

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

Vet. App. No. 14-2719

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**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

CARL E. KILGORE,)	
)	
Petitioner,)	
)	
)	
v.)	Vet. App. No. 14-2719 WRIT
)	
ROBERT A. MCDONALD,)	
Secretary of Veterans Affairs,)	
)	
Respondent.)	

**SECRETARY’S RESPONSE TO PETITION FOR EXTRAORDINARY RELIEF
AND COURT ORDER DATED SEPTEMBER 2, 2014**

On August 15, 2014, Carl E. Kilgore, Petitioner, through counsel, filed a petition for extraordinary relief in the nature of a writ of mandamus (Petition). In his petition, Petitioner asks that the Court compel the Department of Veterans Affairs (VA) Regional Office (RO) in Nashville, Tennessee to issue a Statement of the Case (SOC) in response to his May 1, 2012, Notice of Disagreement (NOD) which disagreed with the disability ratings and the effective dates assigned to his service-connected heart condition, and compel VA to comply with the remand directives of an October 26, 2012, Board decision with regard to his claim of entitlement to a total rating based on individual unemployability (TDIU), prior to March 2, 2009. See Petition at 1.

In its September 2, 2014, Order, the Court directed the Secretary to file a response to the petition, including information regarding the status of the Petitioner’s claim at the Nashville RO.

The Secretary, hereby, responds to the Court's Order. For the reasons provided below, the Secretary respectfully submits that the Court should dismiss the petition.

SUMMARY OF PERTINENT FACTS

In a March 2011 decision, the Board, *inter alia*, granted service connection for coronary artery disease, granted TDIU from March 2, 2009, and remanded a claim of entitlement to service connection for a low back disorder. See Petitioner's Appendix 002-038. Petitioner appealed the March 2011 Board decision. In a Joint Motion for Partial Remand (JMPR) dated November 14, 2011, Petitioner and the Secretary agreed that the Board's March 2011 decision should be vacated and remanded for the Board to consider the effect of Petitioner's service-connected artery disease on the effective date awarded for TDIU. See Petitioner's Appendix at 039. Petitioner did not appeal that portion of the Board's decision that granted service connection for coronary artery disease. *Id.* at 039. The Court granted the JMR in November 2011. See *id.* at 045.

In an April 2012 rating decision, the RO implemented the Board's March 2011 decision and granted service connection for coronary artery disease and assigned a 10% disability rating, effective September 6, 2005, and a 30% rating effective January 28, 2011. *Id.* at 051. On May 1, 2012, Petitioner filed an NOD in response to the April 2012 rating decision. *Id.* at 051.

In an October 26, 2012, decision, the Board again remanded Petitioner's claim of entitlement to service connection for a low back disorder, claimed as

herniated disc of the lumbar spine, to include as secondary to service-connected diabetes mellitus, type II, to the RO. See Petitioner's Appendix 085. The Board also remanded the claim of entitlement to TDIU, prior to March 2, 2009. See *id.* In the remand directives, the Board instructed the RO to do the following: (1) obtain a VA examination and opinion with regard to the etiology of Petitioner's low back disorder; and (2) after the completion of the examination, refer Petitioner's TDIU claim to the Director of Compensation and Pension Service for extraschedular consideration. *Id.* at 090-091. In the declaration of Philip R. Bramlage, the Assistant Service Center Manager of the Nashville RO, Mr. Bramlage indicated that the RO provided Petitioner an examination in January 2013 in accordance with the Board's directives. See Secretary's Exhibit at 1. Mr. Bramlage also indicated that Petitioner's claims file was directed to be sent to the Veterans Benefits Administration's Central Office, but was inadvertently sent to the Board. See Secretary's Exhibit at 1-2. In January 2014, the file was returned to the Nashville RO. *Id.*

On September 2, 2014, the RO issued an SOC with regard to the coronary artery disease claim and sent Petitioner's claim of entitlement to TDIU prior to March 2, 2009, to the Director of Compensation Service for extraschedular consideration. See *id.* at 2, 3, 4.

RESPONSE TO PETITION

In addition to its appellate jurisdiction, the Court has the authority under the All Writs Act (“AWA”), 28 U.S.C. § 1651(a), to issue extraordinary writs necessary in aid of its jurisdiction. *Dailey v. Principi*, 17 Vet.App. 61, 65 (2003). However, “[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations.” *Id.* (quoting *Kerr v. United States District Court*, 426 U.S. 394, 402, (1976)). Three conditions must be met before a court may issue a writ of mandamus: (1) The petitioner must lack adequate alternative means to attain the desired relief, thus ensuring that the writ is not used as a substitute for the appeals process, (2) the petitioner must demonstrate a clear and indisputable right to the writ, and (3) the Court must be convinced, given the circumstances, that the issuance of the writ is warranted. See *Cheney v. U.S. Dist. Ct. D. C.*, 542 U.S. 397, 380-81 (2004) (citing *Kerr*, 426 U.S. at 403; *Erspamer v. Derwinski*, 1 Vet.App. 3, 9 (1990) (quoting *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384, 74 S.Ct. 145, 458, 98 L.Ed. 106 (1953))).

Notwithstanding the foregoing, Court jurisdiction over a petition for extraordinary relief is predicated upon a petitioner meeting the case-or-controversy requirement of Article III of the Constitution of the United States. See *Aronson v. Brown*, 7 Vet.App. 153, 155 (1994); *Mokal v. Derwinski*, 1 Vet.App. 12, 13 (1990). Accordingly, a petition which seeks relief that has been accomplished should be dismissed as moot. See *Thomas v. Brown*, 9 Vet.App. 269, 270 (1996) (*per curiam* order); *Bond v. Derwinski*, 2 Vet.App.

376, 377 (1992) (*per curiam* order) (Court lacks jurisdiction absent a case or controversy or when once live case or controversy becomes moot); *Mokal*, 1 Vet.App. at 15 (Court dismissed portion of petition seeking mandamus relief because controversy surrounding that portion of petition was moot).

In its September 2, 2014, Order, the Court directed the Secretary to provide the status of the Petitioner's underlying claims. As noted above, on September 2, 2014, the RO issued an SOC with regard to Petitioner's coronary artery disease and referred the TDIU matter to the Director of Compensation for consideration of the claim on an extraschedular basis. See Secretary's Exhibit at 2, 3, 4, 6-32. In light of the foregoing, the RO's actions have effectively remedied this matter and render Petitioner's request for extraordinary relief moot. See *Chandler v. Brown*, 10 Vet.App. 175, 177 (*per curiam* order); *Mokal*, *supra*.

The Court also directed the Secretary to respond to the petition. In the petition, Petitioner alleges that the RO has failed to "expeditiously" refer his underlying TDIU claim to the Director of Compensation for extraschedular consideration and to issue an SOC with regard to his May 1, 2012, NOD. See Petition at 10 (citing 38 U.S.C. §§ 5109B, 7112). In addition, Petitioner claims that the RO "has been improperly withholding the SOC." See *id.*

The Secretary submits that Petitioner has failed to meet the requirements for the Court's issuance of extraordinary relief in this case. When delay is alleged as the basis for a petition for a writ of mandamus, a clear and unmistakable right to the writ does not exist unless the petitioner demonstrates

that the alleged delay is so extraordinary, given the demands on and resources of the Secretary that is the equivalent to “an arbitrary refusal to act.” *Constanza v. West*, 12 Vet.App. 133, 134 (1999) (per curiam). That is not the case here.

With regard to the timeliness of the SOC, the RO’s Assistant Service Center Manager explained that the processing of this matter was delayed by the adjudication involving the October 2012 Board remand. See Secretary’s Exhibit at 2. Furthermore, the Secretary submits that the claim is not entitled to “expeditious” treatment as required by 38 U.S.C. §§ 5109B, 7112. These statutes, respectively, provide that remands issued by the Board or the Court are subject to expeditious treatment. See 38 U.S.C. §§ 5109B (providing that “[t]he Secretary shall take such action as may be necessary to provide for expeditious treatment by the appropriate regional office of the Veterans Benefits Administration of any claim that is remanded to the regional office of the Veterans Benefits Administration by the Board of Veterans’ Appeals), 7112 (providing that “[t]he Secretary shall take such actions as may be necessary to provide for the expeditious treatment by the Board of any claim that is remanded to the Secretary by the Court of Appeals for Veterans Claims). In this case, the coronary artery disease matter was neither remanded by the Court’s November 2011 Order nor the Board’s October 2012 remand. The November 2011 JMPR was based on the Board’s failure to consider whether the Board’s grant of service connection for the coronary artery disease impacted the TDIU claim. See Petitioner’s Appendix at 039-044.

