



This document is scheduled to be published in the Federal Register on 09/05/2014 and available online at <http://federalregister.gov/a/2014-21139>, and on [FDsys.gov](http://FDsys.gov)

DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Parts 3, 14, and 20

RIN 2900-AN91

Substitution in Case of Death of Claimant

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document adopts as a final rule the Department of Veterans Affairs' (VA) proposal to amend its regulations on adjudication of VA benefit claims, representation of claimants, and the Board of Veterans' Appeals rules of practice. Specifically, these amendments implement section 212 of the Veterans' Benefits Improvement Act of 2008, which allows an eligible survivor to substitute for a deceased claimant in the decedent's pending claim or appeal of a decision on a claim. This final rule addresses eligibility for substitution and the procedures applicable to requests to substitute in a claim that is pending before a VA agency of original jurisdiction or an appeal that is pending before the Board of Veterans' Appeals.

DATES: Effective Date: This final rule is effective [insert date 30 days after date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Ms. Damali Mason, Pension and Fiduciary Service (21PF), Veterans Benefits Administration, Department of Veterans

Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 632-8852. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: Section 212 of the Veterans' Benefits

Improvement Act of 2008, Public Law 110-389 (the Act), added section 5121A to title 38, United States Code, which authorizes certain persons to substitute for a deceased claimant in a claim or appeal that is pending before VA. If a claimant dies while a claim for VA benefits or an appeal of a decision on a VA benefits claim is pending, section 5121A permits a person who would be eligible for accrued benefits under 38 U.S.C. 5121(a) to complete the decedent's claim or appeal. In a proposed rule published in the Federal Register on February 15, 2011, VA proposed to implement section 5121A by adding a new 38 CFR 3.1010 regarding adjudication of substitution matters. 76 FR 8666, 8672, Feb. 15, 2011. We also proposed to amend 38 CFR part 14 to address the representation of substitutes and 38 CFR part 20 to address substitution in appeals pending before the Board of Veterans' Appeals (Board). Id. at 8673.

We provided a 60-day comment period for the proposed rule and invited interested persons to submit comments on or before April 18, 2011. VA received no comments during the comment period. However, following the close of the comment period, an organization requested additional time to submit comments. On July 5, 2011, VA published notice that it would extend the comment period for the proposed rule for an additional 30 days to August 4, 2011. See 76 FR 39062, July 5, 2011. During the extended comment period, VA received comments from one individual and four organizations.

Several commenters characterized proposed § 3.1010(c)(1), which would have required a request to substitute to include, at a minimum, the word “substitute” or “substitution,” as overly formalistic. We agree and have changed the provision. During our initial implementation of section 5121A, which was based upon the statutory provisions, we encountered situations where an eligible survivor who did not know the applicable substitution principles requested that VA continue the adjudication of a pending claim. In each situation, the survivor’s request was sufficient to identify his or her intent to continue the prosecution of the pending claim or appeal. Accordingly, we modified § 3.1010(c)(1) to instead require that a substitution request “indicate intent to substitute” for a deceased claimant in a pending claim or appeal. This change should address the commenters’ concerns and allow VA to identify substitution requests that require a decision.

Several commenters complained that requiring a person who seeks to substitute in a claim or appeal to provide certain information, such as the decedent’s VA claim number, is overly burdensome and contrary to VA’s claimant-friendly system. We agree that requiring a survivor to provide the decedent’s VA claim or appeal number might be burdensome to the extent that the survivor does not have the information and must request it from VA before submitting a substitution request.

VA received over one million claims in each of the last five years. For this reason, VA requires basic identifying information to match a substitution request with a pending claim or appeal. We recognize that a deceased claimant’s Social Security number may be more accessible to survivors than the decedent’s VA claim or appeal number. Accordingly, we revised § 3.1010(c)(1) to clarify that a person seeking

substitution may provide the decedent's Social Security number in lieu of a claim or appeal number. We also revised § 3.1010(c)(1) to replace the proposed phrase "the applicable claim number or appeal number" with the more specific phrase "the deceased claimant's claim number, Social Security number, or appeal number." This change clarifies that it is the deceased claimant's claim, Social Security, or appeal number that is required. These changes make the regulation claimant-friendly while balancing VA's need to identify the pending claim or appeal in which the survivor seeks to substitute with the substitute's need for simple procedures.

