REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

21-5454

ROGER W. WIKER,

Appellant,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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APPELLANT'S REPLY ARGUMENTS

I. The Secretary is incorrect that the January and October 1965 notice letters were adequate—the former erroneously told the Veteran that his claim had been granted, and neither accurately informed him of the proper time limit for filing a notice of disagreement.

As the Board favorably found, the January 1965 notice letter "erroneously informed [Mr. Wiker] that service connection was awarded for cataracts." R-8; *Romero v. Tran*, 33 Vet.App. 252, 266 (2021). Nonetheless, the Secretary asserts that the letter informed the Veteran that VA had disallowed his claim. Sec. Br. at 12-13. Specifically, he notes that the first letter notified Mr. Wiker that VA had disallowed service connection for cataracts by informing him that "compensation is not payable" and that unspecified eye conditions, a personality condition, and conversion reaction "were not incurred in or aggravated by service." Sec. Br. at 12-13 (quoting R-4830). Yet, as noted, the Board already favorably found that the Veteran was erroneously informed in January 1965 that his claim had been granted. R-8. The Court should reject the Secretary's arguments attempting to relitigate this point. *Romero*, 33 Vet.App. at 266.

The Secretary's *post hoc* contention that the letter informed Mr. Wiker that service connection was disallowed because it stated that compensation was not payable does not vitiate this fact. Sec. Br. at 12-13; *see* R-6-15; *Evans v. Shinseki*, 25 Vet.App. 7, 17 (2011). The January 1965 letter stated that service connection for cataracts was granted. R-4830; *see also* R-8. That compensation was not payable for

this only meant that the Veteran was not entitled to a monthly payment—compensation, in 1965 and today, means the "monthly payment made by the Secretary to a veteran because of service-connected disability . . .." 38 U.S.C. § 101(13); *see* 85 Pub. Law 857, § 101, 72 Stat. 1107 (Sept. 2, 1965); *see also Stezel v. Mansfield*, 508 F.3d 1345, 1347 (Fed. Cir. 2007). Therefore, that the January 1965 letter told the Veteran he was not entitled to compensation only meant he was not entitled to a monthly payment, not that he was not service connected for cataracts. *Contra* Sec. Br. at 12-13.

Relatedly, the Secretary's implication that the January 1965 letter's inclusion of unspecified eye conditions in the list of disabilities found not to be due to service meant it informed him that service connection for cataracts was denied again ignores the Board's favorable finding: "the letter . . . erroneously informed [Mr. Wiker] that service connection was awarded for cataracts." *Compare id.* at 12 *with* R-8. Furthermore, the RO addressed multiple eye conditions in the decision denying service connection for cataracts. R-4837; *see* App. Br. at 12. The inclusion of eye conditions generally in the section of the notice letter listing non-service-connected conditions did not provide the level of clarity required by section 3.103 (1965). Accordingly, the Court should reject the Secretary's arguments that the January 1965 letter told Mr. Wiker that his cataracts claim had been disallowed, and hold that the letter did not comply with the regulatory notice requirements. Sec. Br. at 12-13; *see* App. Br. at 10-13.

Similarly, the Court should reject the Secretary's arguments that the January and October 1965 letters, read together, provided Mr. Wiker with adequate notice because neither informed him he had until October 1966 to appeal the denial of service connection. Sec. Br. at 11-12; *see* App. Br. at 11-14. Because the first letter erroneously told the Veteran that service connection for cataracts had been granted, it necessarily did not convey the required information—that service connection had been denied, and that he could appeal the denial of service connection within one year of the notice of denial. *See* 38 U.S.C. § 4005(b)(1) (1965); 38 C.F.R. § 19.2(a)(1) (1965); *see also* App. Br. at 11. Therefore, that the January 1965 letter "accurately informed Appellant of the time limit for filing a notice of disagreement as to" other denied claims is irrelevant. Sec. Br. at 12. The issue is whether Mr. Wiker knew the deadline for appealing service connection for *cataracts*, not other claims. *See* App. Br. at 10-18; *but see* Sec. Br. at 12.

As he was only correctly informed that service connection had been denied in October 1965, he had a year from that letter to appeal the denial via a notice of disagreement. R-4824; 38 U.S.C. § 4005(b)(1) (1965); 38 C.F.R. § 19.2(a)(1) (1965); *see also* App. Br. at 11, 13-14. The October 1965 letter, however, did not inform Mr. Wiker of this. R-4824. And a claimant's appellate rights needed to "be included in *each* notification of a determination of entitlement or nonentitlement to Veterans Administrative benefits by the agency of original jurisdiction." 38 C.F.R. § 19.109(a) (1965). The absence of this information in the October 1965 letter was fatal to that

letter complying with the regulatory notice requirements. *Id.*; *see also* App. Br. at 13-14. And the Secretary is incorrect that this deficiency was remedied by the earlier letter conveying general appellate rights information because it too did not tell Mr. Wiker the correct deadline, October 1966, for filing a notice of appeal. Sec. Br. at 11; *see* App. Br. at 13-14.

II. The Secretary's assertions that the Veteran had actual knowledge of his appellate rights and that a reasonable person would have such knowledge are not supported by the record or law.

a. The record does not demonstrate that the Veteran had actual knowledge of his right to file a notice of disagreement regarding service connection for cataracts by October 1966.

Like the Board, the Secretary points to three pieces of evidence to assert that Mr. Wiker had actual knowledge of the 1965 denial of service connection for cataracts and of his right to appeal: a 1966 educational benefits form "indicating his awareness that processing of the compensation claim had ceased;" a 1972 letter expressing an understanding that his cataracts were not service-connected; and the September 1965 attempted notice of disagreement from Attorney Arnold. Sec. Br. at 14 (citing R-12; R-4721; R-4808; R-4812; R-4826).

However, the issue is not simply whether he knew that his claim was denied, but also whether he knew he could appeal the denial and the deadline for doing so. *See supra*, Arg. I.; App. Br. at 11-14. That Mr. Wiker understood from the October 1965 letter that his claim was denied does not demonstrate he had actual knowledge

of the other crucial piece of information—that he had until October 1966 to appeal that denial. *See* 38 C.F.R. § 3.103(a); *but see* Sec. Br. at 14; R-12.

And as argued in Mr. Wiker's opening brief, the attempted September 1965 notice of disagreement from Attorney Arnold does not show such actual knowledge. App. Br. at 15-16; *see* R-4826-28; *contra* Sec. Br. at 14. The express text of the letter notes the Veteran's understanding "that his cataract was found to be service connected." R-4826. The only way to read this letter is as him he incorrectly thinking he was service connected and not knowing he could appeal the in-fact denial of service connection for cataracts, or how to do so. *Id.*; *see also* App. Br. at 16. Accordingly, there is no plausible interpretation that the attempted September 1965 notice of disagreement demonstrated actual knowledge of the Veteran's right to appeal the denial of service connection, much less the time limit for doing so. *But see* Sec. Br. at 14. The Court should reject the Secretary's arguments to the contrary. *Id.*

b. No reasonable person would have known that the Veteran had until October 1966 to appeal the denial of service connection for cataracts.

The Secretary asserts that "given the notifications that were provided in this case," a reasonable person would have known that Mr. Wiker had one year from October 1965 to appeal the denial of service connection for cataracts. Sec. Br. at 16. Yet it is undisputed that the October 1965 notification letter Mr. Wiker received relayed no appellate-rights information. R-2552; *see* Sec. Br. at 3; App. Br. at 4, 14. The only information the Veteran received about his right to appeal the denial of

service connection for cataracts was in the January 1965 letter, which wrongly told him he was service connected for cataracts. R-4830. That letter stated he could file a notice of disagreement "within one year from the date of *this letter*," i.e., by January 1966. *Id.* It did not inform him he had one year from the mailing of the notice of denial of service connection, which, considering the Board's favorable finding that the January 1965 letter erroneously told him he was granted service connection, was the October 1965 letter. R-8; R-4824; R-4830; 38 U.S.C. § 4005(b)(1) (1965); *see also* App. Br. at 17. And no reasonable person would have been able to conclude that the January 1965 letter telling Mr. Wiker he had one year from the date of that letter to appeal the denial of service connection actually meant he had one year from the date of the later-delivered October 1965 notice of denial. App. Br. at 17-18; *contra* Sec. Br. at 16; R-11-12.