In addition, the RO's handling of the TDIU matter does not constitute "an arbitrary refusal to act." See *Constanza*, 12 Vet.App. at 143. Upon receipt of the October 2012 Board decision, the RO undertook and completed the development as directed by the Board. The Board directed the RO to refer the TDIU matter to the Director of Compensation after a VA examination had been provided with regard to a claim for benefits for a low back disorder. See Petitioner's Appendix 085. An examination was provided in January 2013. See Secretary's Exhibit at 1. Thereafter, the RO referred the TDIU claim to the Director of Compensation per the Board's October 2012 remand directives. See *id.* at 2, 3, 4.

Moreover, the RO has satisfied the basis of the writ petition by having issued the SOC with regard to the coronary artery disease matter and having referred the TDIU claim to the Director of Compensation. See Secretary's Exhibits. Therefore, Petitioner's request for extraordinary relief is moot, and the Court should decline jurisdiction to take further action. See *Aronson v. Brown*, 7 Vet.App. 153, 155 (1994).

CONCLUSION

For the foregoing reasons, Respondent respectfully urges that the Petitioner has failed to demonstrate a compelling basis for the issuance of an extraordinary writ and that the basis of the writ is now moot. Therefore, the Petition should be dismissed.

Respectfully submitted,

TAMMY L. KENNEDY
Acting General Counsel

MARY ANN FLYNN
Assistant General Counsel

/s/Kenneth A. Walsh
KENNETH A. WALSH
Deputy Assistant General Counsel

/s/Bobbiretta E. Jordan
BOBBIRETTA E. JORDAN
Appellate Attorney
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U.S. Department of Veterans Affairs
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Washington, D.C. 20420
(202) 632-6955

Attorneys for the Respondent, Secretary of
Veterans Affairs

EXHIBIT



**Department of Veterans Affairs
Nashville Regional Office
Nashville, Tennessee**

DECLARATION OF PHILIP R. BRAMLAGE, ASSISTANT VETERANS SERVICE CENTER MANAGER

I, Philip R. Bramlage, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury the following:

- I. I am an Assistant Veterans Service Center Manager. This declaration is in response to the U.S. Court of Appeals for Veterans Claims September 2, 2014, Order in the matter of Carl E. Kilgore, Petitioner, No. 14-2719, instructing the Secretary to file an answer to the petition. The facts attested to herein are based on my personal knowledge.
- II. On October 26, 2012, the Board of Veterans' Appeals (BVA) remanded the issues of service connection for a low back disorder, claimed as a herniated disc of the lumbar spine, to include as secondary to service-connected diabetes mellitus, type II; and, entitlement to a total disability rating based on individual unemployability (TDIU), prior to March 2, 2009.

A review of Veterans Benefits Administration's (VBA's) MAP-D (Modern Awards and Processing and Development) system reveals, on or around January 10, 2013, a letter was received from the Veteran's attorney.

On January 25, 2013, an examination was ordered by the Nashville Regional Office, in accordance with the remand.

On January 31, 2013, the requested examination was completed and returned to the Nashville Regional Office.

A review of VBA's MAP-D system reveals, on or around March 29, 2013, a letter was received from the Veteran's attorney.

A review of VBA's MAP-D system reveals, on or around April 24, 2013, a letter was received from the Veteran's attorney.

A review of VBA's MAP-D system reveals, on or around May 17, 2013, a letter was received from the Veteran's attorney.

A review of VBA's MAP-D system reveals, on or around June 24, 2013, a letter was received from the Veteran's attorney.

On July 17, 2013, the claims file was directed to be sent to VBA's Central Office, in accordance with the remand, but according to VBA's electronic COVERS system the file was instead received by BVA on July 30, 2013.

A review of VBA's MAP-D system reveals, on or around September 3, 2013, a letter was received from the Veteran's attorney.

On January 15, 2014, according to VBA's electronic COVERS (Control of Veterans Records) system the file was returned to the Nashville Regional Office from BVA.

On January 23, 2014, a decision on a dependency claim was rendered.

A review of VBA's MAP-D system reveals, on or around January 29, 2014, a letter was received from the Veteran's attorney.

On August 18, 2014, medical records were obtained from the Murfreesboro VA Medical Center in connection with the remanded claim.

On September 2, 2014, a Statement of the Case (SOC) was sent to Mr. Kilgore for the issue of an increased rating in the evaluation of coronary artery disease. The Notice of Disagreement (NOD) giving rise to this SOC was received on May 7, 2012. The Nashville Regional Office attempts to work NODs based on date of receipt. At the end of August, the average days pending (nationwide) from the time of a NOD to SOC mailing was 624 days. Mr. Kilgore's NOD took approximately 848 days to work. The processing of the NOD was compounded by the adjudication required for the remand.

Furthermore, a Supplemental Statement of the Case was sent to Mr. Kilgore in regards to the effective date for Dependents Educational Assistance (Chapter 35 benefits).

Additionally, on September 2, 2014, the claims file was forwarded to VBA's Central Office, in accordance with the remand which directed the file be sent to the Director of Compensation Service for extra-schedular consideration for TDIU.

I certify, under penalty of perjury under the laws of the United States, that the foregoing is true and correct.

Executed on September 9, 2014


Philip R. Bramlage, Assistant Veterans Service Center Manager

Folder Data History Search Transfer(s)

E. CARL [REDACTED]

Not at Your Station

Current Folder Location

From: 320 Transfer To: 101 Type Of Transfer: Temp

Date: 09/02/2014 13:33

Extra Scheduler

Director C_P

11/01/2014 Send Back Date:

Position Pending: Brokered Work

at 21 OFFICE OF THE DIRECTOR

Transfer Slip

Type	Vol	Sta	Loc	Trans	Sp
Claim	01	101		Temp	
Claim	02	101		Temp	
Claim	03	101		Temp	
Claim	04	101		Temp	
Claim	05	101		Temp	
Claim	06	101		Temp	

BIRLS Information

Name: CARL EDWARD KILGORE

POA: 00R SSN: 408-80-3

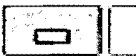
Type	Curr	Transfer	Prior	In T
CLAIM	320	06/17/97	376	
INS	310	06/07/11		

Temporary Transfer Request By

None

Permanent Transfer Request By

None



- Display Folder Data

Folder Data History Search Transfer(s)

RE, CARL [REDACTED]

Not at Your Station

Current Folder Location

Location	Status	Date / Time In	Date / Time Out	User Id
GWILLI		06/02/2014 11:22	06/03/2014 09:22	ADJJHOL
ATF		05/30/2014 11:19	06/02/2014 11:22	ADJJHOL
GWILLI		01/21/2014 12:34	05/30/2014 11:19	ADJJHOL
CAVC		01/21/2014 12:30	01/21/2014 12:34	ADJGWIL
KDAVI		01/15/2014 13:52	01/21/2014 12:30	ADJKDAV
		07/17/2013 09:10	07/30/2013 06:32	BVALMAI
		05/20/2013 06:24	05/23/2013 07:26	ADJSKEL
		05/16/2013 12:16	05/16/2013 12:16	AMCPPE
		11/30/2012 13:32	05/16/2013 12:16	AMCPPE
		05/11/2012 12:25	06/04/2012 10:47	RVAMKR

Type	Vol	Sta	Loc	Trans	Spcl
Claim	01	101		Temp	
Claim	02	101		Temp	
Claim	03	101		Temp	
Claim	04	101		Temp	
Claim	05	101		Temp	
Claim	06	101		Temp	

BIRLS Information

Name: CARL EDWARD KILGORE

POA: 00R SSN: [REDACTED]

Type	Curr	Transfer	Prior	In Trans
CLAIM	320	06/17/97	376	
INS	310	06/07/11		

Records Found

Temporary Transfer Request By
None

Permanent Transfer Request By
None

Area: [REDACTED]

[Request Folder](#)

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7/23/2014 04:43 pm 341 SCHIELE, BRIAN L Contact with Claimant
140710-000811
341/IRC/bls
ID protocol, address and phone number verified.
Rating question?