Several commenters recommended that, in light of the time elapsed between the effective date of section 5121A, October 10, 2008, and the promulgation of these regulations, VA consider timely any request to substitute for a claimant who died between October 10, 2008, and the effective date of this regulation if filed within one year after the effective date of the regulation. The commenters suggest this application of the rule is necessary to account for delays in completing the rulemaking proceeding. However, section 5121A(a)(1) itself authorizes substitution only if a substitute files a substitution request "not later than one year after the date of the death of such claimant," and VA has been processing substitution requests in accordance with section 5121A since the effective date of the statute. Accordingly, we will not make any changes based upon these comments.

Proposed § 3.1010(g)(1) limited substitution to "pending" claims and appeals. Under proposed paragraph (g)(1)(i), a claim would not be pending for substitution purposes if VA decided the claim before the claimant died and the claimant died before filing a notice of disagreement (NOD). Several commenters suggested that proposed

paragraph (g)(1)(i) would erroneously exclude claims that substitutes might wish to appeal to the Board. We interpret the comments as suggesting that VA authorize substitutes to appeal an agency of original jurisdiction decision on a claim if the claimant dies before he or she has an opportunity to file an NOD and the one-year NOD filing period has not expired. The commenters further asserted that limiting a substitute's right to appeal is inconsistent with the procedures for filing an NOD and for filing an appeal to the Court of Appeals for Veterans Claims (Veterans Court). We agree that Congress did not intend to restrict a substitute's ability to appeal a decision on the decedent's claim.

Congress did not explicitly address NODs with respect to substitution in section 5121A. Nevertheless, it is clear that Congress intended that section 5121A would liberalize survivors' ability to continue claims for the purpose of processing them to completion. In the Joint Explanatory Statement on the predecessor bill, S. 3023, as amended, 154 Cong. Rec. S10445, S10447 (2008), the Conference Committee explained, "with a claim or appeal pending adjudication at the time of death, the surviving spouse or other beneficiary is unable to take up the claim where it is in the process and must refile the claim separately as if submitting a new claim." To remedy this, Congress allowed survivors "to substitute for the deceased claimant rather than being forced to re-file and restart the claim or appeal." Id.

After considering the comments and the general congressional intent that proceedings before VA "should be as informal and nonadversarial as possible," Walters v. Nat'l. Ass'n. of Radiation Survivors, 473 U.S. 305, 323 (1985), we revised § 3.1010(g)(1) to allow a substitute to appeal a decision on a claim during the one-year

substitution period prescribed in section 5121A(a)(1) if the decedent had an actionable right of appeal on the date of death.

We revised § 3.1010(g)(1)(i) to provide that, for purposes of substitution, a claim is also considered pending if, at the time of the claimant's death, the agency of original jurisdiction has decided the claim but the claimant has not filed an NOD and the 1-year period for filing an NOD has not expired. This revision will permit a substitute to file an NOD in the same manner as a live claimant. It is also consistent with the Veterans Court's decision in Taylor v. Nicholson, 21 Vet. App. 126 (2007). In Taylor, the Veterans Court reversed a Board decision denying a survivor's claim for accrued benefits that was based on a finding that the deceased veteran's compensation claim was not pending on the date of his death. 21 Vet. App. at 128-29. The Veterans Court held that the veteran's compensation claim was pending on the date of his death because nearly 11 months remained in the period in which he could have filed an NOD. Id. For purposes of accrued benefits, the court determined that a claim remains pending until the period for filing a notice of disagreement has expired. Id. at 129. Although the Veterans Court decided Taylor before Congress enacted section 5121A, given the linkage between sections 5121 and 5121A, we have determined that it is reasonable to consistently prescribe when a claim is "pending" for purposes of both substitution and accrued benefits.

Additionally, in Breedlove v. Shinseki, 24 Vet. App. 7, 20 (2010), the Veterans Court held that, if requested, the Veterans Court will consider substitution requests in its pending cases. Therefore, in § 3.1010(g)(1)(ii), we have revised the last sentence to clarify that substitution before VA is not available once the Board issues a final decision,

but substitution for purposes of filing an appeal with the Veterans Court is not precluded. Our proposed statement could have been interpreted as prohibiting substitution in appeals to or pending before the Veterans Court, which would conflict with the Veterans Court's holding in Breedlove. 24 Vet. App. at 20. Furthermore, we do not have jurisdiction to regulate matters pending before the Veterans Court.

