. See § 1.525(d). Powers of attorney See § 14.631(e).

§ 19.156 Rule 56; Legal interns, law students and paralegals.

Legal interns, law students and paralegals must be under the direct supervision of a recognized attorney (Rule 52, § 19.152) in order to prepare cases before the Board of Veterans Appeals. These individuals may present oral arguments at hearings only if the recognized attorney is present. Otherwise, such individuals must qualify as agents or representatives under Rule 53 or 54 (§ 19.153 or 19.154). Legal interns law students and paralegals who desire to participate at a hearing before the Board must make advance arrangements with the Chief of the Hearing Section and submit written authorization from the attorney naming the individual who will be participating in the hearing. (38 U.S.C. 3404, 4005(b)(2))

Hearings

§ 19.157 Rule 57; General.

(a) *Right to a hearing.* A hearing on appeal shall be granted if an appellant or a representative expresses a desire to appear in person. (38 U.S.C. 4002)

(b) *Purpose of hearing.* The purpose of a hearing is to receive argument and testimony relevant and material to the appellate issue. (38 U.S.C. 4002)

(c) *Nonadversary proceedings.* Hearings conducted by and for the Board are ex parte in nature and nonadversary. Parties to the hearing will be permitted to ask questions, including follow-up questions, of all witnesses but cross-examination will not be permitted. Proceedings will not be limited by legal rules of evidence, but reasonable bounds of relevancy and materiality will be maintained. (38 U.S.C. 4002)

§ 19.158 Rule 58; Who may appear.

The appellant, the authorized representative, and members of Congress and their staffs may appear and present argument and testimony in support of an appeal. At the request of an appellant, a Veterans Benefits Counselor of the Veterans Administration may present the appeal at a hearing before the Board of Veterans Appeals or before Veterans Administration field personnel acting for the Board. (38 U.S.C. 4002, 4005(b)(2))

Cross-Reference: Witnesses. See Rule 65, § 19.165.

§ 19.159 Rule 59; Scheduling and notice of hearing.

(a) *General.* To the extent that facilities permit, hearings will be scheduled at the convenience of appellants and their representatives, with consideration of the travel distance involved. While a statement of the case should be prepared prior to the hearing it is not a prerequisite for entitlement to a hearing, and an appellant may request that the hearing be scheduled prior to issuance of the statement of the case. (38 U.S.C. 4002)

(b) *Notification of hearing.* When a hearing is scheduled, the person requesting it will be notified of its time and place, and of the fact that the government may not assume any expense incurred by the appellant, the representative or witnesses attending the hearing. (38 U.S.C. 4002)

(c) *Extension of time.* An extension of time for appearance at a hearing may be granted for good cause

Source: All Sources : Federal Legal : U.S. : Federal Register
 Terms: 57 fr 4088 (Edit Search)

57 FR 4088

DEPARTMENT OF VETERANS AFFAIRS

AGENCY: Department of Veterans Affairs.

38 CFR Parts 14, 19, and 20

Appeals Regulations; Rules of Practice

RIN 2900-AE02

57 FR 4088

February 3, 1992

ACTION: Final regulations.

SUMMARY: The Department of Veterans Affairs (VA) is issuing final regulatory amendments revising the Board of Veterans' Appeals' (BVA) Appeals Regulations and Rules of Practice governing appeals practices and procedures within VA. Conforming amendments have also been made to other related VA regulations. The effect of these amendments will be to revise and update these regulations to reflect current law and practices and to provide information needed by individuals who wish to appeal decisions made by VA adjudicatory bodies to the BVA. The revisions are necessary in order to provide appellate procedures which conform to current law and to inform the public about those procedures.

EFFECTIVE DATE: These rules are effective March 4, 1992.

FOR FURTHER INFORMATION CONTACT: Mr. Steven L. Keller, Counsel to the Chairman (01C), Board of Veterans' Appeals, 810 Vermont Avenue NW., Washington, DC 20420 (202) 233-2978.

TEXT:

SUPPLEMENTARY INFORMATION: On August 18, 1989, VA published in the Federal Register (54 FR 34334) a notice proposing amendment of part 19 and the addition of part 20 of title 38, Code of Federal Regulations, to update the Appeals Regulations and Rules of Practice of the Board of Veterans' Appeals. Conforming revisions to part 14 were also proposed.