1/29/2014 11:35 am 320 BENDER, SARA JOAN Contact with Claimant
Received letter from Veteran's attorney regarding Notice of Disagreement. Forwarded to Appeals Team.

9/03/2013 07:07 am 320 KILGORE, CRAIG MATTHEW Contact with Claimant
RCVD COPY OF APPEALS LTR (DROP) SEARCHED TO FILE

6/24/2013 08:11 am 320 KILGORE, CRAIG MATTHEW Contact with Claimant
RCVD LTR FROM POA (CHISHOLM) ROUTED TO APPEALS

5/17/2013 01:25 pm 320 KILGORE, CRAIG MATTHEW Contact with Claimant
RCVD LTR FROM POA (CHISHOLM) SEARCHED TO TEMP FILE

4/24/2013 08:10 am 320 KILGORE, CRAIG MATTHEW Contact with Claimant
RCVD LTR FROM POA (CHISHOLM) SEARCHED TO FILE

3/29/2013 08:09 am 320 KILGORE, CRAIG MATTHEW Contact with Claimant
RCVD LTR FROM POA SEARCHED TO FILE

3/25/2013 06:41 am 320 KILGORE, CRAIG MATTHEW Contact with Claimant
RCVD VAE SEACHED TO FILE

1/10/2013 09:58 am 320 KILGORE, CRAIG MATTHEW Contact with Claimant
RCVD LTR FROM POA (CHISHOLM) SEARCHED TO FILE

5/03/2012 12:04 pm 320 DAVIS, KEVIN L Contact with Claimant
Mailed copy of C&P examination dated March 10, 2012 to attorney Robert Chisholm



DEPARTMENT OF VETERANS AFFAIRS

September 2, 2014

CARL KILGORE
4912 OLD MANCHESTER HIGHWAY
TULLAHOMA, TN 37388

In Reply Refer To:
Appeals Team (320/CH)
[REDACTED]
Carl Kilgore

Dear Mr. Kilgore:

You have filed a Notice of Disagreement with our action. This is the first step in appealing to the Board of Veterans' Appeals (BVA). This letter and enclosures contain very important information concerning your appeal.

Statement of the Case

We have enclosed a Statement of the Case, a summary of the law and evidence concerning your claim. This summary will help you to make the best argument to the BVA on why you think our decision should be changed.

What You Need To Do

To complete your appeal, you must file a formal appeal. We have enclosed VA Form 9, Appeal to the Board of Veterans' Appeals, which you may use to complete your appeal. We will gladly explain the form if you have questions. Your appeal should address:

- the benefit you want
- the facts in the Statement of the Case with which you disagree; and
- the errors that you believe we made in applying the law.

When You Need To Do It

You must file your appeal with this office within 60 days from the date of this letter or within the remainder, if any, of the one-year period from the date of the letter notifying you of the action that you have appealed. **If we do not hear from you within this period, we will close your case.** If you need more time to file your appeal, you should request more time before the time limit for filing your appeal expires. See item 5 of the instructions in VA Form 9, Appeal to Board of Veterans' Appeals.

Hearings

You may have a hearing before we send your case to the BVA. If you tell us that you want a hearing, we will arrange a time and a place for the hearing. VA will provide the hearing room, the hearing official, and a transcript of the hearing for the record. VA cannot pay any other expenses of the hearing. You may **also** have a hearing before the BVA, as noted on the enclosed VA Form 9, Appeal to the Board of Veterans' Appeals. **Do not delay filing your appeal if you request a hearing. Your request for a hearing does not extend the time to file your appeal.**

Representation

If you do not have a representative, it is not too late to choose one. An accredited representative of a recognized service organization may represent you in your claim for VA benefits without charge. An accredited attorney or an accredited agent may also represent you before VA, and may charge you a fee for services performed after the filing of a notice of disagreement. In certain cases, VA will pay your accredited agent or attorney directly from your past due benefits. For more information on the accreditation process and fee agreements (including filing requirements), you and/or your representative should review 38 U.S.C. § 5904 and 38 C.F.R. § 14.636 and VA's website at <http://www.va.gov/ogc/accreditation.asp>. You can find the necessary power of attorney forms on this website, or if you ask us, we can send you the forms. You can also find the names of accredited attorneys, agents and service organization representatives on this website.

What We Will Do

After we receive your appeal, we will send your case to the BVA in Washington, DC for a decision. The BVA will base its decision on an independent review of the entire record, including the transcript of the hearing, if you have a hearing.

Sincerely yours,

RO Director
VA Regional Office

Enclosure(s): Centralized Mail Address Enclosure
VA Form 9

CC: Private Attorney

Statement of the Case		<i>Department of Veterans Affairs Nashville Regional Office</i>		Page 1 09/02/2014
NAME OF VETERAN Carl Kilgore	VA FILE NUMBER [REDACTED]	SOCIAL SECURITY [REDACTED]	POA Private Attorney	

ISSUE:

Evaluations of coronary artery disease evaluated as 10 percent disabling effective prior to January 28, 2011 and 30 percent disabling effective January 28, 2011.

EVIDENCE:

- Service treatment records from October 1968 to December 1971
- VA letter sent on February 8, 2006, informing you of the evidence needed in order to establish entitlement to benefits
- Treatment reports, VAMC Nashville, from August 20, 1997 through August 12, 2014
- Rating decision dated June 6, 2006, VA notification dated June 22, 2006
- Treatment reports, Harton Regional Medical Center, from February 2007 received on June 23, 2008
- VA letter sent on October 22, 2008, informing you of the evidence needed in order to establish entitlement to benefits
- VA examinations, VAMC Nashville, TN dated February 3, 2009; March 2, 2009; January 3, 2012; March 10, 2012 (addendum dated March 28, 2012); January 29, 2013
- Individual Unemployability assessment from Carl Barchi received July 6, 2009 and December 13, 2010
- Board of Veterans' Appeals decision dated June 17, 2010, VA notification dated June 17, 2010
- Treatment reports, Vanderbilt University Medical Center, from July 2005 received December 20, 2010
- Board of Veterans' Appeals decisions dated March 7, 2011; October 26, 2012; and January 10, 2014
- All evidence contained in the claims file prior to September 6, 2005, which is the earliest date a claim for Nehmer purposes was received in VA
- Rating Decision dated April 2, 2012; notification dated April 3, 2012
- Correspondence, Notice of Disagreement, received May 7, 2012
- Correspondence sent to the veteran dated June 29, 2012
- Statement, Edmond J. Calandra, M.A., CCM, CDMS, received August 28, 2012
- Correspondence, Election of De Novo Review Process, received July 19, 2012
- Vocational Assessment, Edmond J. Calandra, M.A., CCM, CDMS, dated August 23, 2012

ADJUDICATIVE ACTIONS:

Military Service: Army: June 30, 1969 to January 18, 1972: Honorable

03-07-2011 Board of Veterans' Appeals decision granting service connection for coronary artery disease.

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NAME OF VETERAN Carl Kilgore	VA FILE NUMBER [REDACTED]	SOCIAL SECURITY NR [REDACTED]	POA Private Attorney	

04-02-2012 Claim considered based on all the evidence of record.

04-03-2012 Claimant notified of decision.

05-07-2012 Notice of Disagreement received.

06-29-2012 Appeal Election Letter sent to the appellant.

07-19-2012 De Novo Review election received from appellant.

You have elected consideration of your appeal by a Decision Review Officer. This decision is based on the guidelines and provisions of the Decision Review Officer Appeal process, and includes a review of your VA Claims Folder and records you submitted or we obtained in support of your claim.

PERTINENT LAWS; REGULATIONS; RATING SCHEDULE PROVISIONS:

Unless otherwise indicated, the symbol “§” denotes a section from title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans’ Relief. Title 38 contains the regulations of the Department of Veterans Affairs which govern entitlement to all veteran benefits.