One commenter suggested treating substitution requests in the same manner as motions for reconsideration of a Board decision, which toll the time available to appeal a Board decision to the Veterans Court if filed during the appeal period. However, the commenter's suggestion is beyond the scope of this rulemaking because VA cannot prescribe a method for tolling the appeal period in 38 U.S.C. 7266(a) in its regulations. See Breedlove, 24 Vet. App. at 13 (noting that VA's prescription as to how the Veterans Court is to allow and implement substitution would violate the separation of powers doctrine). The Veterans Court's case law, not VA regulations, established the rule that a timely motion for reconsideration tolls the appeal period. Therefore, VA cannot implement the commenter's suggestion.

Proposed § 3.1010(e) regarding decisions on substitution requests provided that the "agency of original jurisdiction will decide in the first instance all requests to substitute, including any request to substitute in an appeal pending before the Board of Veterans' Appeals." Several commenters suggested that the Board should decide a substitution request if an appeal is pending before the Board at the time of a claimant's death. This suggestion apparently arose out of concern that requiring the agency of original jurisdiction where the appeal originated to decide a request to substitute would cause unnecessary delay and confuse eligible survivors, who may not know at which

agency of original jurisdiction the appeal originated. One commenter recommended that a substitution request should be accepted at the agency of original jurisdiction, the Board, or the court having jurisdiction. We do not implement the commenters' suggestions or make any changes based upon the comments.

As explained in the proposed rule, allowing the Board to decide a substitution request would deprive the survivor of the right to the "one review on appeal" mandated by 38 U.S.C. 7104(a). 76 FR at 8667-8668, Feb. 15, 2011. Under the rule as proposed, if the agency of original jurisdiction denies a substitution request, the requestor may appeal that denial to the Board. Although the commenters assert that a substitution request is not a "claim," the right to appeal applies to "[a]ll questions in a matter which under [38 U.S.C.] 511(a) . . . is subject to decision by the Secretary." 38 U.S.C. 7104(a). Accordingly, absent authority from Congress, a request to substitute in a decedent's claim or appeal must be decided in the first instance by the VA agency of original jurisdiction. Consistent with section 7104(a), if the person requesting to substitute for the deceased claimant disagrees with the agency of original jurisdiction's decision on a substitution request, he or she may appeal the decision to the Board.

When the Board receives notice that an appellant has died, it will dismiss the appeal without prejudice and return the case to the agency of original jurisdiction. Thus, regardless of whether VA is working with an electronic or paper claims file, by the time a survivor has submitted a substitution request, the claims file will generally be at the agency of original jurisdiction. By requiring the substitution request to be filed with the agency of original jurisdiction, VA reduces the number of mailrooms and employees required to get the request to the organization that must act upon it. If a survivor



inadvertently submits a substitution request to the Board, the Board will treat it as it does other misdirected mail and forward it to the agency of original jurisdiction for action. For purposes of determining whether a substitution request was timely filed in such cases, VA will treat the date that the Board received the request as the date the agency of original jurisdiction received it, and, as a result, no disadvantage accrues to the potential substitute.

We do not make any changes based upon the commenters' suggestion that VA permit filing of substitution requests at the Veterans Court because section 5121A does not govern substitution in appeals that are pending before the court. Breedlove, 24 Vet. App. at 14.

Several commenters expressed concern that having the Board dismiss an appeal without prejudice while a substitution request is pending before an agency of original jurisdiction would cause significant delay. We disagree. Under 38 CFR 20.900(a)(2) and 20.1302(a), a case returned to the Board following an agency of original jurisdiction decision allowing substitution or pursuant to an appeal of a denial of a substitution request assumes the same place on the Board's docket as the appeal that was pending at the time of the deceased claimant's death. The regulation will protect eligible survivors from significant delay by authorizing the substitute claimant to continue the decedent's appeal from where the decedent left it. Therefore, VA makes no change based on these comments.

In § 3.1010(e)(3)(ii) regarding joint class representatives, we proposed that "only one person of the joint class may be a substitute at any one time." One commenter suggested that limiting the number of substitutes and giving all substitution rights to the

first eligible person to file a substitution request may be unconstitutional if there are multiple individuals with equal substitution eligibility. Specifically, the commenter asserted that the substitute may not represent the interests of all eligible survivors and that, if the substitute dies later than one year after the deceased claimant died but before the substitute completes the claims process, the remaining eligible survivors would have no remedy. The commenter recommended that VA allow all of the decedent's eligible survivors to apply and create a class of substitutes from which the class would select a representative. As explained below, we will not implement the commenter's recommendation that we allow a class of substitutes.