VA received ten comments on the proposed regulations -- four from service organizations, two from legal services organizations allied with a service organization, two from Members of the Board of Veterans' Appeals, one from a VA employee, and one from a private attorney-at-law.

Some commenters have referred to various sections of the Veterans' Judicial Review Act (Pub. L. 100-687). In the remarks which follow, provisions of the Act which have been codified will be referred to by their section numbers in title 38, United States Code (as amended by Pub. L. 100-687), rather than by section numbers of the Act. All references to section numbers in title 38, United States Code, throughout this document have been revised to reflect the renumbering accomplished by recent legislation.

There were several general comments, in addition to specific comments concerning individual amendments.

One commenter objected to moving the cross-references from individual sections, where they are currently located, to appendices to parts 19 and 20 -- asserting that this format was less helpful to the user of the regulations. VA agrees that this method of setting out cross-references is somewhat less desirable, but the change was made at the direction of the Office of the Federal Register. The BVA plans to issue an updated version of a pamphlet which includes these regulations (VA Pamphlet 1-1) within the next few months. This pamphlet version will use the old cross-reference format.

The same commenter suggested that the Rule of Practice references in part 20 be abandoned and that only the CFR citation be used. This suggestion has not been adopted. The Rule of Practice terminology is widely used by judicial and quasijudicial bodies, such as the BVA. The use of Rule numbers, as opposed to

38 CFR 20.700(a)

		<i>Case.</i>
19.27	38 CFR 19.50-19.53	See re administrative appeals.
19.30	38 CFR 20.202	Rule 202. Substantive Appeal.
19.32	38 CFR 20.302	Rule 302. Time limit for filing Notice of Disagreement, Substantive Appeal, and response to Supplemental Statement of the Case.
	38 CFR 20.501	Rule 501. Time limits for filing Notice of Disagreement, Substantive Appeal, and response to Supplemental Statement of the Case in simultaneously contested claims.
19.33	38 CFR 19.50-19.53	See re administrative appeals.
19.50	38 CFR 19.53	Restriction as to change in payments pending determination of administrative appeals.
19.76	38 CFR 20.704	Rule 704. Scheduling and notice of hearings conducted by traveling Sections of the Board of Veterans' Appeals at Department of Veterans Affairs field facilities.
		Rule 713. Hearings in simultaneously contested claims.
19.100	38 CFR 20.713	
19.101	38 CFR 19.30	Furnishing the Statement of the Case and instructions for filing a Substantive Appeal.

6. New Part 20, Board of Veterans' Appeals: Rules of Practice, is added to 38 CFR to read as follows:

PART 20 -- BOARD OF VETERANS' APPEALS: RULES OF PRACTICE

Subpart A -- General

Sec.

20.1 Rule 1. Purpose and construction of Rules of Practice.

20.2 Rule 2. Procedure in absence of specific Rule of Practice.

20.3 Rule 3. Definitions.

20.4-20.99 [Reserved]

Subpart B -- The Board

20.100 Rule 100. Name, business hours, and mailing address of the Board

20.101 Rule 101. Jurisdiction of the Board.

20.102 Rule 102. Delegation of authority -- Rules of Practice.

the veteran (e.g., a veteran's survivor, a guardian, or a fiduciary appointed to receive VA benefits on an individual's behalf), and the applicable Department of Veterans Affairs file number. They must specifically identify which expenses charged are felt to be unreasonable and the reason, or reasons, why the amount of the expenses is felt to be excessive or unreasonable. Such motions must be filed at the following address: Office of Counsel to the Chairman (01C) Board of Veterans' Appeals, 810 Vermont Avenue NW, Washington, DC 20420. They should be accompanied by all such evidence as the moving party desires to submit. The appellant or claimant, as applicable, must mail a copy of the motion and any accompanying evidence to the representative, with a return receipt requested. The receipt, which must bear the signature of the representative or an employee of the representative, must then be filed with the Board at the same address as proof of service of the motion. The representative may file a response to the motion, with any accompanying evidence, with the Board at the same address not later than 30 days following the date of receipt of the copy of the motion. The representative must mail a copy of any such response and any accompanying evidence to the appellant, with a return receipt requested. The receipt, which must bear the signature of the appellant, must then be filed with the Board at the same address as proof of service of the response. The ruling on the motion will be by the Chairman. Factors considered in determining whether expenses are excessive or unreasonable include the complexity of the case, the potential extent of benefits recoverable, whether travel expenses are in keeping with expenses normally incurred by other representatives, etc. Once there has been a ruling on the motion, an order shall issue which will constitute the final decision of the Board with respect to the motion.