This is not "merely disagreeing with the Board's factual findings." *Contra* Sec. Br. at 16. Rather, it is an argument that the specific notifications the Veteran received in this case did not provide him with the information required by its own regulations. *See* App. Br. at 17-18. The Secretary fails to appreciate this point, and the Court should reject his characterization of Mr. Wiker's argument as merely calling for it to reweigh the evidence. Sec. Br. at 16. The Court should accordingly hold that the Board erred in finding that a reasonable person would have been able to read the January and October 1965 letters together to understand he had one year from the latter to appeal the denial of service connection. R-11-12.

III. The Secretary, like the Board, impermissibly requires the Veteran to have signed the attempted notice of disagreement to demonstrate that he personally submitted it and fails to appreciate that the RO waived the power of attorney form requirement.

The Secretary argues that the September 1965 filing was not personally submitted by Mr. Wiker, and so was not a notice of disagreement under 38 C.F.R. § 19.111(a) (1965). He, like the Board, asserts that to have been personally submitted by the Veteran, the letter needed to have been signed by him. Sec. Br. at 19; *see* R-13. But the Board's and the Secretary's definition of a notice of disagreement personally submitted by a claimant—that it be signed by him—finds no support in law. *See* App. Br. at 19-22.

Section 19.111(a) (1965) only required that a notice of disagreement be "filed by a claimant personally," and it did not define what personally meant. App. Br. at 19-20. Put another way, the regulation unambiguously did *not* require that a notice of disagreement be signed by a claimant. *See id.* The Court should therefore reject the Board's and the Secretary's additional requirement that the notice needed to have been signed by Mr. Wiker because it imposes an additional requirement not found in the unambiguous plain text of the regulation. *See Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019) (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 873, 843 n.9 (1984)); *see also* App. Br. at 19-20. Instead, as argued in the Veteran's opening brief, the Court should interpret "filed by a claimant personally" as only requiring a claimant's active participation in drafting the notice, here, evinced by Mr. Wiker

consulting with Attorney Arnold, participating in drafting the notice, and requesting that Attorney Arnold submit it on his behalf. App. Br. at 22; R-2563.

The need for this outcome is only reinforced by looking to the Secretary's contemporary regulations. App. Br. at 20-21. In 1965, the Secretary required that a renouncement of VA benefits "be in writing over the [beneficiary's] signature." 38 C.F.R. § 3.106(a) (1965). Likewise, an election of pension had to be "signed" by the beneficiary. 38 C.F.R. § 3.1553(f)(l) (1965). A power of attorney form needed to be "signed by the claimant." 38 C.F.R. § 14.641 (1965). The Secretary does not contend with the notion that where he included particular language in these regulations requiring a claimant's signature but not in section 19.111(a) (1965), it should generally be presumed that he "act[ed] intentionally and purportedly in the disparate inclusion or exclusion." *Jones v. Shinseki*, 26 Vet.App. 56, 62 (2012) (quoiting *Heino v. Shinseki*, 683 F.3d 1372, 1379 (Fed. Cir. 2012)); *see* Sec. Br. at 16-19; *see also* App. Br. at 20. The Court should reject his arguments accordingly.

The Secretary similarly fails to explain why, even if the phrase "filed by a claimant personally" was ambiguous, the Court should determine that requiring a claimant's signature us consistent with the regulation's structure and history as to warrant deference. App. Br. at 21-22; *Kisor*, 139 S.Ct. at 2416; *see* Sec. Br. at 16-19. An interpretation of section 19.111(a) (1965) that would allow VA to reject a notice of disagreement simply because it was not signed by the claimant—particularly where, as here, the evidence shows that the Veteran participated in drafting the notice and

intended to appeal the RO's decision—is inconsistent with this purpose, as well as VA's pro-veteran statutory and regulatory framework. *See Hudgens v. McDonald*, 823 F.3d 630, 638 (Fed. Cir. 2016) (relying on the pro-veteran canon of interpretation upon a determination that a VA regulation was genuinely ambiguous); *see also* App. Br. at 21; R-2563. As Mr. Wiker argued in his opening brief, the purpose of section 19.111(a) (1965) must have been to ensure that a claimant actually intended to appeal a denial, and that VA would not accept unauthorized appeals. App. Br. at 21. This goal is not furthered by the Board's and the Secretary's interpretation, and the Court should reject it accordingly. *See Kisor*, 139 S.Ct. at 2416; *see also* App. Br. at 21.

Nor does the Secretary explain why determining whether a notice of disagreement was "filed by a claimant personally" "implicate[d] [VA']s substantive expertise" as to warrant deference. *Kisor*, 139 S.C.t at 2416; *see also* App. Br. at 21-22; *see generally* Sec. Br at 16-22. As Mr. Wiker argued in his opening brief, this question only looked to whether the evidence shows that a claimant intended to appeal a decision. App. Br. at 21. The Court is as well-suited to address this as VA. *Id.* (quoting *Kisor*, 139 S.Ct. at 2417). And arguing that this means the Court should not defer to VA's interpretation of "filed by a claimant personally" as requiring the claimant's signature, but instead should interpret any ambiguities in this phrase in a pro-veteran fashion, is not attempting to rewrite the regulation, as the Secretary asserts. Sec. Br. at 18-19.

Finally, the Secretary states that the RO could not "create a valid power of attorney by simply 'enclosing a copy of [the October 1965 letter to Attorney Arnold rejecting the attempted notice of disagreement] to the veteran' in correspondence to" Attorney Arnold. Sec. Br. at 18 (quoting R-4825). Presumably, he disputes the Veteran's argument that the RO waived the regularity requirement that Attorney Arnold needed to submit a power of attorney form when it sent him this letter. *Compare id. with* App. Br. at 23-24.

But the Secretary offers no substantive argument for why VA could not waive the requirement that a representative needed to submit a signed power of attorney form to be recognized as a claimant's representative. *Compare* App. Br. at 23; *Percy v. Shinseki*, 23 Vet.App. 37, 46-47 (2007) *with* Sec. Br. at 18. Nor does he dispute that under the presumption of regularity, when the RO mailed Attorney Arnold this letter, it did so in compliance with 38 C.F.R. § 1.503 (1965)'s rule that VA would only disclose information regarding Mr. Wiker's appeal to his "duly authorized representative." *Compare* App. Br. at 23; *Marsh v. Nicholson*, 19 Vet.App. 381, 387-88 (2005) *with* Sec. Br. at 18. The Court should reject the Secretary's undeveloped argument accordingly. *Locklear v. Nicholson*, 20 Vet.App. 410, 416-17 (2006). And it should therefore hold that the RO waived the power of attorney requirement and implicitly recognized Attorney Arnold as Mr. Wiker's representative, and, moreover, reverse the Board's finding that the September 1965 letter was not a valid notice of disagreement. App. Br. at 24.

IV. The Secretary is incorrect that the Veteran had actual knowledge of the RO rejecting the attempted September 1965 notice of disagreement and his right to cure any deficiencies in that notice.

The Secretary alleges that Mr. Wiker "had actual knowledge that the letter submitted by his attorney in September 1965 had not been accepted as a notice of disagreement." Sec. Br. at 20. He relies upon the RO's June 1973 letter to the Veteran informing him that a "valid appeal was not submitted within the specified time" of the January 1965 decision to support this claim. *Id.* (quoting R-4702). But the issue is not whether Mr. Wiker knew that the attempted notice of disagreement was rejected at some point. *Contra* Sec. Br. at 20. Rather, it is whether he knew, within the relevant timeframe, of the purported defect in the attempted notice of disagreement, that he could remedy it, and how he could remedy it. *See* App. Br. at 24-26. The 1973 notice, issued seven years after the expiration of the one-year period to appeal the October 1965 notice, could not possibly provide fair notice of this information. *See* R-4702. The Court should accordingly reject the Secretary's arguments and hold that the 1964 claim remained pending. *See* App. Br. at 19.

V. Despite the Secretary's protestations, reversing the Board's denial of an effective date of December 1964 would not require any additional factfinding.

The Secretary asserts that reversing the Board's denial of service connection as of December 1964 "would require factfinding that the Court should not undertake." Sec. Br. at 21. But the Veteran was found to have cataracts in service. R-4067; R-4837. He also had cataracts when the RO adjudicated his claim in January 1965. *See* R-4848 (Dec. 1964 claim for cataracts); R-4830 (Jan. 1965 letter to the veteran noting his cataracts disability and informing him they were not compensable). And VA has determined his cataracts were related to his military service. *See* R-4180. These uncontroverted facts establish that, when Mr. Wiker filed his claim in December 1964, he was entitled to service connection for cataracts, and the Court may rely upon them to reverse the Board's denial of service connection as of December 1964. *See* App. Br. at 29.