In a House Committee on Veterans' Affairs report on a bill that preceded the enactment of Public Law 110-389, the Committee was clear that "VA should interpret this section so that only one qualified dependent at a time is deemed eligible to apply as the substitute claimant." H.R. REP. NO. 110-789, at 17 (2008) (commenting on H.R. 5892, 110th Cong.). Later, the Joint Explanatory Statement on S. 3023, as amended, reiterated that section 111 of H.R. 5892 "further stipulates that only one person may be treated as the [substitute] claimant under this section." Joint Explanatory Statement on Amendment to Senate Bill, S. 3023, as Amended, 154 Cong. Rec. S10445, S10447 (2008). Furthermore, the Compromise Agreement stipulated that "the individual who would be eligible to receive accrued benefits . . . must file a request to be substituted as the claimant." Id.

Nonetheless, we agree with the commenter that, if the substitute dies later than one year after the deceased claimant died but before the substitute completes the claims process, the remaining eligible survivors would have no remedy. We note that

Congress did not address the issue raised by the commenter. Nevertheless, we reemphasize it is clear that Congress intended that section 5121A would liberalize survivors' ability to continue claims for the purpose of processing them to completion. Although Congress did not explicitly address successive substitution in section 5121A, we recognize that Congress implicitly contemplated allowing successive substitution and that the "1 year after the date of the death of the claimant" limitation to file a request for substitution was intended to apply to initial substitution and not to successive substitution. Accordingly, and to address the commenter's assertion, we revised § 3.1010(g)(5) to prescribe that upon the death of an eligible substitute another member of the same joint class or a member of the next preferred subordinate category listed in 38 CFR 3.1000(a)(1) through (5) may substitute for the deceased substitute but only if the person requesting the successive substitution files a request to substitute no later than one year after the date of the substitute's death (not the date of the claimant's death). Additionally, we interpret the 1-year limit that Congress put on filing a request to substitute for an original claimant to mean that Congress did not want the ability to substitute to continue indefinitely and that 1 year is a reasonable time period to allow an eligible survivor to apply for substitution. As a result, we adopted the 1-year limit that Congress assigned for initial substitution in section 5121A and assigned a 1-year limit to successive substitution in § 3.1010(g)(5). Therefore, we encourage the person requesting to substitute for a deceased substitute to expeditiously apply for substitution within the requisite 1-year period following the substitute's death (not the date of the claimant's death), in order to preserve their ability to become a successive substitute.

Several commenters suggested that proposed § 3.1010(d), regarding evidence of eligibility for substitution, should incorporate language stating that VA will only require such evidence when it is not already in VA records and that VA will inform the person seeking substitution if it requires additional evidence. The commenters believe that requiring the substitute to resubmit information that is already in VA records is a duplication of effort and a waste of time. VA disagrees with these comments.

A person requesting substitution may not know what evidence is in the deceased claimant's file. Claim files can be quite voluminous and may not provide family information that is current or accurate at the time of the deceased claimant's death. It is possible that the deceased claimant divorced or remarried or had a child during the period between the initiation of a claim or appeal and his or her death. Another possibility is that the deceased claimant's child has changed his or her name for personal or marital reasons or had to change his or her Social Security number in response to an identity theft. Finally, if the person requesting substitution was not the deceased claimant's dependent for purposes of VA benefits prior to the claimant's death, VA probably would not have the information it needs in the decedent's claim file.

Requiring a person requesting substitution to provide evidence of eligibility to substitute is more likely to provide accurate, up-to-date evidence of the requestor's status, which should allow VA to promptly process the request. Moreover, the statute authorizing substitution requires "[a]ny person seeking to be substituted for [a deceased] claimant [to] present evidence of the right to claim such status." 38 U.S.C. 5121A(a)(2). If an eligible survivor's substitution request requires no further proof, VA may grant substitution without further inquiry. To clarify the meaning of

evidence of eligibility, VA has modified § 3.1010(d) by adding a reference to § 3.1000(a)(1) through (5). VA makes no other change based on these comments.