(Authority: 38 U.S.C. 5904)

(Approved by the Office of Management and Budget under control number 2900-0085)

§ 20.611 Rule 611. Continuation of representation following death of a claimant or appellant.

A recognized organization, attorney, agent, or person properly designated to represent a claimant or appellant will be recognized as the representative of his or her survivors for a period of one year following the death of the claimant or appellant. A representative may also continue to act with respect to any appeal pending upon the death of the claimant or appellant until such time as a final decision has been promulgated by the Board of Veterans' Appeals. The provisions of this section do not apply to any survivor who has appointed another representative in accordance with these rules or who has indicated in writing that he or she does not wish to be represented by the claimant's or appellant's representative. Written notice that a survivor does not wish to be represented by the claimant's or appellant's representative will be effective when received by the agency of original jurisdiction or, if the case has been certified to the Board for appellate review, by the Board of Veterans' Appeals.

(Authority: 38 U.S.C. 5902-5904)

§§ 20.612-20.699 [Reserved]

Subpart H -- Hearings on Appeal

§ 20.700 Rule 700. General.

(a) *Right to a hearing.* A hearing on appeal will be granted if an appellant or an appellant's representative acting on his or her behalf, expresses a desire to appear in person.

(b) *Purpose of hearing.* The purpose of a hearing is to receive argument and testimony relevant and material to the appellate issue. It is contemplated that the appellant and witnesses, if any, will be present. A personal hearing will not normally be scheduled solely for the purpose of receiving argument by a representative. Such argument should be submitted in the form of a written brief. Oral argument may also be submitted on audio cassette for transcription for the record in accordance with paragraph (d) of this section. Requests for appearances by representatives alone to personally present argument to Members of the Board may be granted if good cause is shown. Whether good cause has been shown will be determined by the presiding Member of the hearing panel involved.

(c) *Nonadversarial proceedings.* Hearings conducted by and for the Board are ex parte in nature and nonadversarial. Parties to the hearing will be permitted to ask questions including follow-up questions, of all witnesses but cross-examination will not be permitted. Proceedings will not be limited by legal rules of evidence, but reasonable bounds of relevancy and materiality will be maintained. The presiding Member may set reasonable time limits for the presentation of argument and may exclude documentary evidence, testimony, and/or argument which is not relevant or material to the issue, or issues, being considered or which is unduly repetitious.

38 CFR 20.700(a)

(d) *Informal hearings.* This term is used to describe situations in which the appellant cannot, or does not wish to, appear. In the absence of the appellant, the authorized representative may present oral arguments, not exceeding 30 minutes in length, to the Board on an audio cassette without personally appearing before a Board of Veterans' Appeals hearing panel. These arguments will be transcribed by Board personnel for subsequent review by the panel members. This procedure will not be construed to satisfy an appellant's request to appear in person.

(Authority: 38 U.S.C. 7102, 7104(a), 7105(a))

§ 20.701 Rule 701. Who may present oral argument.

Only the appellant and/or his or her authorized representative may appear and present argument in support of an appeal. At the request of an appellant, a Veterans Benefits Counselor of the Department of Veterans Affairs may present the appeal at a hearing before the Board of Veterans' Appeals or before Department of Veterans Affairs field personnel acting for the Board.

(Authority: 38 U.S.C. 7102, 7104(a), 7105)

§ 20.702 Rule 702. Scheduling and notice of hearings conducted by the Board of Veterans' Appeals in Washington, DC, and by agency of original jurisdiction personnel acting on behalf of the Board of Veterans' Appeals at field facilities.

(a) *General.* To the extent that officials scheduling hearings for or on behalf of the Board of Veterans' Appeals determine that necessary physical resources and qualified personnel are available, hearings will be scheduled at the convenience of appellants and their representatives, with consideration of the travel distance involved. While a Statement of the Case should be prepared prior to the hearing, it is not a prerequisite for a hearing and an appellant may request that the hearing be scheduled prior to issuance of the Statement of the Case.