Sec. 5103. Notice to claimants of required information and evidence

(a) REQUIRED INFORMATION AND EVIDENCE- Upon receipt of a complete or substantially complete application, the Secretary shall notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim. As part of that notice, the Secretary shall indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary, in accordance with section 5103A of this title and any other applicable provisions of law, will attempt to obtain on behalf of the claimant.

(b) TIME LIMITATION-

(1) In the case of information or evidence that the claimant is notified under subsection (a) is to be provided by the claimant, if such information or evidence is not received by the Secretary within 1 year from the date of such notification, no benefit may be paid or furnished by reason of the claimant's application.

(2) This subsection shall not apply to any application or claim for Government life insurance benefits.

Sec. 5103A. Duty to assist claimants

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(a) DUTY TO ASSIST-

- (1) The Secretary shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a law administered by the Secretary.
- (2) The Secretary is not required to provide assistance to a claimant under this section if no reasonable possibility exists that such assistance would aid in substantiating the claim.
- (3) The Secretary may defer providing assistance under this section pending the submission by the claimant of essential information missing from the claimant's application.

(b) ASSISTANCE IN OBTAINING RECORDS-

- (1) As part of the assistance provided under subsection (a), the Secretary shall make reasonable efforts to obtain relevant records (including private records) that the claimant adequately identifies to the Secretary and authorizes the Secretary to obtain.
- (2) Whenever the Secretary, after making such reasonable efforts, is unable to obtain all of the relevant records sought, the Secretary shall notify the claimant that the Secretary is unable to obtain records with respect to the claim. Such a notification shall--
 - (A) identify the records the Secretary is unable to obtain;
 - (B) briefly explain the efforts that the Secretary made to obtain those records; and
 - (C) describe any further action to be taken by the Secretary with respect to the claim.
- (3) Whenever the Secretary attempts to obtain records from a Federal department or agency under this subsection or subsection (c), the efforts to obtain those records shall continue until the records are obtained unless it is reasonably certain that such records do not exist or that further efforts to obtain those records would be futile.

(c) OBTAINING RECORDS FOR COMPENSATION CLAIMS- In the case of a claim for disability compensation, the assistance provided by the Secretary under subsection (b) shall include obtaining the following records if relevant to the claim:

- (1) The claimant's service medical records and, if the claimant has furnished the Secretary information sufficient to locate such records, other relevant records pertaining to the claimant's active military, naval, or air service that are held or maintained by a governmental entity.
- (2) Records of relevant medical treatment or examination of the claimant at Department health-care facilities or at the expense of the Department, if the claimant furnishes information sufficient

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to locate those records.

(3) Any other relevant records held by any Federal department or agency that the claimant adequately identifies and authorizes the Secretary to obtain.

(d) **MEDICAL EXAMINATIONS FOR COMPENSATION CLAIMS-**

(1) In the case of a claim for disability compensation, the assistance provided by the Secretary under subsection (a) shall include providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim.

(2) The Secretary shall treat an examination or opinion as being necessary to make a decision on a claim for purposes of paragraph (1) if the evidence of record before the Secretary, taking into consideration all information and lay or medical evidence (including statements of the claimant)--

(A) contains competent evidence that the claimant has a current disability, or persistent or recurrent symptoms of disability; and

(B) indicates that the disability or symptoms may be associated with the claimant's active military, naval, or air service; but

(C) does not contain sufficient medical evidence for the Secretary to make a decision on the claim.

(e) **REGULATIONS-** The Secretary shall prescribe regulations to carry out this section.

(f) **RULE WITH RESPECT TO DISALLOWED CLAIMS-** Nothing in this section shall be construed to require the Secretary to reopen a claim that has been disallowed except when new and material evidence is presented or secured, as described in section 5108 of this title.

(g) **OTHER ASSISTANCE NOT PRECLUDED-** Nothing in this section shall be construed as precluding the Secretary from providing such other assistance under subsection (a) to a claimant in substantiating a claim as the Secretary considers appropriate.

38 USC Section 5106. Furnishing of information by other agencies

The head of any Federal department or agency shall provide such information to the Secretary as the Secretary may request for purposes of determining eligibility for or amount of benefits, or verifying other information with respect thereto. The cost of providing information to the Secretary under this section shall be borne by the department or agency providing the information.

38 USE Section 5107. Claimant responsibility; benefit of the doubt

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(a) CLAIMANT RESPONSIBILITY- Except as otherwise provided by law, a claimant has the responsibility to present and support a claim for benefits under laws administered by the Secretary.

(b) BENEFIT OF THE DOUBT- The Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary. When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.

§3.102 (New) 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(a))

§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.

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(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 Sec. 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.

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(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(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

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benefit sought will include a summary of the evidence considered. (Authority: 38 U.S.C. 501, 1115, 1506, 5104.)

§3.104 (05/2001) 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]

§3.159 (05/08) Department of Veterans Affairs assistance in developing claims.

(a) Definitions. For purposes of this section, the following definitions apply:

(1) Competent medical evidence means evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions. Competent medical evidence may also mean statements conveying sound medical principles found in medical treatises. It would also include statements contained in authoritative writings such as medical and scientific articles and research reports or analyses.

(2) Competent lay evidence means any evidence not requiring that the proponent have specialized education, training, or experience. Lay evidence is competent if it is provided by a person who has knowledge of facts or circumstances and conveys matters that can be observed and described by a lay person.

(3) Substantially complete application means an application containing the claimant's name; his or her relationship to the veteran, if applicable; sufficient service information for VA to verify the claimed service, if applicable; the benefit claimed and any medical condition(s) on which it is based; the claimant's signature; and in claims for nonservice-connected disability or death pension and parents' dependency and indemnity compensation, a statement of income.

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(4) For purposes of paragraph (c)(4)(i) of this section, event means one or more incidents associated with places, types, and circumstances of service giving rise to disability.

(5) Information means non-evidentiary facts, such as the claimant's Social Security number or address; the name and military unit of a person who served with the veteran; or the name and address of a medical care provider who may have evidence pertinent to the claim.

(b) VA's duty to notify claimants of necessary information or evidence. (1) When VA receives a complete or substantially complete application for benefits, it will notify the claimant of any information and medical or lay evidence that is necessary to substantiate the claim (hereafter in this paragraph referred to as the "notice"). In the notice VA will inform the claimant which information and evidence, if any, that the claimant is to provide to VA and which information and evidence, if any, that VA will attempt to obtain on behalf of the claimant. The information and evidence that the claimant is informed that the claimant is to provide must be provided within one year of the date of the notice. If the claimant has not responded to the notice within 30 days, VA may decide the claim prior to the expiration of the one-year period based on all the information and evidence contained in the file, including information and evidence it has obtained on behalf of the claimant and any VA medical examinations or medical opinions. If VA does so, however, and the claimant subsequently provides the information and evidence within one year of the date of the notice, VA must readjudicate the claim.

(Authority: 38 U.S.C. 5103)

(2) If VA receives an incomplete application for benefits, it will notify the claimant of the information necessary to complete the application and will defer assistance until the claimant submits this information.

(Authority: 38 U.S.C. 5102(b), 5103A(3))

(3) No duty to provide the notice described in paragraph (b)(1) of this section arises:

(i) Upon receipt of a Notice of Disagreement; or

(ii) When, as a matter of law, entitlement to the benefit claimed cannot be established.

(Authority: 38 U.S.C. 5103(a), 5103A(a)(2))

(c) VA's duty to assist claimants in obtaining evidence. Upon receipt of a substantially complete application for benefits, VA will make reasonable efforts to help a claimant obtain evidence necessary to substantiate the claim. In addition, VA will give the assistance described in paragraphs (c)(1), (c)(2), and (c)(3) to an individual attempting to reopen a finally decided claim. VA will not pay any fees charged by a custodian to provide records requested.

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(1) Obtaining records not in the custody of a Federal department or agency. VA will make reasonable efforts to obtain relevant records not in the custody of a Federal department or agency, to include records from State or local governments, private medical care providers, current or former employers, and other non-Federal governmental sources. Such reasonable efforts will generally consist of an initial request for the records and, if the records are not received, at least one follow-up request. A follow-up request is not required if a response to the initial request indicates that the records sought do not exist or that a follow-up request for the records would be futile. If VA receives information showing that subsequent requests to this or another custodian could result in obtaining the records sought, then reasonable efforts will include an initial request and, if the records are not received, at least one follow-up request to the new source or an additional request to the original source.