One commenter suggested that VA address the potential situation of an appellant whose appeal is pending before the Board dying and the Board issuing a decision after the appellant's death but before the Board learns that the appellant has died. The commenter recommended that, if the Board learns the appellant died before the Board decided the appeal and there is a substitution-eligible survivor, then the Board should reissue its decision as of the date of the deceased claimant's death to make Board substitution procedures consistent with the procedures of the Veterans Court. We will not implement the commenter's recommendation.

The recommendation would not work under this final rule because the Board's retroactive reissuance of a decision that is effective on the date of the claimant's death would mean that there is no appeal pending before the Board, such that substitution would not be available. It would be more advantageous for the decedent's survivor to have the Board vacate its post-death decision, which would mean that the appeal was pending before the Board when the claimant died and an eligible survivor could request substitution. Furthermore, upon substitution, the substitute claimant may submit additional evidence in support of the pending appeal, which could mean the difference between the Board denying the appeal and the Board allowing of the appeal. The Board's retroactive reissuance of its decision would eliminate the substitute's opportunity to submit additional evidence. For these reasons, we make no changes based on the comment.

One commenter expressed concern that, whenever an eligible survivor claims accrued benefits, survivors pension, or dependency and indemnity compensation, and VA concludes that the eligible survivor's claim is also a request to substitute, VA would provide a substitution waiver form to the survivor or ask the survivor whether he or she wants to waive the right to substitute. VA has no intention of encouraging waiver of substitution rights. Rather § 3.1010(c)(2) merely permits an eligible survivor to exercise a preference not to be considered a substitute while VA considers the survivor's claim for accrued benefits, survivors pension, or dependency and indemnity compensation. In order to waive substitution rights that VA already granted, a substitute would have to provide a written waiver to VA. Thus, like renouncement of benefits under § 3.106(a), waiver of the right to substitute requires a written waiver signed by the eligible survivor. We added language consistent with § 3.106(a) in § 3.1010(c)(2) to clarify that, for purposes of substitution, a waiver of substitution must be in writing and signed by the eligible survivor.

Proposed § 3.1010(g)(5) could have been interpreted as saying that the Board has jurisdiction over initial claims. Therefore, we have revised § 3.1010(g)(5) to clarify the potential procedural postures of claims and appeals.

One commenter noted that the proposed amendments to 38 CFR 20.900(a) do not specifically address appeals that were advanced on the Board's docket under § 20.900(c). Specifically, the commenter asked whether the substitute would be entitled to the deceased appellant's advanced docket placement. This commenter then proposed that a substitute should be entitled to the deceased appellant's advanced placement if the advancement was due to administrative delay or error but not if the

advancement was for reasons of age or illness. VA modified § 20.900(a)(2) to address this comment.

As explained in proposed § 20.900(a)(2), an appellant who is an eligible substitute or is appealing the denial of a substitution request will receive the benefit of the docket number held by the decedent upon his or her death. Advancement on the Board's docket is a separate motion procedure providing for earlier consideration and determination of a case where sufficient cause is shown. 38 U.S.C. 7107(a)(2); 38 CFR 20.900(c) (stating that an advancement on the docket motion will be granted in certain circumstances, such as if the appellant is seriously ill, under severe financial hardship, or for other sufficient cause shown, such as advanced age or administrative error resulting in significant delay in docketing the case). A motion to advance a case on the Board's docket may be made by a party to the case, his or her representative, or by the Board's Chairman or Vice Chairman. 38 CFR 20.900(c). Advancing a case on the docket does not provide an appellant with a new docket number; rather it allows that case to be considered ahead of other cases that have been assigned an earlier docket number.

Since the substitute essentially steps into the shoes of a deceased appellant in order to process a claim to completion, VA is revising proposed § 20.900(a)(2) to provide a substitute with the advantage of any advanced docket placement that the decedent had prior to his or her death. However, absent such advancement, the substitute would need to file a motion to have the case advanced on the docket based on the substitute's own circumstances. For example, if a substitute is age 75 or older, he or she would be able to file a motion for advancement on the docket based on age.

We modified § 20.900(a)(2) to clarify that a substitute appellant is entitled to the deceased appellant's advanced docket placement. We also made minor modifications to § 20.900(c)(2) to ensure it is clear that a substitute appellant may file a motion for advancement on the Board's docket and update the name of the office where appellants must file such motions for advancement.