The facts the Secretary highlights about the Veteran reporting he was undergoing cataract removal surgery *after* his claim and the RO's January 1965 adjudication do not throw these favorable facts into dispute. Sec. Br. at 21-22. At most, the surgeries the Secretary notes implicate the relative severity, i.e., level of impairment, of Mr. Wiker's cataracts *after* the RO adjudicated his claim in January 1965. *See* R-4287; R-4709-11; R-4826-29. The Veteran only needed to demonstrate that a disability existed sometime during the claim period to demonstrate a potentially service-connectable disability. *McClain v. Nicholson*, 21 Vet.App. 319, 321 (2007). His

level of cataracts impairment was only germane to assessing the downstream issue of the proper disability rating after January 1965, not whether he was entitled to service connection at that time. *See id.* Therefore, these facts do not show that the record was controverted regarding the Veteran's entitlement to service connection as of December 1964. *See Grantham v. Brown*, 114 F.3d 1156, 1158-59 (Fed. Cir. 1997) (noting that issues regarding the proper compensation level are downstream from the issue of service connection); *contra* Sec. Br. at 21-22.

Accordingly, the Court should reject the Secretary's argument that it cannot reverse the Board's denial of service connection as of December 1964. And, as argued in Mr. Wiker's opening brief, the Court should reverse that denial. App. Br. at 29. At a minimum, the Court should remand for the Board to properly apply the law and make a finding regarding when the Veteran's entitlement to service connection arose. *See* 38 U.S.C. § 5110(a).

CONCLUSION

The Secretary is incorrect that the Board properly determined that the January 1965 notice letter complied with the regulatory notice requirements—the letter's erroneous statement that service connection for cataracts was granted was fatal to its compliance with those requirements, and the deficient October 1965 notice did not cure this error. Additionally, the record does not demonstrate that Mr. Wiker had actual knowledge of his appellate rights, nor that a reasonable person would have known he had until October 1966 to appeal the denial. The Secretary is similarly wrong that the Board correctly determined that the September 1965 filing was not a proper notice of disagreement, and that Mr. Wiker knew the notice was rejected and that he could cure it. Finally, despite the Secretary's protestations to the contrary, the uncontroverted facts establish that Mr. Wiker was entitled to service connection when the RO adjudicated his claim in January 1965.

For these reasons, along with those advanced in Mr. Wiker's opening brief, the Court should reverse the Board's July 1, 2021, decision denying an earlier effective date and remand with an order for the Board to award an effective date of July 22, 1964. At the very least, the Court should vacate the Board's decision and remand for it to provide an adequate statement of reasons or bases for its decision.

Respectfully submitted,

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members of the Board thereto, and designate the chief thereof. If a section as a result of a vacancy or absence or inability of a member assigned thereto to serve thereon is composed of a number of members less than designated for the section, the Chairman may assign other members to the section or direct the section to proceed with the transaction of business without awaiting any additional assignment of members thereto. A hearing docket shall be maintained and formal recorded hearings shall be held by such associate member or members as the Chairman may designate, the associate member or members being of the section which will make final determination in the claim. A section of the Board shall make a determination on any proceeding instituted before the Board and on any motion in connection therewith assigned to such section by the Chairman and shall make a report of any such determination, which report shall constitute its final disposition of the proceeding. (Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1241.)

§ 4003. Determinations by the Board.

(a) The determination of the section, when unanimously concurred in by the members of the section shall be the final determination of the Board, except that the Board on its own motion may correct an obvious error in the record, or may upon the basis of additional official information from the service department concerned reach a contrary conclusion.

(b) When there is a disagreement among the members of the section the concurrence of the Chairman with the majority of members of such section shall constitute the final determination of the Board, except that the Board on its own motion may correct an obvious error in the record, or may upon the basis of additional official information from the service department concerned reach a contrary conclusion. (Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1241.)

§ 4004. Jurisdiction of the Board.

(a) All questions on claims involving benefits under the laws administered by the Veterans' Administration shall be subject to one review on appeal to the Administrator. Final decisions on such appeals shall be made by the Board.

(b) When a claim is disallowed by the Board, it may not thereafter be reopened and allowed, and no claim based upon the same factual basis shall be considered; however, where subsequent to disallowance of a claim, new and material evidence in the form of official reports from the proper service department is secured, the Board may authorize the reopening of the claim and review of the former decision.

(c) The Board shall be bound in its decisions by the regulations of the Veterans' Administration, instructions of the Administrator, and the precedent opinions of the chief law officer.

(d) The decisions of the Board shall be in writing and shall contain findings of fact and conclusions of law separately stated. (Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1241; Pub. L. 87-97, § 1, July 20, 1961, 75 Stat. 215.)

AMENDMENTS

1961—Subsec. (d). Pub. L. 87-97 added subsec. (d).

EFFECTIVE DATE OF 1961 AMENDMENT

Section 2 of Pub. L. 87-97 provided that: "The amendment made by this Act [adding subsec. (d) of this section] shall take effect as of January 1, 1962."

§ 4005. Filing of notice of disagreement and appeal.

(a) Appellate review will be initiated by a notice of disagreement and completed by a substantive appeal after a statement of the case is furnished as prescribed in this section. Each appellant will be accorded hearing and representation rights pursuant to the provisions of this chapter and regulations of the Administrator.

(b)(1) Except in the case of simultaneously contested claims, notice of disagreement shall be filed within one year from the date of mailing of notice of the result of initial review or determination. Such notice, and appeals, must be in writing and be filed with the activity which entered the determination with which disagreement is expressed (hereafter referred to as the "agency of original jurisdiction"). A notice of disagreement postmarked before the expiration of the one-year period will be accepted as timely filed.

(2) Notices of disagreement, and appeals, must be in writing and may be filed by the claimant, his legal guardian, or such accredited representative, attorney, or authorized agent as may be selected by him. Not more than one recognized organization, attorney, or agent will be recognized at any one time in the prosecution of a claim.

(c) If no notice of disagreement is filed in accordance with this chapter within the prescribed period, the action or determination shall become final and the claim will not thereafter be reopened or allowed, except as may otherwise be provided by regulations not inconsistent with this title.

(d)(1) Where the claimant, or his representative, within the time specified in this chapter, files a notice of disagreement with the decision of the agency of original jurisdiction, such agency will take such development or review action as it deems proper under the provisions of regulations not inconsistent with this title. If such action does not resolve the disagreement either by granting the benefit sought or through withdrawal of the notice of disagreement, such agency will prepare a statement of the case consisting of—

(A) A summary of the evidence in the case pertinent to the issue or issues with which disagreement has been expressed;

(B) A citation or discussion of the pertinent law, regulations, and, where applicable, the provisions of the Schedule for Rating Disabilities;

(C) The decision on such issue or issues and a summary of the reasons therefor.

(2) A statement of the case, as required by this subsection, will not disclose matters that would be contrary to section 3301 of this title or otherwise contrary to the public interest. Such matters may be disclosed to a designated representative unless the relationship between the claimant and the representative is such that disclosure to the representative would be as harmful as if made to the claimant.

(3) Copies of the "statement of the case" prescribed in paragraph (1) of this subsection will be submitted to the claimant and to his representative, if there is one. The claimant will be afforded a period of sixty days from the date the statement of the case is mailed to file the formal appeal. This may be extended for a reasonable period on request for good cause shown. The appeal should set out specific allegations of error of fact or law, such allegations related to specific items in the statement of the case. The benefits sought on appeal must be clearly identified. The agency of original jurisdiction may close the case for failure to respond after receipt of the statement of the case, but questions as to timeliness or adequacy of response shall be determined by the Board of Veterans' Appeals.

(4) The appellant will be presumed to be in agreement with any statement of fact contained in the statement of the case to which no exception is taken.

(5) The Board of Veterans' Appeals will base its decision on the entire record and may dismiss any appeal which fails to allege specific error of fact or law in the determination being appealed. (Added Pub. L. 87-666, § 1, Sept. 19, 1962, 76 Stat. 553.)

CODIFICATION

A prior section 4005, Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1241, relating to applications for review on appeal, was repealed by Pub. L. 87-666.

PRIOR PROVISIONS

Provisions similar to those comprising this section were contained in former section 4005 of this title, prior to the general amendment of sections 4005—4007 by Pub. L. 87-666.

EFFECTIVE DATE

Section 3 of Pub L. 87-666 provided that: "The amendments made by this Act [enacting this section, and sections 4005A and 4006 of this title, redesignating former section 4006 as 4007 of this title, and repealing former sections 4005 and 4007 of this title] shall be effective January 1, 1963."

§ 4005A. Simultaneously contested claims.