(i) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from non-Federal agency or department custodians. The claimant must provide enough information to identify and locate the existing records, including the person, company, agency, or other custodian holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided.

(ii) If necessary, the claimant must authorize the release of existing records in a form acceptable to the person, company, agency, or other custodian holding the records.

(Authority: 38 U.S.C. 5103A(b))

(2) Obtaining records in the custody of a Federal department or agency. VA will make as many requests as are necessary to obtain relevant records from a Federal department or agency. These records include but are not limited to military records, including service medical records; medical and other records from VA medical facilities; records from non-VA facilities providing examination or treatment at VA expense; and records from other Federal agencies, such as the Social Security Administration. VA will end its efforts to obtain records from a Federal department or agency only if VA concludes that the records sought do not exist or that further efforts to obtain those records would be futile. Cases in which VA may conclude that no further efforts are required include those in which the Federal department or agency advises VA that the requested records do not exist or the custodian does not have them.

(i) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from Federal agency or department custodians. If requested by VA, the claimant must provide enough information to identify and locate the existing records, including the custodian or agency holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided. In the case of records requested to corroborate a claimed stressful event in service, the claimant must provide information sufficient for the records custodian to conduct a search of the corroborative records.

(ii) If necessary, the claimant must authorize the release of existing records in a form acceptable to the custodian or agency holding the records.

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(Authority: 38 U.S.C. 5103A(b))

(3) Obtaining records in compensation claims. In a claim for disability compensation, VA will make efforts to obtain the claimant's service medical records, if relevant to the claim; other relevant records pertaining to the claimant's active military, naval or air service that are held or maintained by a governmental entity; VA medical records or records of examination or treatment at non-VA facilities authorized by VA; and any other relevant records held by any Federal department or agency. The claimant must provide enough information to identify and locate the existing records including the custodian or agency holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided.

(Authority: 38 U.S.C. 5103A(c))

(4) Providing medical examinations or obtaining medical opinions. (i) In a claim for disability compensation, VA will provide a medical examination or obtain a medical opinion based upon a review of the evidence of record if VA determines it is necessary to decide the claim. A medical examination or medical opinion is necessary if the information and evidence of record does not contain sufficient competent medical evidence to decide the claim, but:

(A) Contains competent lay or medical evidence of a current diagnosed disability or persistent or recurrent symptoms of disability;

(B) Establishes that the veteran suffered an event, injury or disease in service, or has a disease or symptoms of a disease listed in §3.309, §3.313, §3.316, and §3.317 manifesting during an applicable presumptive period provided the claimant has the required service or triggering event to qualify for that presumption; and

(C) Indicates that the claimed disability or symptoms may be associated with the established event, injury, or disease in service or with another service-connected disability.

(ii) Paragraph (4)(i)(C) could be satisfied by competent evidence showing post-service treatment for a condition, or other possible association with military service.

(iii) Paragraph (c)(4) applies to a claim to reopen a finally adjudicated claim only if new and material evidence is presented or secured.

(Authority: 38 U.S.C. 5103A(d))

(d) Circumstances where VA will refrain from or discontinue providing assistance. VA will refrain from providing assistance in obtaining evidence for a claim if the substantially complete application for benefits indicates that there is no reasonable possibility that any assistance VA would provide to the claimant would substantiate the claim. VA will discontinue providing

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assistance in obtaining evidence for a claim if the evidence obtained indicates that there is no reasonable possibility that further assistance would substantiate the claim. Circumstances in which VA will refrain from or discontinue providing assistance in obtaining evidence include, but are not limited to:

- (1) The claimant's ineligibility for the benefit sought because of lack of qualifying service, lack of veteran status, or other lack of legal eligibility;
- (2) Claims that are inherently incredible or clearly lack merit; and
- (3) An application requesting a benefit to which the claimant is not entitled as a matter of law.

(Authority: 38 U.S.C. 5103A(a)(2))

(e) Duty to notify claimant of inability to obtain records. (1) If VA makes reasonable efforts to obtain relevant non-Federal records but is unable to obtain them, or after continued efforts to obtain Federal records concludes that it is reasonably certain they do not exist or further efforts to obtain them would be futile, VA will provide the claimant with oral or written notice of that fact. VA will make a record of any oral notice conveyed to the claimant. For non-Federal records requests, VA may provide the notice at the same time it makes its final attempt to obtain the relevant records. In either case, the notice must contain the following information:

- (i) The identity of the records VA was unable to obtain;
- (ii) An explanation of the efforts VA made to obtain the records;
- (iii) A description of any further action VA will take regarding the claim, including, but not limited to, notice that VA will decide the claim based on the evidence of record unless the claimant submits the records VA was unable to obtain; and
- (iv) A notice that the claimant is ultimately responsible for providing the evidence.

(2) If VA becomes aware of the existence of relevant records before deciding the claim, VA will notify the claimant of the records and request that the claimant provide a release for the records. If the claimant does not provide any necessary release of the relevant records that VA is unable to obtain, VA will request that the claimant obtain the records and provide them to VA.

(Authority: 38 U.S.C. 5103A(b)(2))

(f) For the purpose of the notice requirements in paragraphs (b) and (e) of this section, notice to the claimant means notice to the claimant or his or her fiduciary, if any, as well as to his or her representative, if any.

(Authority: 38 U.S.C. 5102(b), 5103(a))

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(g) The authority recognized in subsection (g) of 38 U.S.C. 5103A is reserved to the sole discretion of the Secretary and will be implemented, when deemed appropriate by the Secretary, through the promulgation of regulations.

(Authority: 38 U.S.C. 5103A(g))

§3.2600 Review of benefit claims decisions.

(a) A claimant who has filed a timely Notice of Disagreement with a decision of an agency of original jurisdiction on a benefit claim has a right to a review of that decision under this section. The review will be conducted by an Adjudication Officer, Veterans Service Center Manager, or Decision Review Officer, at VA's discretion. An individual who did not participate in the decision being reviewed will conduct this review. Only a decision that has not yet become final (by appellate decision or failure to timely appeal) may be reviewed. Review under this section will encompass only decisions with which the claimant has expressed disagreement in the Notice of Disagreement. The reviewer will consider all evidence of record and applicable law, and will give no deference to the decision being reviewed.

(b) Unless the claimant has requested review under this section with his or her Notice of Disagreement, VA will, upon receipt of the Notice of Disagreement, notify the claimant in writing of his or her right to a review under this section. To obtain such a review, the claimant must request it not later than 60 days after the date VA mails the notice. This 60-day time limit may not be extended. If the claimant fails to request review under this section not later than 60 days after the date VA mails the notice, VA will proceed with the traditional appellate process by issuing a Statement of the Case. A claimant may not have more than one review under this section of the same decision.

(c) The reviewer may conduct whatever development he or she considers necessary to resolve any disagreements in the Notice of Disagreement, consistent with applicable law. This may include an attempt to obtain additional evidence or the holding of an informal conference with the claimant. Upon the request of the claimant, the reviewer will conduct a hearing under §3.103(c).

(d) The reviewer may grant a benefit sought in the claim notwithstanding §3.105(b), but, except as provided in paragraph (e) of this section, may not revise the decision in a manner that is less advantageous to the claimant than the decision under review. A review decision made under this section will include a summary of the evidence, a citation to pertinent laws, a discussion of how those laws affect the decision, and a summary of the reasons for the decision.

(e) Notwithstanding any other provisions of this section, the reviewer may reverse or revise (even if disadvantageous to the claimant) prior decisions of an agency of original jurisdiction (including the decision being reviewed or any prior decision that has become final due to failure to timely appeal) on the grounds of clear and unmistakable error (see §3.105(a)).

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(f) Review under this section does not limit the appeal rights of a claimant. Unless a claimant withdraws his or her Notice of Disagreement as a result of this review process, VA will proceed with the traditional appellate process by issuing a Statement of the Case.