We made nonsubstantive changes to § 20.900(a)(1) to make it more closely track paragraph (a)(2). In § 3.1010(a), we removed the incorrect reference to "of this part" and an erroneous period placed in the citation to 38 CFR 3.1000(a)(1). We also added the statutory reference at the end of that section. In § 20.1304(b)(1), we revised the address to reflect the correct Board office and mail code.

Finally, we updated references to "death pension" to read "survivors pension." This change is intended to make the references consistent with the law governing pension for survivors, e.g., 38 U.S.C. 1541, Surviving spouses of veterans of a period of war, and to better communicate to stakeholders the purpose of the program.

Based on the rationale set forth in the proposed rule and this document, VA adopts the provisions of the proposed rule as a final rule with the changes discussed above.

### Paperwork Reduction Act

Although this document contains provisions constituting collections of information, at 38 CFR 3.1010(b) and (c) and 14.631(g), under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), no new or proposed revised collections of information are associated with this final rule. The information collection requirements for §§ 3.1010(b) and (c) and 14.631(g) are currently approved by the



Office of Management and Budget (OMB) and have been assigned OMB control numbers 2900-0740 (VA Form 21-0847, Request for Substitution of Claimant Upon Death of Claimant) and 2900-0321 (VA Form 21-22, Appointment of Veterans Service Organization as Claimant's Representative, and VA Form 21-22a, Appointment of Individual as Claimant's Representative). We are adding a parenthetical statement after § 3.1010 so that the control number is displayed for the collection.

### Regulatory Flexibility Act

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

### Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory

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

The economic, interagency, budgetary, legal, and policy implications of this final rule have been examined, and it has been determined that it is not a significant regulatory action under Executive Order 12886. VA’s impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA’s Web site at <http://www1.va.gov/orpm/>, by following the link for “VA Regulations Published.”

### Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the

aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any 1 year. This final rule will have no such effect on State, local, and tribal governments, or on the private sector.

#### Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.103, Life Insurance for Veterans; 64.104, Pension for Non-Service-Connected Disability for Veterans; 64.105, Pension to Veterans' Surviving Spouses, and Children; 64.109, Veterans Compensation for Service-Connected Disability; 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death; and 64.115, Veterans Information and Assistance.

#### Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit this document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Jose D. Riojas, Chief of Staff, Department of Veterans Affairs, approved this document on August 29, 2014, for publication.

List of Subjects

38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Pensions, Veterans.

38 CFR Part 14

Administrative practice and procedure, Claims, Courts, Foreign relations, General Counsel, Government employees, Lawyers, Legal services, Organization and functions (Government agencies), Reporting and recordkeeping requirements, Surety bonds, Trusts and trustees, Veterans.

38 CFR Part 20

Administrative practice and procedure, Claims, Veterans.

Dated: September 2, 2014

---

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

For the reasons set forth in the preamble, VA amends 38 CFR parts 3, 14, and 20 as follows:

## PART 3—ADJUDICATION

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

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

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

2. Add § 3.1010 to read as follows:

#### § 3.1010 Substitution under 38 U.S.C. 5121A following death of a claimant.

(a) Eligibility. If a claimant dies on or after October 10, 2008, a person eligible for accrued benefits under § 3.1000(a) listed in 38 CFR 3.1000(a)(1) through (5) may, in priority order, request to substitute for the deceased claimant in a claim for periodic monetary benefits (other than insurance and servicemembers' indemnity) under laws administered by the Secretary, or an appeal of a decision with respect to such a claim, that was pending before the agency of original jurisdiction or the Board of Veterans' Appeals when the claimant died. Upon VA's grant of a request to substitute, the substitute may continue the claim or appeal on behalf of the deceased claimant for purposes of processing the claim or appeal to completion. Any benefits ultimately awarded are payable to the substitute and other members of a joint class, if any, in equal shares.

(b) Time and place for filing a request. A person may not substitute for a deceased claimant under this section unless the person files a request to substitute with the agency of original jurisdiction no later than one year after the claimant's death.

(c) Request format. (1) A request to substitute must be submitted in writing. At a minimum, a request to substitute must indicate intent to substitute; include the deceased claimant's claim number, Social Security number, or appeal number; and include the names of the deceased claimant and the person requesting to substitute.