(a) In simultaneously contested claims where one is allowed and one rejected, the time allowed for the filing of a notice of disagreement shall be sixty days from the date notice of the adverse action is mailed. In such cases the agency of original jurisdiction shall promptly notify all parties in interest at the last known address of the action taken, expressly inviting attention to the fact that notice of disagreement will not be entertained unless filed within the sixty-day period prescribed by this subsection.

(b) Upon the filing of a notice of disagreement, all parties in interest will be furnished with a statement of the case in the same manner as is prescribed in section 4005. The party in interest who filed a notice of disagreement will be allowed thirty days from the date of mailing of such statement of the case in which to file a formal appeal. Extension of time may be granted for good cause shown but with consideration to the interests of the other parties involved. The substance of the appeal will be communicated to the other party or parties in interest and a period of thirty days will be allowed for filing a brief or argument in answer thereto. Such notice shall be forwarded to the last known address of record of the parties concerned, and such action shall constitute sufficient evidence of notice. (Added Pub. L. 87-666, § 1, Sept. 19, 1962, 76 Stat. 554.)

PRIOR PROVISIONS

Provisions similar to those comprising this section were contained in former section 4007 of this title, prior to the general amendment of sections 4005—4007 by Pub. L. 87-666.

EFFECTIVE DATE

Section effective Jan. 1, 1963, see section 3 of Pub. L. 87-666, set out as a note under section 4005 of this title.

§ 4006. Administrative appeals.

Application of review on appeal may be made within the one-year period prescribed in section 4005 of this title by such officials of the Veterans' Administration as may be designated by the Administrator. An application entered under this paragraph shall not operate to deprive the claimant of the right of review on appeal as provided in this chapter. (Added Pub. L. 87-666, § 1, Sept. 19, 1962, 76 Stat. 554.)

CODIFICATION

A prior section 4006, Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1242, relating to the docketing of appeals, was redesignated section 4007 of this title.

PRIOR PROVISIONS

Provisions similar to those comprising this section were contained in subsec. (c)(2) of former section 4005 of this title, prior to the general amendment of sections 4005—4007 by Pub. L. 87-666.

EFFECTIVE DATE

Section effective Jan. 1, 1963, see section 3 of Pub. L. 87-666, set out as a note under section 4005 of this title.

§ 4007. Docketing of appeals.

All cases received pursuant to application for review on appeal shall be considered and decided in regular order according to their places upon the docket; however, for cause shown a case may be advanced on motion for earlier consideration and determination. Every such motion shall set forth succinctly the grounds upon which it is based. No such motion shall be granted except in cases involving interpretation of law of general application affecting other claims, or for other sufficient cause shown. (Pub. L. 85-857, § 4007, formerly § 4006, Sept. 2, 1958, 72 Stat. 1242, renumbered Pub. L. 87-666, § 1, Sept. 19, 1962, 76 Stat. 553.)

CODIFICATION

A prior section 4007, Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1242, relating to simultaneously contested claims, was repealed by Pub. L. 87-666. See section 4005A of this title.

§ 4008. Rejection of applications.

An application for review on appeal shall not be entertained unless it is in conformity with this chapter. (Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1243.)

§ 4009. Independent medical opinions.

(a) When, in the judgment of the Board, expert medical opinion, in addition to that available within the Veterans' Administration, is warranted by the medical complexity or controversy involved in an appeal case, the Board is authorized to secure an advisory medical opinion from one or more independent medical experts who are not employees of the Veterans' Administration.

(b) The Administrator shall make necessary arrangements with recognized medical schools, universities, or clinics to furnish such advisory medical

CODE

OF FEDERAL

REGULATIONS

TITLE 38

Revised as of January 1, 1965

CONTAINING A CODIFICATION OF DOCUMENTS OF GENERAL APPLICABILITY AND FUTURE EFFECT AS OF JANUARY 1, 1965

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erans Affairs or the Deputy Administrator may release information, statistics, or reports to individuals or organizations when in his judgment such release would serve a useful purpose.

(b) *Release of information concerning policy and administration.* Correspondence, reports, records and other papers concerning matters of policy and administration, the disclosure of which may either (1) violate the provisions of personnel procedures on conduct of Veterans Administration employees, (2) adversely reflect upon a special group of veterans, (3) have a detrimental effect upon business or private interest, or (4) involve the Veterans Administration in a controversy, will not be disclosed by any officer or employee of the Veterans Administration to any person or persons outside the Veterans Administration without the consent of the Administrator, Deputy Administrator, a department head, top staff official or Manager having jurisdiction over the particular subject matter. Disclosure of all investigative information or reports may be made only as provided by § 1.454.

[23 F.R. 5694, July 29, 1958, as amended at 24 F.R. 2527, Apr. 1, 1959]

§ 1.502 Disclosure of the amount of monetary benefits.

The monthly monetary rate of pension, compensation, retirement pay, subsistence allowance, or readjustment allowance of any beneficiary shall be made known to any person who applies for such information.

§ 1.503 Disclosure of information to a veteran or his duly authorized representative as to matters concerning the veteran alone.

Information may be disclosed to a veteran or his duly authorized representative as to matters concerning himself alone when such disclosure would not be injurious to the physical or mental health of the veteran. If the veteran be deceased, matters concerning him may be disclosed to his widow, children, or next of kin if such disclosure will not be injurious to the physical or mental health of the person in whose behalf information is sought or cause repugnance or resentment toward the decedent.

§ 1.504 Disclosure of information to a widow, child, or other claimant.

Information may be disclosed to a widow, widower, child, or other dependent parent or other claimant, or the duly authorized representative of any of these persons as to matters concerning such person alone when such disclosure will not be injurious to the physical or mental health of the person to whom the inquiry relates. If the person concerning whom the information is sought is deceased, matters concerning such person may be disclosed to the next of kin if the disclosures will not be injurious to the physical or mental health of the person in whose behalf the information is sought or cause repugnance or resentment toward the decedent.

§ 1.505 Genealogy.

Information of a genealogical nature when its disclosure will not be detrimental to the memory of the veteran and not prejudicial, so far as may be apparent, to the interests of any living person or to the interests of the Government may be released by the Veterans Administration or in the case of inactive records may be released by the Archivist of the United States if in his custody.

§ 1.506 Disclosure of records to Federal Government departments and State unemployment compensation agencies.

All records or documents required for official purposes by any department or other agency of the United States Government or any State Unemployment Compensation Agency acting in an official capacity for the Veterans' Administration shall be furnished in response to an official request, written or oral, from such department or agency. If the requesting department or agency does not indicate the purpose for which the records or documents are requested and there is doubt as to whether they are to be used for official purposes, the requesting department or agency will be asked to specify the purpose for which they are to be used.

§ 1.507 Disclosures to Members of Congress.

Members of Congress shall be furnished in their official capacity in any case such information contained in the Veterans Administration files as may be requested for official use. However, in any unusual case, the request will be presented to the Administrator, Deputy Administrator, Assistant Administrator, or department head for personal action. When the requested information is of a type which may not be furnished a claimant, the Member of Congress shall be

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 Information to be furnished claimants; appellate rights.

The claimant will be notified of any decision authorizing the payment of benefit or disallowance of a claim. Notice will include the reason for the decision, the claimant's right to initiate an appeal by filing a notice of disagreement and the time limits within which such notice may be filed. See subpart B, Part 19 of this chapter.

[29 F.R. 1462, Jan. 29, 1964]

§ 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. 1462, Jan. 29, 1964; 29 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 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 Veterans Administration issue, the provisions of § 3.114 are for application.)

A change in diagnosis may be accepted as a basis for severance action if the examining physician or physicians or other proper medical authority certifies that, in the light of all accumulated evidence, the diagnosis on which service connection was predicated is clearly erroneous. This certification must be accompanied by a summary of the facts, findings, and reasons supporting the conclusion. When severance of service connection is considered warranted, a rating proposing severance will be prepared setting forth all material facts and reasons, and submitted to Central Office for review without notice to the claimant or representative. Ratings for carious or missing teeth, pyorrhea, or Vincent's disease will not be submitted. If the proposal is approved on review by Central Office, the claimant will be notified at his 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 service connection should be maintained. If additional evidence is not received within that period, rating action will be taken and the award will be discontinued effective the last day of the month in which the 60-day period expired. (38 U.S.C. 3012 (b) (6); Public Law 87–825)

(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, rating action will be taken. The reduction will be made effective the last day of the month in which a 60-day period from date of notice to the payee expires. The veteran will be notified at his latest address of record of the action taken and furnished detailed reasons therefor, and will be given 60 days for the presentation of additional evidence. (38 U.S.C. 3012(b) (6); Public Law 87–825)

(f) *Reduction in evaluation—pension.* Where a reduction in evaluation is considered warranted because of a change in non-service-connected disability or employability and the lower evaluation would result in a reduction or discontinuance of pension payments currently being made, the award will be reduced or discontinued effective the last day of the month in which reduction or discontinuance of the award is approved. The veteran will be notified at his latest address of record of the action taken and furnished detailed reasons therefor, and the conditions under which his claim may be reopened. (38 U.S.C. 3012(b) (5); Public Law 87–825)

[26 F.R. 1569, Feb. 24, 1961, as amended at 27 F.R. 4364, May 8, 1962; 27 F.R. 11886, Dec. 1, 1962]

CROSS REFERENCES: Effective dates. See § 3.400. Reductions and discontinuances. See § 3.500. Protection; service connection. See § 3.957.