(g) This section applies to all claims in which a Notice of Disagreement is filed on or after June 1, 2001. (Authority: 38 U.S.C. 5109A and 7105(d))

19.29 - Statement of the Case.

The Statement of the Case must be complete enough to allow the appellant to present written and/or oral arguments before the Board of Veterans' Appeals. It must contain:

- (a) A summary of the evidence in the case relating to the issue or issues with which the appellant or representative has expressed disagreement;
- (b) A summary of the applicable laws and regulations, with appropriate citations, and a discussion of how such laws and regulations affect the determination; and
- (c) The determination of the agency of original jurisdiction on each issue and the reasons for each such determination with respect to which disagreement has been expressed.

(Authority: 38 U.S.C. 7105(d)(1))

§19.32 Closing of appeal for failure to respond to Statement of the Case.

The agency of original jurisdiction may close the appeal without notice to an appellant or his or her representative for failure to respond to a Statement of the Case within the period allowed. However, if a Substantive Appeal is subsequently received within the 1-year appeal period (60-day appeal period for simultaneously contested claims), the appeal will be considered to be reactivated. (Authority: 38 U.S.C. 7105(d)(3))

§20.302 Rule 302. (07/08) Time limit for filing...

(a) Notice of Disagreement. Except in the case of simultaneously contested claims, a claimant, or his or her representative, must file a Notice of Disagreement with a determination by the agency of original jurisdiction within one year from the date that that agency mails notice of the determination to him or her. Otherwise, that determination will become final. The date of mailing the letter of notification of the determination will be presumed to be the same as the date of that letter for purposes of determining whether an appeal has been timely filed. (Authority: 38 U.S.C. 7105(b)(1))

(b) Substantive Appeal.

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(1) General. Except in the case of simultaneously contested claims, a Substantive Appeal must be filed within 60 days from the date that the agency of original jurisdiction mails the Statement of the Case to the appellant, or within the remainder of the 1-year period from the date of mailing of the notification of the determination being appealed, whichever period ends later. The date of mailing of the Statement of the Case will be presumed to be the same as the date of the Statement of the Case and the date of mailing the letter of notification of the determination will be presumed to be the same as the date of that letter for purposes of determining whether an appeal has been timely filed.

(2) Special rule in certain cases where additional evidence is submitted. Except in the case of simultaneously contested claims, if (i) a claimant submits additional evidence within 1 year of the date of mailing of the notification of the determination being appealed, and (ii) that evidence requires, in accordance with §19.31 of this title, that the claimant be furnished a Supplemental Statement of the Case, then the time to submit a Substantive Appeal shall end not sooner than 60 days after such Supplemental Statement of the Case is mailed to the appellant, even if the 60-day period extends beyond the expiration of the 1-year appeal period. (Authority: 38 U.S.C. 7105 (b)(1), (d)(3).)

(c) Response to Supplemental Statement of the Case. Where a Supplemental Statement of the Case is furnished, a period of 30 days from the date of mailing of the Supplemental Statement of the Case will be allowed for response. The date of mailing of the Supplemental Statement of the Case will be presumed to be the same as the date of the Supplemental Statement of the Case for purposes of determining whether a response has been timely filed. Provided a Substantive Appeal has been timely filed in accordance with paragraph (b) of this section, the response to a Supplemental Statement of the Case is optional and is not required for the perfection of an appeal. (Authority: 38 U.S.C. 7105(d)(3))

§3.321 General rating considerations.

(a) Use of rating schedule. The 1945 Schedule for Rating Disabilities will be used for evaluating the degree of disabilities in claims for disability compensation, disability and death pension, and in eligibility determinations. The provisions contained in the rating schedule will represent as far as can practicably be determined, the average impairment in earning capacity in civil occupations resulting from disability. (Authority: 38 U.S.C. 1155)

(b) Exceptional cases:

(1) Compensation. Ratings shall be based as far as practicable, upon the average impairments of earning capacity with the additional proviso that the Secretary shall from time to time readjust this schedule of ratings in accordance with experience. To accord justice, therefore, to the exceptional case where the schedular evaluations are found to be inadequate, the Chief Benefits Director or the Director, Compensation and Pension Service, upon field station submission, is authorized to approve on the basis of the criteria set forth in this paragraph an extra-schedular evaluation commensurate with the average earning capacity impairment due

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exclusively to the service-connected disability or disabilities. The governing norm in these exceptional cases is: A finding that the case presents such an exceptional or unusual disability picture with such related factors as marked interference with employment or frequent periods of hospitalization as to render impractical the application of the regular schedular standards.

§4.1 Essentials of evaluative rating

This rating schedule is primarily a guide in the evaluation of disability resulting from all types of diseases and injuries encountered as a result of or incident to military service. The percentage ratings represent as far as can practicably be determined the average impairment in earning capacity resulting from such diseases and injuries and their residual conditions in civil occupations. Generally, the degrees of disability specified are considered adequate to compensate for considerable loss of working time from exacerbations or illnesses proportionate to the severity of the several grades of disability. For the application of this schedule, accurate and fully descriptive medical examinations are required, with emphasis upon the limitation of activity imposed by the disabling condition. Over a period of many years, a veteran's disability claim may require reratings in accordance with changes in laws, medical knowledge and his or her physical or mental condition. It is thus essential, both in the examination and in the evaluation of disability, that each disability be viewed in relation to its history.

§4.2 Interpretation of examination reports

Different examiners, at different times, will not describe the same disability in the same language. Features of the disability which must have persisted unchanged may be overlooked or a change for the better or worse may not be accurately appreciated or described. It is the responsibility of the rating specialist to interpret reports of examination in the light of the whole recorded history, reconciling the various reports into a consistent picture so that the current rating may accurately reflect the elements of disability present. Each disability must be considered from the point of view of the veteran working or seeking work. If a diagnosis is not supported by the findings on the examination report or if the report does not contain sufficient detail, it is incumbent upon the rating board to return the report as inadequate for evaluation purposes.

§4.3 Resolution of 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 the degree of disability such doubt will be resolved in favor of the claimant. See §3.102 of this chapter.

§4.6 Evaluation of evidence

The element of the weight to be accorded the character of the veteran's service is but one factor entering into the considerations of the rating boards in arriving at determinations of the

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evaluation of disability. Every element in any way affecting the probative value to be assigned to the evidence in each individual claim must be thoroughly and conscientiously studied by each member of the rating board in the light of the established policies of the Department of Veterans Affairs to the end that decisions will be equitable and just as contemplated by the requirements of the law.

§4.7 Higher of two evaluations.

Where there is a question as to which of two evaluations shall be applied, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria required for that rating. Otherwise, the lower rating will be assigned.

§4.14 Avoidance of pyramiding

The evaluation of the same disability under various diagnoses is to be avoided. Disability from injuries to the muscles, nerves, and joints of an extremity may overlap to a great extent, so that special rules are included in the appropriate bodily system for their evaluation. Dyspnea, tachycardia, nervousness, fatigability, etc., may result from many causes; some may be service connected, others, not. Both the use of manifestations not resulting from service-connected disease or injury in establishing the service-connected evaluation and the evaluation of the same manifestation under different diagnoses are to be avoided.

§4.104 (7005N) Schedule of ratings-cardiovascular system

7005 Arteriosclerotic heart disease (Coronary artery disease):

With documented coronary artery disease resulting in:

- Chronic congestive heart failure, or; workload of 3 METs or less results in dyspnea, fatigue, angina, dizziness, or syncope, or; left ventricular dysfunction with an ejection fraction of less than 30 percent 100
- More than one episode of acute congestive heart failure in the past year, or; workload of greater than 3 METs but not greater than 5 METs results in dyspnea, fatigue, angina, dizziness, or syncope, or; left ventricular dysfunction with an ejection fraction of 30 to 50 percent 60
- Workload of greater than 5 METs but not greater than 7 METs results in dyspnea, fatigue, angina, dizziness, or syncope, or; evidence of cardiac hypertrophy or dilatation on electrocardiogram, echocardiogram, or X-ray 30
- Workload of greater than 7 METs but not greater than 10 METs results in dyspnea, fatigue, angina,

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dizziness, or syncope, or; continuous medication
required 10

NOTE: If nonservice-connected arteriosclerotic heart disease is superimposed on service-connected valvular or other non-arteriosclerotic heart disease, request a medical opinion as to which condition is causing the current signs and symptoms.