(2) In lieu of a specific request to substitute, a claim for accrued benefits, survivors pension, or dependency and indemnity compensation by an eligible person listed in § 3.1000(a)(1) through (5) is deemed to include a request to substitute if a claim for periodic monetary benefits (other than insurance and servicemembers' indemnity) under laws administered by the Secretary, or an appeal of a decision with respect to such a claim, was pending before the agency of original jurisdiction or the Board of Veterans' Appeals when the claimant died. A claimant for accrued benefits, survivors pension, or dependency and indemnity compensation may waive the right to substitute in writing over the claimant's signature.

(d) Evidence of eligibility. A person filing a request to substitute must provide evidence of eligibility to substitute. Evidence of eligibility to substitute means evidence demonstrating that the person is among those listed in the categories of eligible persons in § 3.1000(a)(1) through (5) and first in priority order. If a person's request to substitute does not include evidence of eligibility when it is originally submitted and the person may be an eligible person, the Secretary will notify the person—

(1) Of the evidence of eligibility required to complete the request to substitute;

(2) That VA will take no further action on the request to substitute unless VA receives the evidence of eligibility; and

(3) That VA must receive the evidence of eligibility no later than 60 days after the date of notification or one year after the claimant's death, whichever is later, or VA will deny the request to substitute.

(e) Decisions on substitution requests. Subject to the provisions of § 20.1302 of this chapter, the agency of original jurisdiction will decide in the first instance all requests to substitute, including any request to substitute in an appeal pending before the Board of Veterans' Appeals.

(1) Notification. The agency of original jurisdiction will provide written notification of the granting or denial of a request to substitute to the person who filed the request, together with notice in accordance with § 3.103(b)(1).

(2) Appeals. The denial of a request to substitute may be appealed to the Board of Veterans' Appeals pursuant to 38 U.S.C. 7104(a) and 7105.

(3) Joint class representative. (i) A joint class means a group of two or more persons eligible to substitute under the same priority group under § 3.1000(a)(1) through (a)(5), e.g., two or more surviving children.

(ii) In the case of a joint class of potential substitutes, only one person of the joint class may be a substitute at any one time. The first eligible person in the joint class to file a request to substitute will be the substitute representing the joint class.

(f) Adjudications involving a substitute. The following provisions apply with respect to a claim or appeal in which a survivor has been substituted for the deceased claimant:

(1) Notice under § 3.159. VA will send notice under § 3.159(b), “Department of Veterans Affairs assistance in developing claims,” to the substitute only if the required notice was not sent to the deceased claimant or if the notice sent to the deceased claimant was inadequate.

(2) Expansion of the claim not permitted. A substitute may not add an issue to or expand the claim. However, a substitute may raise new theories of entitlement in support of the claim.

(3) Submission of evidence and other rights. A substitute has the same rights regarding hearings, representation, appeals, and the submission of evidence as would have applied to the claimant had the claimant not died. However, rights that may have applied to the claimant prior to death but which cannot practically apply to a substitute, such as the right to a medical examination, are not available to the substitute. The substitute must complete any action required by law or regulation within the time period remaining for the claimant to take such action on the date of his or her death. The time remaining to take such action will start to run on the date of the mailing of the decision granting the substitution request.

(4) Board of Veterans’ Appeals procedures. The rules and procedures governing appeals involving substitutes before the Board of Veterans’ Appeals are found in parts 19 and 20 of this chapter.

(g) Limitations on substitution. The following limitations apply with respect to substitution:

(1) A claim or appeal must be pending. (i) A claim is considered to be pending if the claimant had filed the claim with an agency of original jurisdiction but dies before the



agency of original jurisdiction makes a decision on the claim. A claim is also considered to be pending if, at the time of the claimant's death, the agency of original jurisdiction has made a decision on the claim, but the claimant has not filed a notice of disagreement, and the period allowed by law for filing a notice of disagreement has not expired.

(ii) An appeal is considered to be pending if a claimant filed a notice of disagreement in response to a notification from an agency of original jurisdiction of its decision on a claim, but dies before the Board of Veterans' Appeals issues a final decision on the appeal. If the Board issued a final decision on an appeal prior to the claimant's death, the appeal is not pending before VA for purposes of this section, even if the 120-day period for appealing the Board's decision to the Court of Appeals for Veterans Claims has not yet expired.

(2) Benefits awarded. Any benefits ultimately awarded are limited to any past-due benefits for the time period between the effective date of the award and what would have been the effective date of discontinuance of the award as a result of the claimant's death.