§ 3.106 Renouncement.

(a) Any person entitled to pension, compensation, or dependency and indemnity compensation under any of the laws administered by the Veterans Administration may renounce his right to that benefit. The renouncement will be in writing over the person's signature. Upon receipt of such renouncement in the Veterans Administration, payment of such benefits and the right thereto will be terminated, and such person will be denied any and all rights thereto from such filing. (38 U.S.C. 3106(a))

(b) The renouncement will not preclude the person from filing a new application for pension, compensation, or dependency and indemnity compensation at any future date. Such new application will be treated as an original application, and no payments will be made thereon for any period before the date such new application is received in the Veterans Administration. (38 U.S.C. 3106(b))

(c) The renouncement of dependency and indemnity compensation by one beneficiary will not serve to increase the rate payable to any other beneficiary in the same class.

(d) The renouncement of dependency and indemnity compensation by a widow will not serve to vest title to this benefit in children under the age of 18 years or to increase the rate payable to a child or children over the age of 18 years.

[26 F.R. 1569, Feb. 24, 1961]

§ 3.107 Awards where all dependents do not apply.

Except as provided in § 3.251(a) (4), in any case where claim has not been filed by or on behalf of all dependents who may be entitled, the awards (original or amended) for those dependents who have filed claim will be made for all

However, to qualify for assistance locomotion must be prevented by the disability; mere precautionary inactivity will be excluded from consideration.

(c) *Effective date.* This act is effective September 8, 1959. (Instruction 1, 38 U.S.C. 801, Pub. Law 86-239)

[26 F.R. 1610, Feb. 24, 1961]

§ 3.1553 Implementation of the provisions of the "Veterans' Pension Act of 1959."

(a) *Service requirements of deceased veterans.* (1) Ninety days or more in either World War I, World War II, or the Korean conflict (for method of computing service see § 3.17); or

(2) A discharge or release from such service for a service-connected disability; or

(3) At the time of death was receiving (or entitled to receive) compensation or retirement pay based upon World War I, World War II or Korean conflict service-connected disability.

NOTE: The requirement is eliminated that a World War II or Korean conflict veteran be shown at the time of his death, in addition to the service requirement, to have had a service-connected disability for which compensation would have been payable if disabling to a degree of 10 percent or more.

(b) *Amounts of pension payable within prescribed income limitations*—(1) *Veteran*—(i) *With no dependents.* If the veteran is unmarried (or married but not living with and not reasonably contributing to the support of his spouse) and has no child, pension will be paid at the monthly rate set forth in column II of the following table opposite the veteran's annual income as shown in column I:

I If income is not over—	II Monthly amount
$600	$85
$1,200	70
$1,800	40

(ii) *With dependents.* If the veteran is married and living with or reasonably contributing to the support of his spouse, or has a child or children, pension will be paid at the monthly rate set forth in columns II, III, or IV (depending upon the number of his dependents) of the following table opposite the veteran's annual income as shown in column I:

I If income is not over—	II Monthly amount One dependent	III Monthly amount Two dependents	IV Monthly amount Three or more dependents
$1,000	$90	$95	$100
$2,000	75	75	75
$3,000	45	45	45

(iii) *In need of aid and attendance.* If the veteran is in need of regular aid and attendance, the monthly rate payable will be increased by $70.

(iv) *Reasonably contributing to support of spouse.* A veteran will be paid as a person without a spouse unless he is reasonably contributing to her support. In determining whether a veteran is reasonably contributing to the support of his spouse all of the circumstances such as his income and estate and the separate income and estate of his spouse will be taken into consideration. In any case where a special apportionment is made the special apportionment will be considered as reasonable contribution.

(v) *Income of spouse.* For the purpose of counting the income of a spouse, a veteran will be considered as living with his spouse, even though they reside apart, unless they are estranged. Where a veteran is living with his spouse the total annual income of the spouse which is reasonably available to or for the veteran except $1,200 will be considered as the income of the veteran, unless to do so would work a hardship upon the veteran. The income of the spouse will be considered as available to the veteran and counting such income will be presumed not to work a hardship upon him unless evidence is presented to rebut the presumption. Such evidence may consist of a showing that the spouse has incurred unusual family expenses as a result of sickness, hospitalization, prolonged care in a nursing home, or other unusual expenses (e.g., spouse working to help defray veteran's unusual medical expenses). However, the fact that the counting of a part of the spouse's income would reduce or deny the veteran pension will not be considered as working a hardship on him.

(2) *Widow*—(i) *Without child.* If there is no child, pension will be paid at the monthly rate set forth in column II of the following table opposite the

widow's annual income as shown in column I:

I If income is not over—	II Monthly amount
$600	$60
$1,200	45
$1,800	25

(ii) *With child.* If there is a widow and one child, pension will be paid at the monthly rate set forth in column II of the following table opposite the widow's annual income as shown in column I:

I If income is not over—	II Monthly amount
$1,000	$75
$2,000	60
$3,000	40

(iii) *With more than one child.* If there is a widow and more than one child, the monthly rate payable under subdivision (ii) of this subparagraph

(2) *Income included.*

(i) Income of the spouse as provided in paragraph (b)(1)(v) of this section.

(ii) Special allowance under 38 U.S.C. 412.

(iii) Except as otherwise provided in subdivisions (viii)(*b*) and (ix) of this subparagraph, total salary, retirement or annuity payments, or similar income, irrespective of whether a part of such benefit was waived pursuant to statute, contract, or otherwise.

(iv) The inclusions contained in § 3.252(c)(1).

(v) Commercial life insurance (including Federal employees Government life insurance) consisting of lump sum or installment payments.

(*a*) Commercial life insurance received by a beneficiary will be considered as income in the calendar year in which received even though the beneficiary had the right to elect a lump sum or installment payments.

(*b*) Where an annuity or payment of endowment insurance is received by the purchaser, no part of the payment received will be considered annual income until the full amount of the considera-

party, the lump sum will be considered as income when actually received.

(viii) Retirement benefits paid under a Federal, State, municipal or private business or industrial plan, including Railroad Retirement and Social Security benefits (Federal Old Age and Survivors' Insurance and Disability Insurance Benefits).

(*a*) Where the payments received consist of part principal and part interest, interest will not be counted separately.

(*b*) Where the retirement benefit is based on the claimant's own employment, the payments will not be considered income until the amount of the claimant's personal contribution (as distinguished from amounts contributed by the employer) has been received. After he has received an amount equal to his personal contribution, all payments will be considered income.

(*c*) Benefits received by a widow based on her husband's employment will be considered income as received.

(ix) Retirement pay received direct from a service department (except amounts waived under 38 U.S.C. 3105).

(x) Proceeds of bequests and inheritances received in the settlement of estates. However, such property, including stocks and bonds received by inheritance or otherwise, will not be considered as "annual income" until the property or other property acquired in lieu thereof by exchange or barter, has been converted into cash. Where such property is converted into cash, the amount of the claimant's personal contribution will be deducted in determining the net income.

(xi) Gifts.

(xii) World war adjusted compensation.

(xiii) Family allowances authorized by service personnel.

(xiv) Bonus or similar cash gratuity by any State based on service in the Armed Forces of the United States.

(xv) Reasonable value of allowances to a person in military or naval service in addition to base pay, such as clothing, subsistence and quarters.

(xvi) Insurance paid under the Merchant Marine Act of 1936, as amended.

(xvii) Payments under chapter 73 of Title 10 of the United States Code (formerly the Uniformed Services Contingency Option Act) (10 U.S.C. 1441).

(xviii) Subsistence allowance under Title II, Public Law 346, 78th Congress, and such education and training allowance, under 38 U.S.C. ch. 33, as is in excess of amounts expended for training.

(xix) Overtime pay received by Government employees.

(xx) All other income not specifically excluded.

(3) *Income excluded.* The following exclusions apply to the income of a widow, a child where there is no veteran or widow, a veteran and his spouse:

(i) Payments of 6 months death gratuity from a service department.