§3.400 (10-06) General (all)

Except as otherwise provided, the effective date of an evaluation and award of pension, compensation or dependency and indemnity compensation based on an original claim, a claim reopened after final disallowance, or a claim for increase will be the date of receipt of the claim or the date entitlement arose, whichever is the later.

(Authority: 38 U.S.C. 5110(a))

(a) Unless specifically provided. On basis of facts found.

(b) Disability benefits-(1) Disability pension (3.3). An award of disability pension may not be effective prior to the date entitlement arose.

(i) Claims received prior to October 1, 1984. Date of receipt of claim or date on which the veteran became permanently and totally disabled, if claim is filed within one year from such date, whichever is to the advantage of the veteran.

(ii) Claims received on or after October 1, 1984. (A) Except as provided in paragraph (b)(1)(ii)(B) of this section, date of receipt of claim.

(B) If, within one year from the date on which the veteran became permanently and totally disabled, the veteran files a claim for a retroactive award and establishes that a physical or mental disability, which was not the result of the veteran's own willful misconduct, was so incapacitating that it prevented him or her from filing a disability pension claim for at least the first 30 days immediately following the date on which the veteran became permanently and totally disabled, the disability pension award may be effective from the date of receipt of claim or the date on which the veteran became permanently and totally disabled, whichever is to the advantage of the veteran. While rating board judgment must be applied to the facts and circumstances of each case, extensive hospitalization will generally qualify as sufficiently incapacitating to have prevented the filing of a claim. For the purposes of this subparagraph, the presumptive provisions of 3.342(a) do not apply.

(2) Disability compensation-(i) Direct service connection (3.4(b)). Day following separation from active service or date entitlement arose if claim is received within 1 year after separation from service; otherwise, date of receipt of claim, or date entitlement arose, whichever is later. Separation from service means separation under conditions other than dishonorable from continuous active service which extended from the date the disability was incurred or aggravated.

(ii) Presumptive service connection (3.307, 3.308, 3.309). Date entitlement arose, if claim is received within 1 year after separation from active duty; otherwise date of receipt of claim, or date entitlement arose, whichever is later. Where the requirements for service connection are met during service, the effective date will be the day following separation from service if there was

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continuous active service following the period of service on which the presumption is based and a claim is received within 1 year after separation from active duty.

(c) Death benefits-(1) Death in service (38 U.S.C. 5110(j), Pub. L. 87-825) (3.4(c), 3.5(b)). First day of the month fixed by the Secretary concerned as the date of actual or presumed death, if claim is received with 1 year after the date the initial report of actual death or finding of presumed death was made; however benefits based on a report of actual death are not payable for any period for which the claimant has received, or is entitled to receive an allowance, allotment, or service pay of the veteran.

(2) Service-connected death after separation from service (38 U.S.C. 5110(d), Pub. L. 87-825) (3.4(c), 3.5(b)). First day of the month in which the veteran's death occurred if claim is received within 1 year after the date of death; otherwise, date of receipt of claim.

(3) Nonservice-connected death after separation from service. (i) For awards based on claims received prior to October 1, 1984, or on or after December 10, 2004, first day of the month in which the veteran's death occurred if claim is received within one year after the date of death; otherwise, date of receipt of claim.

(ii) For awards based on claims received between October 1, 1984, and December 9, 2004, first day of the month in which the veteran's death occurred if claim is received within 45 days after the date of death; otherwise, date of receipt of claim.

(Authority: 38 U.S.C. 5110(d))

(4) Dependency and indemnity compensation-(i) Deaths prior to January 1, 1957 (3.702). Date of receipt of election.

(ii) Child (38 U.S.C. 5110(e), Pub. L. 87-835). First day of the month in which entitlement arose if claim is received within 1 year after the date of entitlement; otherwise, date of receipt of claim.

(iii) Deaths on or after May 1, 1957 (in-service waiver cases) (3.5(b)(3) and 3.702). Date of receipt of election. (See 3.114(a)).

(d) [Reserved]

(e) Apportionment (3.450 through 3.461, 3.551). On original claims, in accordance with the facts found. On other than original claims from the first day of the month following the month in which:

(1) Claim is received for apportionment of a veteran's award, except that where payments to him (her) have been interrupted, apportionment will be effective the day following date of last payment if a claim for apportionment is received within 1 year after that date;

(2) Notice is received that a child included in the surviving spouse's award is not in the surviving spouse's custody, except that where payments to the surviving spouse have been interrupted, apportionment will be effective the day following date of last payment if such notice is received within 1 year after that date.

(f) Federal employees' compensation cases (3.708). Date authorized by applicable law, subject to any payments made by the Office of Workers' Compensation Programs under the Federal Employees' Compensation Act over the same period of time.

(g) Correction of military records (38 U.S.C. 5110(i); Pub. L. 87-825). Where entitlement is established because of the correction, change or modification of a military record, or of a discharge or dismissal, by a Board established under 10 U.S.C. 1552 or 1553, or because of other corrective action by competent military naval, or air authority, the award will be effective from the latest of these dates:

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- (1) Date application for change, correction, or modification was filed with the service department, in either an original or a disallowed claim;
- (2) Date of receipt of claim if claim was disallowed; or
- (3) One year prior to date of reopening of disallowed claim.
- (h) Difference of opinion (3.105). (1) As to decisions not final prior to receipt of an application for reconsideration or to reopen, or prior to reconsideration on Department of Veterans Affairs initiative, the date from which benefits would have been payable if the former decision had been favorable.
- (2) As to decisions which have become final (by appellate decision or failure to timely initiate and perfect an appeal) prior to receipt of an application for reconsideration or to reopen, the date of receipt of such application or the date entitlement arose, whichever is later.
- (3) As to decisions which have become final (by appellate decision or failure to timely initiate and perfect an appeal) and reconsideration is undertaken solely on Department of Veterans Affairs initiative, the date of Central Office approval authorizing a favorable decision or the date of the favorable Board of Veterans Appeals decision.
- (4) Where the initial determination for the purpose of death benefits is favorable, the commencing date will be determined without regard to the fact that the action may reverse, on a difference of opinion, an unfavorable decision for disability purposes by an adjudicative agency other than the Board of Veterans Appeals, which was in effect at the date of the veteran's death.
- (i) Disability or death due to hospitalization, etc. (38 U.S.C. 5110(c), (d); Public Law 87-825; 3.358, 3.361, and 3.800.) (1) Disability. Date injury or aggravation was suffered if claim is received within 1 year after that date; otherwise, date of receipt of claim.
- (2) Death. First day of month in which the veteran's death occurred if a claim is received within 1 year following the date of death; otherwise, date of receipt of claim.
- (j) Election of Department of Veterans Affairs benefits (3.700 series). (1) Unless otherwise provided, the date of receipt of election, subject to prior payments.
- (2) July 1, 1960, as to pension payable under Pub. L. 86-211, where pension is payable for June 30, 1960, under the law in effect on that date, including an award approved after that date, if the election is filed within (generally) 120 days from date of notice of the award. The award will be subject to prior payments over the same period of time.
- (3) January 1, 1965, as to pension payable under Pub. L. 86-211 (73 Stat. 432) as amended by Pub. L. 88-664 if there was basic eligibility for pension on June 30, 1960, under the law in effect on that date and an election if filed prior to May 1, 1965.
- (4) January 1, 1965, as to pension payable under Pub. L. 86-211 (73 Stat. 432) as amended by Pub. L. 88-664 if there was basic eligibility on that date for pension on the basis of service in the Indian wars or Spanish-American War and an election is filed prior to May 1, 1965.
- (5) January 1, 1969, as to pension payable under Pub. L. 86-211 (73 Stat. 432), as amended by Pub. L. 90-275 (82 Stat. 64), if there was basic eligibility for pension on June 30, 1960, under the law in effect on that date and an election is filed prior to May 1, 1969.
- (6) August 1, 1972, as to pension payable under Pub. L. (73 Stat. 432) as amended by Pub. L. 92-328 (86 Stat. 393) if there was basic eligibility on that date based on death of a veteran of the Spanish-American War and an election is filed prior to December 1, 1972.
- (k) Error (3.105). Date from which benefits would have been payable if the corrected decision had been made on the date of the reversed decision.