(Authority: 38 U.S.C. 7102, 7104(a), 7105(a))

(b) *Notification of hearing.* When a hearing is scheduled, the person requesting it will be notified of its time and place, and of the fact that the Government may not assume any expense incurred by the appellant, the representative or witnesses attending the hearing.

(Authority: 38 U.S.C. 7102, 7104(a), 7105(a))

(c) *Requests for changes in hearing dates.* (1) The appellant or the representative may request a different date for the hearing within 60 days from the date of the letter of notification of the time and place of the hearing, or not later than two weeks prior to the scheduled hearing date, whichever is earlier. The request must be in writing, but the grounds for the request need not be stated. Only one such request for a change of the date of the hearing will be granted, subject to the interests of other parties if a simultaneously contested claim is involved. In the case of hearings to be conducted by the Board of Veterans' Appeals in Washington, DC, such requests for a new hearing date must be filed with: Chief, Hearing Section (014B), Board of Veterans' Appeals, 810 Vermont Avenue, NW., Washington, DC 20420. In the case of hearings conducted for the Board by agency of original jurisdiction personnel, the requests must be filed with the office of the official of the Department of Veterans Affairs who signed the notice of the original hearing date.

(2) After the period described in paragraph (c)(1) of this section has passed, or after one change in the hearing date is granted based on a request received during such period, the date of the hearing will become fixed. After a hearing date has become fixed, an extension of time for appearance at a hearing will be granted only for good cause, with due consideration of the interests of other parties if a simultaneously contested claim is involved. Examples of good cause include, but are not limited to, illness of the appellant and/or representative, difficulty in obtaining necessary records, and unavailability of a necessary witness. The motion for a new hearing date must be in writing and must explain why a new hearing date is necessary. If good cause is shown, the hearing will be rescheduled for the next available hearing date after the appellant or his or her representative gives notice that the contingency which gave rise to the request for postponement has been removed. Ordinarily, however, hearings will not be postponed more than 30 days. An adverse determination by the agency of original jurisdiction as to whether good cause for postponement has been shown is an appealable issue. In the case of a hearing conducted by the Board of Veterans' Appeals in Washington, DC, whether good cause for establishing a new hearing date has been shown will be determined by the presiding Member of the hearing panel assigned to conduct the hearing. In the case of hearings to be conducted by the Board of Veterans' Appeals in Washington, DC, the motion for a new hearing date must be filed with: Chief, Hearing Section (014B), Board of Veterans' Appeals, 810

APPENDIX 3

IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS

WARREN B. COOK,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 15-0873
)	
ROBERT A. MCDONALD,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

DECLARATION OF DAVID C. SPICKLER

I, David C. Spickler, pursuant to 28 U.S.C. § 1746, declare under the penalty of perjury the following:

1. I am the Deputy Vice Chairman of the Board of Veterans' Appeals (Board), in the Department of Veterans Affairs (VA). The information contained in this declaration is based on my knowledge, unless otherwise indicated.
2. This declaration is provided in response to an order of the United States Court of Appeals for Veterans Claims, dated March 7, 2016, directing the Secretary to provide a memorandum of law responsive to a filing from the Appellant.
3. In an April 6, 2016, filing, the Appellant noted that the Board afforded him a hearing in June 2012, but denied his request for a second hearing. The Appellant's filing states that "a review of the applicable VA regulations concerning hearings reveals no express limitation imposed on a veteran's right to a hearing." The February 20, 2015, Board decision on appeal cited to 38 C.F.R. § 20.700(a) and stated that "as the [Appellant] has been afforded a Board hearing, no further hearing is necessary."
4. Based on my review of the information available in the Veterans Appeals Control and Locator System (VACOLS) (the Board's computerized tracking system), the Board currently has over 67,500 pending hearing requests. Based on my review of current staffing statistics, the Board has 75 full time Veterans Law

Judges who are available to preside over Board hearings. Based on my review of Board hearing statistics from the past three (3) fiscal years, the Board holds between 10,500 to 12,500 hearings each year.

5. I certify under the penalty of perjury that the foregoing is true and correct.

Executed on the 29th day of April 2016.



DAVID C. SPICKLER