(ii) Donations from public or private relief or welfare organizations.

NOTE: This includes the value of maintenance furnished by a friend or relative or by a charitable organization (civic or governmental) and benefits such as old age assistance, aid to dependent children, aid to the needy blind.

(iii) Any compensation, pension and dependency and indemnity compensation payments by the United States Government under laws administered by the Veterans Administration except under 38 U.S.C. 412.

(iv) Payments under policies of United States Government life insurance or National Service life insurance and payments of Servicemen's Indemnity.

(v) Lump-sum death payments under Title II of the Social Security Act.

(vi) Payments to an individual under public or private retirement, annuity, endowment or similar plans or programs equal to his personal contributions thereto.

(vii) Amounts equal to amounts paid by a widow or child of a deceased veteran for:

(*a*) His just debts;

(*b*) The expenses of his last illness; and

(*c*) The expenses of his burial to the extent such expenses are not reimbursed under 38 U.S.C. ch. 23. If a claim for burial allowance has not been made at the time the claim for pension is adjudicated, it will be assumed in determining the actual expenses that $250 will be paid as burial allowance. Subsequent readjustment will be made if the facts indicate otherwise. (See also subparagraph (2) (vi) of this paragraph.)

(viii) Proceeds of fire insurance policies.

(4) *Prompt notice of increase in income or corpus of estate, or change in status.* If the claimant begins to receive additional income, the corpus of his estate increases or his status changes

during a calendar year, he must immediately furnish prompt notification. If notification of increase in income or in corpus of estate is promptly received, the claimant's pension will be adjusted effective the date of last payment. If such notification is not promptly received, the adjustment will be effective the first day of January of the calendar year in which the income or net worth was increased, or the effective date of the award, whichever is later. Where change in status of dependents is involved and was reported promptly, adjustment will be effective the date of last payment or date of change in status, whichever is later; if not reported promptly, the date of change in status. The principle of § 3.253(e) with respect to prompt notification, will apply.

(5) *Adjustment of pension on the basis of annual income received.* Where there is doubt as to the extent of anticipated income, payment of pension will be at the lowest level consistent with the report of anticipated income. Increased pension will be awarded from the first of that calendar year or from the date of entitlement, whichever is later, if notice of the claimant's actual income is received within the succeeding calendar year.

(6) *Proportionate computation.* (i) Income (including that of the spouse) will be computed on a proportionate basis to establish the income increment and basic rate of pension where:

(*a*) The income of the claimant for the calendar year exceeds $600 or $1,000, whichever applies.

(*1*) In the claim of a veteran, where there is no entitlement from the first of the calendar year, the computation will be on a proportionate basis from the date of entitlement.

(*2*) In the claim of a widow or the child of a deceased veteran filed within 1 year from the date of the veteran's death, computation will be on a proportionate basis from the date of the veteran's death. If pension is payable only from the date of filing claim, the claimant's income will be computed on a proportionate basis from date of claim.

(*b*) Where there is a status change affecting income limitation and the income of the claimant for the calendar year exceeds $600 or $1,000, whichever applies:

(*1*) From the date the status of a veteran changes during a calendar year from that of a married veteran (or a person who has a child or children) to that of an unmarried person (or a person who does not have a child or children).

(*2*) From the date the status of a veteran changes during a calendar year from that of an unmarried veteran (or a person who does not have a child or children) to that of a married person (or a person who has a child or children).

(*3*) From the date the status of a widow changes during a calendar year from that of a widow and a child to that of a widow without a child.

(*4*) From the date the status of a widow changes during a calendar year from that of a widow without a child to that of a widow and a child.

(*5*) In determining entitlement under the circumstances outlined in subdivisions (*1*) through (*4*) of this subdivision, the proportionate computations will be applied to each period separately and will not be combined to afford a total applicable to the entire calendar year. The amount of income received within each separate period will determine entitlement to pension for that period.

(ii) If the claimant's total income for the calendar year is less than $600 or $1,000, whichever applies, the date of receipt of such income is not a factor and income will not be computed proportionately for only part of a year.

(iii) Where a beneficiary who is receiving pension under the prior law, elects to receive pension under Public Law 86–211 his pension rate will be based upon his annual income for the entire calendar year 1960.

(d) *Corpus of estate.* Payment of pension will not be authorized when the corpus of estate is such that under all the circumstances including consideration of income, it is reasonable that some part of the corpus be consumed for maintenance. This limitation applies to the estate of a veteran, widow or a child where there is no veteran or widow.

(1) *Principles of measurement of corpus of estate.* The term corpus of estate means the net worth of all real and personal property.

(i) *Property which is owned jointly by the veteran and his wife—(a) Real property.* The recorded deed or other evidence of title will constitute prima facie evidence of ownership as shown. In the event both husband and wife appear as owners, whether by purchase, gift, inheritance or operation of law it

will be presumed that each owns one-half. The veteran's statement as to the nature and type of ownership will be accepted as prima facie evidence of the pertinent facts stated unless all the evidence of record raises a doubt. If such evidence raises a doubt as to the nature and type of ownership, the determination will be made in accordance with the facts found.

(b) *Personal property.* All personal property, the title to which is in the name of the veteran, or in his name jointly with his wife, which is subject to disposition by him without joinder of his wife, will, for the purpose of determining the corpus of the veteran's estate, be considered the property of the veteran.

(ii) If the veteran owns property in partnership, the portion to be counted as part of the veteran's estate will be determined by the facts.

(iii) Where there is a veteran, wife and/or child or children, the corpus of the veteran's estate only will be considered; the corpus of the estate of the wife and/or child or children will not be considered. Where there is a widow and child or children the corpus of the widow's estate only will be considered; the corpus of the estate of the child or children will not be considered. Where there is a child or children only the corpus of the estate of the child or children will be considered.

(2) *Factors for consideration.* Judgment will be exercised in individual cases in determining whether the corpus of the claimant's estate is such that it is reasonable to assume that part of it should be consumed for his maintenance before pension would be payable. Items to be considered in determining whether part of the corpus of the estate should be consumed before pension eligibility is established include:

(i) *Type and amount of property involved.* Whether the property can be readily converted into cash at no substantial sacrifice to the claimant. The claimant will not be expected to sell his dwelling (single family unit). Generally ownership of nonincome producing realty will not bar payment of pension unless there is a sizeable amount. Stocks, bonds, other liquid securities and cash and savings accounts will be measured against the needs of the claimant.

(ii) *Age of the claimant and life expectancy.* If the claimant is young, it will be considered that consumption of part of the estate would be more burdensome than in the case of an older claimant since with greater life expectancy need for a greater estate is demonstrated.

(iii) *The state of health of the claimant and his dependents.* It can readily be seen if large medical and hospital expenses are to be anticipated that the potential rate of depletion may preclude liquidation of part of the estate.

(iv) *Number of persons dependent on claimant for support.* Here too, the obligations of the claimant to those dependent upon him for support would have an important bearing on the determination as to whether it would be reasonable that part of the estate be consumed before awarding pension.

(v) *Estate as related to income.* If, in addition to his estate, the claimant has sizeable income (though still within the income limits) this fact together with the size and nature of his estate will be considered. Attention should be given to claimed expenses and if unusual expenses, especially medical, hospital and education, are encountered, this will be carefully weighed.

(e) *Adjustment of pension where veteran is in a Veterans Administration institution, or other institution at the expense of the Veterans Administration (including domiciliary care).*

NOTE: This paragraph applies only to veterans receiving pension under Public Law 86–211 and Spanish-American War veterans who are first awarded pension effective after June 30, 1960.

(1) *Reduction of pension.* Upon receipt of VA Form 21–404, any running award of pension, except where the veteran is receiving care or treatment for Hansen's disease, will be reduced to $30 per month effective:

(i) The first day of the month following 2 full calendar months of care or treatment after the month of admission, or October 1, 1960, whichever is later.

(ii) The day of admission or readmission (including readmission from completion of bed occupancy care status) within 6 months following a period of care or treatment of not less than 2 full calendar months after July 1, 1960, or

(iii) The day of return from furlough or leave of absence of 30 days, readmission from trial visit, or completion of bed occupancy care, where a previous reduction has been made under Public Law 86–211.

NOTE: Periods of treatment or care prior to July 1, 1960, will not be considered under Public Law 86–211.