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(l) Foreign residence. (See 3.653).

(m) Forfeiture (3.901, 3.902). Day following date of last payment on award to payee who forfeited.

(n) Guardian. Day following date of last payment to prior payee or fiduciary.

Note: Award to guardian shall include amounts withheld for possible apportionments as well as money in Personal Funds of Patients.

(o) Increases (38 U.S.C. 5110(a) and 5110(b)(2), Pub. L. 94-71, 89 Stat. 395; 3.109, 3.156, 3.157)-(1) General. Except as provided in paragraph (o)(2) of this section and 3.401(b), date of receipt of claim or date entitlement arose, whichever is later. A retroactive increase or additional benefit will not be awarded after basic entitlement has been terminated, such as by severance of service connection.

(2) Disability compensation. Earliest date as of which it is factually ascertainable that an increase in disability had occurred if claim is received within 1 year from such date otherwise, date of receipt of claim.

(p) Liberalizing laws and Department of Veterans Affairs issues. See 3.114.

(q) New and material evidence (3.156) other than service department records. (1) Received within appeal period or prior to appellate decision. The effective date will be as though the former decision had not been rendered. See 20.1103, 20.1104 and 20.1304(b)(1) of this chapter.

(2) Received after final disallowance. Date of receipt of new claim or date entitlement arose, whichever is later.

(r) Reopened claims. (3.109, 3.156, 3.157, 3.160(e)) Date of receipt of claim or date entitlement arose, whichever is later, except as provided in 20.1304(b)(1) of this chapter.

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

(s) Renouncement (3.106). Except as provided in 3.106(c), date of receipt of new claim.

(t) Whereabouts now known. (See 3.158(c).)

(u) Void, annulled or terminated marriage of a child (38 U.S.C. 5110 (a), (k), (l); Pub. L. 93-527, 88 Stat. 1702; 3.55)-(1) Void. Date the parties ceased to cohabit or date of receipt of claim, whichever is later.

(2) Annulled. Date the decree of annulment became final if claim is filed within 1 year after that date; otherwise date of receipt of claim.

(3) Death. Date of death if claim is filed within 1 year after that date; otherwise date of receipt of claim. Benefits are not payable unless the provisions of 3.55(b) of this part are met. (4) Divorce. Date the decree became final if claim is filed within 1 year of that date; otherwise date of receipt of claim. Benefits are not payable unless the provisions of 3.55(b) of this part are met.

(v) Termination of remarriage of surviving spouse (38 U.S.C. 5110(a), (k); 38 U.S.C. 103(d) and 3010(l) effective January 1, 1971; 3.55)-(1) Void. Date the parties ceased to cohabit or date of receipt of claim, whichever is the later.

(2) Annulled. Date the decree of annulment became final if claim is filed within 1 year after that date; otherwise date of receipt of claim.

(3) Death. Date of death if claim is filed within 1 year after that date; otherwise date of receipt of claim. Benefits are not payable unless the provisions of 3.55(a) of this part are met.

(4) Divorce. Date the decree became final if claim is filed within 1 year after that date; otherwise date of receipt of claim. Benefits are not payable unless the provisions of 3.55(a) of this part are met.

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(w) Termination of relationship or conduct resulting in restriction on payment of benefits (38 U.S.C. 5110(m), effective January 1, 1971; 3.50(b)(2) and 3.55). Date of receipt of application filed after termination of relationship and after December 31, 1970. Benefits are not payable unless the provisions of 3.55(a), as applicable, are met.

(x) Effective date of determination of incompetency (3.353). Date of rating of incompetency. (Not applicable to an incompetency determination made for insurance purposes under 38 U.S.C. 1922).

(y) Effective date of determination restoring competency (3.353). Date shown by evidence of record that competency was regained.

(z) Claims based on service in the Women's Air Forces Service Pilots (WASP), or on service in a similarly situated group (Pub. L. 95-202). (1) Original claim: Date of receipt of claim or date entitlement arose, whichever is later, or as otherwise provided under this section (e.g., paragraph (b)(1) of this section) except that no benefits shall be awarded for any period prior to November 23, 1977.

(2) Reopened claim: Latest of the following dates:

(i) November 23, 1977.

(ii) Date entitlement arose.

(iii) One year prior to date of receipt of reopened claim.

VA, in determining all claims for benefits that have been reasonably raised by the filings and evidence, has applied the benefit-of-the-doubt and liberally and sympathetically reviewed all submissions in writing from the Veteran as well as all evidence of record.

DECISION:

The evaluations of coronary artery disease, evaluated as 10 percent disabling effective prior to January 28, 2011 and 30 percent disabling effective January 28, 2011, are confirmed and continued.

REASONS AND BASES:

We have confirmed and continued the evaluations of your coronary artery disease evaluated as 10 percent disabling effective prior to January 28, 2011 and 30 percent effective January 28, 2011. VA treatment report dated September 23, 2005 notes a diagnosis of coronary artery disease treated with continuous medication. VA treatment report dated February 3, 2006 notes that you have coronary artery disease status post myocardial infarction and stent placement. VA echocardiogram dated June 14, 2006 noted an ejection fraction of 55 to 60 percent.

VA examination dated March 10, 2012, notes a history of cardiac hypertrophy or dilation and referenced the EKG procedure dated January 28, 2011. The examiner noted that you continued to take continuous medication. There was no evidence of current or past congestive heart failure. While your METs level was noted to be 1-3, the examiner stated your METs level is more greatly

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impacted by your non-service connected degenerative disc disease of the back than your cardiac condition. VA regulations stipulate that the use of manifestations resulting from nonservice-connected disease or injury in establishing the service-connected evaluation equates to pyramiding and is to be avoided. Your ejection fraction was 60 percent. VA physician has provided your ejection fraction is a more accurate measure of your cardiac function. The examiner stated your ischemic heart disease does not impact your ability to work.

Based on the diagnosis of coronary artery disease status post myocardial infarction with coronary artery stents with the requirement for continuous medication, a 10 percent evaluation was assigned prior to January 28, 2011. We have received no additional medical evidence indicating a worsening of symptomatology prior to January 28, 2011 which would warrant a higher evaluation. Therefore, the 10 percent assigned prior to January 28, 2011 is confirmed and continued.

An evaluation of 10 percent is assigned if there is workload greater than 7 METs but not greater than 10 METs resulting in dyspnea, fatigue, angina, dizziness, or syncope, or continuous medication is required. A higher evaluation of 30 percent is not warranted unless there is workload greater than 5 METs but not greater than 7 METs resulting in dyspnea, fatigue, angina, dizziness, or syncope; or evidence of cardiac hypertrophy or dilatation on electrocardiogram, echocardiogram, or X-ray. One MET (metabolic equivalent) is the energy cost of standing quietly at rest and represents an oxygen uptake of 3.5 milliliters per kilogram of body weight per minute.

Based on evidence of cardiac hypertrophy or dilatation, an evaluation of 30 percent was assigned effective January 28, 2011. We have received no additional medical evidence indicating a worsening of symptomatology which would warrant a higher evaluation. Therefore, the 30 percent assigned effective January 28, 2011 is confirmed and continued. An evaluation of 30 percent is assigned if there is workload greater than 5 METs but not greater than 7 METs resulting in dyspnea, fatigue, angina, dizziness, or syncope; or evidence of cardiac hypertrophy or dilatation on electrocardiogram, echocardiogram, or X-ray. A higher evaluation of 60 percent is not warranted unless there is more than one episode of acute congestive heart failure in the past year; or workload greater than 3 METs but not greater than 5 METs resulting in dyspnea, fatigue, angina, dizziness, or syncope; or left ventricular dysfunction with an ejection fraction of 30 to 50 percent. One MET (metabolic equivalent) is the energy cost of standing quietly at rest and represents an oxygen uptake of 3.5 milliliters per kilogram of body weight per minute.

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PREPARED BY

I certify I have electronically signed this decision, C. Hall, DRO

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