The date of October 1, 1960, is predicated upon a constructive admission on July 1, 1960, with respect to a veteran receiving pension on June 30, 1960, and who is awarded pension effective July 1, 1960, under Public Law 86–211 because of his election. Where a hospitalized or institutionalized veteran is awarded pension under Public Law 86–211 on the basis of a new claim with an effective date subsequent to July 1, 1960, the period of treatment or care subsequent to June 30, 1960, will be counted even though all or a part of it was before the effective date of his award. However, where a hospitalized or institutionalized veteran elects to receive pension under Public Law 86–211 and the effective date of his election is subsequent to July 1, 1960, the period of treatment or care prior to the effective date of his election will not be counted; his pension will be reduced to $30 monthly effective the first day of the month following 2 full calendar months of care or treatment after the month of election.

(2) *Aid and attendance.* The allowance for regular aid and attendance will be continued during periods of treatment or care where the disability is paraplegia involving paralysis of both lower extremities together with loss of anal and bladder sphincter control, Hansen's disease, blindness (visual acuity 5/200 or less or concentric contraction of visual field to 5 degrees or less). These awards are, however, subject to reduction under subparagraph (1) of this paragraph except where the disabling condition is Hansen's disease.

(3) *Apportionment to wife or children.* Where the pension of any veteran is reduced under the provisions of subparagraph (1) of this paragraph, an apportionment may be made to his wife and/or children effective the date his pension was reduced. The amount of the apportionment generally will be the difference between $30 and the rate payable during the first 2 months of treatment or care. In the exceptional case where claims file evidence clearly establishes materially reduced need on the part of wife or children (example, veteran is already contributing a reasonable amount for an estranged wife) no apportionment or apportionment in a reduced amount will be made in accordance with the facts found. In no event will the veteran be paid more than $30 monthly while hospitalized. If there is a child or children but no wife VA Form 21–592 together with the C-folder will be forwarded to the Chief Attorney informing him that an apportioned award is contemplated and of the amount and effective date. Upon receipt of a reply from the Chief Attorney, payments will be made to the fiduciary appointed by a court or, in the absence of such, one designated by him. If there is a wife and child or children and the children are not in the custody of the wife, the case will be further developed and in addition to the wife's share an apportionment made to the custodian of the children who is recognized by the Chief Attorney. The amount of apportionment for the children will depend upon the equities presented.

(4) *Apportionment to dependent parents.* Where an incompetent veteran having neither wife nor child is receiving care or treatment by the Veterans Administration and his estate exceeds $1,500, an apportionment to his dependent parents under Public Law 86–146 (38 U.S.C. 3203(b)(3)) may not exceed $30 monthly, after 2 full calendar months of treatment or care in Public Law 86–211 cases.

(5) *Restoration of pension upon termination of treatment or care.* Where a veteran whose pension has been reduced under subparagraph (1) of this paragraph is released from treatment or care the apportionment to his wife or children will be discontinued effective the day before his release. The veteran will be awarded the full amount of pension to which he is then entitled from the date of release. If the VA Form 21–404 is not received in sufficient time to effectuate the adjustments without creating an overpayment in the apportioned award, the apportionment will be discontinued effective the date of last payment and the veteran awarded his full entitlement effective the day following the date of last payment. (The reduction in pension after 2 months is an absolute reduction as distinguished from a withholding and no lump sum is payable upon release.)

(f) *Right of election—(1) General.* A statement in writing, signed by the beneficiary (or fiduciary), will be accepted as a valid election. The election may be deferred and exercised at any future date. Action may not be taken to award pension at the new rates until receipt of an election.

(2) *Finality of election.* An election of pension under Title 38, United States Code, as amended by Public Law 86–211 is final and irrevocable after a pension check received thereunder is negotiated, thereby prohibiting a subsequent reelection of pension under Title 38, United States Code, prior to this enactment.

(3) *Exercise of right of election and its effect.* Only veterans, widows, or children where there is no widow, (or their fiduciaries) may make an election and such election controls the rights of all dependents, including children not in the veteran's or widow's custody. However in an apportioned death pension case, the election by the widow will not be permitted to deprive children not in her custody of the present rate of pension and the letter to the widow will include the information that her share will be reduced by the amount necessary to maintain such child's apportioned share at the current rate if she insists upon the election.

(4) *Minors and incompetents.* An election may be made by a fiduciary appointed by a court or, in the absence of such, one designated by a Chief Attorney, including a wife who is being paid under § 13.57 of this chapter. However, an election may not be made by a Manager or chief officer of a hospital or institution who is receiving payment on behalf of an incompetent veteran.

(5) *Effective dates.* When an election is received on or before July 1, 1960, the effective date of the new rate will be July 1, 1960. If an election is received subsequent to July 1, 1960, the new pension rate will be awarded effective the date of receipt of the election, except where death occurs prior to July 1, 1960, claim is filed within 1 year after death and the election is filed within 4 months from date of notice of award, the effective date of the new pension rate will be July 1, 1960. Claimants who were not receiving pension when VA Form 21–6799(NR) was sent as an enclosure with the pension checks mailed the latter part of February 1960 and whose entitlement includes eligibility to pension on June 30, 1960, will be given 4 months from the date of notice of their award within which to elect pension under Public Law 86–211. If an election is received within this 4-month period, pension under Public Law 86–211 may be paid from July 1, 1960. In those cases where a wife or child is alleged on the application and evidence establishing relationship or birth is received within 1 year from the date of request, pension or increased pension will be awarded effective the date of the original award. Where no election form is sent to a hospitalized incompetent veteran, and a fiduciary is appointed or the veteran is rated competent, pension may be paid from the date of hospital discharge but not prior to July 1, 1960, if an election is received within 4 months from the date of the letter informing the fiduciary or the veteran of the right of election.

(g) *Adjustment of payments by amended award on VA Form 21–553 or VA Form 21–519a—(1) Apportioned cases—(i) Veteran cases.* Where there is an apportionment of an incompetent veteran's pension under § 3.310, the increase will be awarded to the dependent or dependents only. In specially apportioned cases, the increase will be awarded to the veteran only, unless the equities indicate otherwise, in which event the pension will be reapportioned.

(ii) *Widow cases.* Where there is an apportionment of a widow's pension under the provisions of Title 38, United States Code, as amended by Public Law 86–211, the widow's share will be the monthly rate set forth in column II of the following table opposite the widow's annual income as shown in column I:

I If income is not over—	II Monthly rate of apportionment
$1,000	$45
$2,000	36
$3,000	24

Where death pension has been specially apportioned, the increase will be awarded to the widow unless the equities require a reapportionment.

(2) *Imprisoned claimants.* Where an apportionment is being made to an imprisoned veteran's wife and/or child the right to elect pension under Public Law 86–211 is vested in the veteran only. The amount may not exceed the death or disability (whichever is the lesser) rate payable under 38 U.S.C. 521 or 38 U.S.C. 541, as amended by Public Law 86–211. If the veteran is unmarried and has no child or if he has a wife and/or child but they are ineligible for an apportion-

§ 14.638 Acts subjecting recognized attorneys or agents to suspension or revocation.

The recognition of any attorney or agent will be subject to suspension or revocation, who knowingly commits or is guilty of any of the following acts, to wit: (a) Presents or prosecutes a fraudulent claim against the United States or the Veterans' Administration; (b) demands or accepts any unlawful compensation for preparing, presenting, or prosecuting any claim before the Veterans' Administration or for advice or consultation concerning such a claim; (c) with intent to defraud has in any manner deceived, misled, or threatened any claimant or prospective claimant by word, circular, letter, or advertisement; (d) who, in the presentation or prosecution of, or in connection with, any matter or business pending before said Veterans' Administration, has as his associate, or employs as his agent, subagent, or correspondent, any person who has been guilty of any of the above-mentioned acts, or who has been denied recognition, or has had his recognition suspended or revoked by the Veterans' Administration, or who himself acts as the associate, agent, subagent, or correspondent of any such person; or who is otherwise and in any manner whatever guilty of dishonest or unprofessional conduct.

§ 14.639 Rules of recognition.

No person other than an accredited representative of a recognized organization shall be recognized in the preparation, presentation, or prosecution of any claim under statutes administered by the Veterans' Administration, unless he has been recognized as an attorney or agent pursuant to the regulations in this part, except (a) that any person (who is a citizen of the United States, or a resident of the United States or of one of its possessions) may be recognized for the purpose of a particular claim upon filing with the office where such claim folder is located a proper power of attorney and a statement signed by such person and the claimant that no fee or compensation of whatsoever nature shall be charged or paid for the services rendered, and except (b) in claims for insurance benefits under a contract in which the Government admits liability on the contract, there is no issue or contest as to the designated beneficiary, and it is reasonably apparent that the attorney or agent will not charge a fee. In the first class of cases the attorney should be advised by VA Form Letter 2–16, Recognition Information to Attorneys and Individuals, regarding the requirements of being recognized in a particular claim or generally. In the latter class of cases, a paragraph substantially as follows should be incorporated in the letter acknowledging receipt of the claim:

> The evidence submitted by you in connection with the claim for insurance benefits in the instant case has been received, and an adjudication of the claim for benefits will be made as expeditiously as possible. It is understood, of course, that you are not entitled to any fee for services performed by you in connection with the preparation and presentation of this claim, inasmuch as you have not been regularly recognized to present claims before the Veterans' Administration by the Administrator of Veterans Affairs.

§ 14.640 Power of attorney.

Only a duly executed power of attorney confers upon an agent or attorney the right to prepare, present, and prosecute a claim before the Veterans' Administration. Upon receipt of a duly executed power of attorney, the agent or attorney named therein will be informed of the status of the claim and will be recognized as the sole agent for the preparation, presentation, and prosecution of the claim covered thereby so long as the power of attorney is effective.

§ 14.641 Formalities of power of attorney.

A power of attorney, in order to be recognized as good and valid, must be signed by the claimant or his guardian and be acknowledged before an officer authorized to administer oaths for general purposes or before an employee of the Veterans' Administration to whom authority to administer oaths has been delegated.

§ 14.642 Diligence or neglect on part of attorney or agent.

An agent or attorney shall be required to exercise due diligence in all claims in which he is recognized. Neglect to prosecute a claim for 6 months or failure to furnish evidence called for by the Veterans' Administration within 90 days shall be held, in default of cause shown, presumptive evidence of the abandonment of all attorneyship rights in the claim.

substantive appeal will not extend the applicable period for taking these actions.

[28 F.R. 35, Jan. 1, 1963]

§ 19.1e Who can file appeal.

A notice of disagreement and a substantive appeal may be filed by the claimant or his authorized representative, attorney or agent. If the claimant is incompetent, they may be filed by the legal guardian, or other proper fiduciary; or in the absence of one of these, by his next of kin or next friend. They shall be filed with the activity which made the decision being appealed.

[28 F.R. 35, Jan. 1, 1963]

§ 19.2 Time limit within which appeals must be filed.

(a) *Notice of disagreement*—(1) *General.* A notice of disagreement shall be filed within 1 year from the date of mailing of notification of the initial review or determination; otherwise, that determination will become final. (38 U.S.C. 4005(b))

(2) *Contested claims.* Where one claim is allowed and one denied, or the allowance of one claim would result in payment of a lesser amount to another claimant, the notice of disagreement from the person adversely affected shall be filed within 60 days from the date of mailing of notification of the review or determination. (38 U.S.C. 4005A(a))

(b) *Substantive appeal*—(1) *General.* A substantive appeal shall be filed within 60 days from the date of mailing of the statement of the case, or within the remainder of the 1-year period from the date of mailing of the notification of the review or determination being appealed, whichever is greater. (38 U.S.C. 4005d(3))

(2) *Contested claims.* A substantive appeal shall be filed within 30 days from the date of mailing of the statement of the case. (38 U.S.C. 4005A(b))

(c) *Extension of time*—(1) *General.* An extension of the 60-day period to file a substantive appeal may be granted for good cause shown. (38 U.S.C. 4005(d)(3))

(2) *Contested claims.* In granting an extension in contested claims, consideration will be given to the interests of the other parties involved. (38 U.S.C. 4005A(b))

(3) *Additional evidence filed.* The filing of additional evidence after receipt of notice of an adverse decision shall not extend the time limit for filing a notice of disagreement or substantive appeal.

(d) *Acceptance of postmark date.* A notice of disagreement or a substantive appeal postmarked prior to the expiration of the applicable time limit will be accepted as having been timely filed.

(e) *Computation of time limit.* In computing the time limit for filing a notice of disagreement or a substantive appeal, the first day of the specified period will be excluded and the last day included. Where the time limit would expire on a Saturday, Sunday, or holiday, the next succeeding workday will be included in the computation.

(f) *Adequacy or timely filing questioned.* If there is a question as to the adequacy or timely filing of a notice of disagreement or substantive appeal or if a protest is received from an adverse determination as to adequacy or timeliness, the agency of original jurisdiction will forward the case to the Board of Veterans Appeals for a final determination.

[28 F.R. 35, Jan. 1, 1963]

§ 19.3 Termination of appeals.

(a) *Closing; failure to respond to statement of case.* The agency of original jurisdiction may close a case without notice to a claimant for failure to respond to a statement of the case within the period or periods allowed. (38 U.S.C. 4005(d)(3)) However, if response is subsequently received within the 1-year appeal period (except for contested claims), the appeal will be considered to be reactivated.

(b) *Withdrawal*—(1) *Notice of disagreement.* A notice of disagreement may be withdrawn at any time before a timely substantive appeal is filed or expiration of the time allowed for such action.

(2) *Substantive appeal.* A substantive appeal may be withdrawn at any time before the Board enters a decision, except where withdrawal would be detrimental to the appellant or the Government.

(3) *Who may withdraw.* Withdrawal may be by the claimant or his authorized representative (person or organization) except that a representative may not withdraw either a notice of disagreement or substantive appeal filed by the claimant personally.

(c) *Dismissal.* Appeals which are insufficient in allegations of error of fact

NOTIFICATION OF APPELLATE RIGHTS

§ 19.109 Rule 9; notice of right to appeal.

(a) *General.* The claimant and his representative, if any, will be informed of the right to initiate an appeal by the filing of a notice of disagreement in writing, and the time limit within which such notice must be filed. This information will be included in each notification of a determination of entitlement or nonentitlement to Veterans Administration benefits by the agency of original jurisdiction.

(b) *Administrative appeals.* In notifying a claimant of an administrative appeal, see Rule 25 (§ 19.125).

(c) *Contested claims.* In notifying a contesting claimant of appellate rights, see Rule 17 (§ 19.117).

§ 19.110 Rule 10; failure to receive notice.

While it is contemplated that the agency of original jurisdiction will give proper notice of the right to appeal and the time limit, failure to notify the claimant of his right to such appellate review or of the time limit applicable to a notice of disagreement or substantive appeal will not extend the applicable period for taking this action.

APPLICATION FOR REVIEW ON APPEAL

§ 19.111 Rule 11; who can file an appeal.

(a) *Claimant, authorized representative, attorney or agent.* A notice of disagreement and a substantive appeal may be filed by a claimant personally or by an accredited representaitve of a recognized service organization, attorney or agent, provided a proper power of attorney has been filed. Where contesting claimants are involved, see Rule 17 (§ 19.117).

(b) *Incompetent claimant.* If the claimant is incompetent, a notice of disagreement and a substantive appeal may be filed by the legal guardian or other proper fiduciary; or, in the absence of one of these, by the next of kin or next friend.

(c) *Attorneys and agents for fee.* An attorney or agent may file an appeal for a fee in any claim wherein a fee has been denied or he is not satisfied with the determination as to the amount of the fee.

§ 19.112 Rule 12; what constitutes an appeal.

An appeal consists of a timely filed notice of disagreement in writing and, after a statement of the case has been furnished, a timely filed substantive appeal.

§ 19.113 Rule 13; notice of disagreement.

A written communication from a claimant or his representative expressing dissatisfaction or disagreement with an adjudicative determination of an agency of original jurisdiction will constitute a notice of disagreement. The notice should be in terms which can be reasonably construed as evidencing a desire for review of that determination. It need not be couched in specific language. Specific allegations of error of fact or law are not required.

§ 19.114 Rule 14; action by agency of original jurisdiction on notice of disagreement.

(a) *Preliminary action.* When a notice of disagreement is timely initiated, the agency of original jurisdiction may take appropriate development and review action, not inconsistent with Title 38, United States Code, and the applicable Veterans Administration Regulations in Title 38, Code of Federal Regulations.

(b) *Statement of the case.* If no preliminary action is required or when it is completed, the agency of original jurisdiction will prepare a statement of the case pursuant to Rule 15 (§ 19.115), if the issue or issues are not resolved by granting the benefit sought in the appeal, or through withdrawal of the notice of disagreement.

§ 19.115 Rule 15; statement of the case.

(a) *Purpose.* The purpose of the statement of the case is to give the claimant "notice" of the facts pertinent to the issue or issues and the action taken, sufficient to permit proper exercise of statutory appeal rights.

(b) *Contents.* A statement of the case shall consist of:

(1) A summary of the evidence in the case pertinent to the issue or issues with which disagreement has been expressed;

(2) A citation or discussion of the pertinent law, Veterans Administration Regulations or other criteria, and, where