(3) Benefits for last sickness and burial only. When substitution cannot be established under any of the categories listed in § 3.1000(a)(1) through (a)(4), only so much of any benefits ultimately awarded may be paid as may be necessary to reimburse the person who bore the expense of last sickness and burial. No part of any benefits ultimately awarded shall be used to reimburse any political subdivision of the United States for expenses incurred in the last sickness or burial of any claimant.

(4) Substitution by subordinate members prohibited. Failure to timely file a request to substitute, or a waiver of the right to request substitution, by a person of a preferred category of eligible person will not serve to vest the right to request substitution in a person in a lower category or a person who bore the expense of last sickness and burial; neither will such failure or waiver by a person or persons in a joint class serve to increase the amount payable to other persons in the class.

(5) Death of a substitute. If a substitute dies while a claim or appeal is pending before an agency of original jurisdiction, or an appeal of a decision on a claim is pending before the Board, another member of the same joint class or a member of the next preferred subordinate category listed in § 3.1000(a)(1) through (5) may substitute for the deceased substitute but only if the person requesting the successive substitution files a request to substitute no later than one year after the date of the substitute's death (not the date of the claimant's death).

(Authority: 38 U.S.C. 5121, 5121A)

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900-0740)

#### PART 14—LEGAL SERVICES, GENERAL COUNSEL, AND MISCELLANEOUS CLAIMS

3. The authority citation for part 14 continues to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 2671-2680; 38 U.S.C. 501(a), 512, 515, 5502, 5901-5905; 28 CFR part 14, appendix to part 14, unless otherwise noted.

4. Amend § 14.630 by adding paragraph (e) and revising the authority citation at the end of the section to read as follows:

§ 14.630. Authorization for a particular claim.

\* \* \* \* \*

(e) With respect to the limitation in paragraph (b) of this section, a person who had been authorized under paragraph (a) of this section to represent a claimant who later dies and is replaced by a substitute pursuant to 38 CFR 3.1010 for purposes of processing the claim to completion will be permitted to represent the substitute if the procedures of § 14.631(g) are followed.

(Authority: 38 U.S.C. 501(a), 5121A, 5903)

5. Amend § 14.631 by adding paragraph (g) and revising the authority citation at the end of the section to read as follows:

§ 14.631. Powers of attorney; disclosure of claimant information.

\* \* \* \* \*

(g) If a request to substitute is granted pursuant to 38 CFR 3.1010, then a new VA Form 21–22, “Appointment of Veterans Service Organization as Claimant's Representative,” or VA Form 21–22a, “Appointment of Individual as Claimant's Representative,” under paragraph (a) of this section is required in order to represent the substitute before VA. If the substitute desires representation on a one-time basis pursuant to § 14.630(a), a statement signed by the person providing representation and

the substitute that no compensation will be charged or paid for the services is also required.

(Authority: 38 U.S.C. 501(a), 5121A, 5902, 5903, 5904)

\* \* \* \* \*

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

6. The authority citation for part 20 continues to read as follows:

Authority: 38 U.S.C. 501(a) and as noted in specific sections.

### Subpart J—Action by the Board

7. Amend § 20.900 by:

- a. Revising paragraph (a).
- b. Revising paragraph (c)(2).
- c. Revising the authority citation at the end of the section.

The revisions read as follows:

#### § 20.900 Rule 900. Order of consideration of appeals.

(a) Docketing of appeals. Applications for review on appeal are docketed in the order in which they are received.

(1) A case returned to the Board following action pursuant to a remand assumes its original place on the docket.

(2) A case returned to the Board following the grant of a substitution request or pursuant to an appeal of a denial of a substitution request assumes the same place on the docket held by the deceased appellant at the time of his or her death. Pursuant to paragraph (c) of this section, if the deceased appellant's case was advanced on the docket prior to his or her death, the substitute will receive the benefit of the advanced placement.

\* \* \* \* \*

(c) \* \* \*

(2) Requirements for motions. Motions for advancement on the docket must be in writing and must identify the specific reason(s) why advancement on the docket is sought, the name of the veteran, the name of the appellant if other than the veteran (e.g., a veteran's survivor, a guardian, a substitute appellant, or a fiduciary appointed to receive VA benefits on an individual's behalf), and the applicable Department of Veterans Affairs file number. The motion must be filed with: Director, Office of Management, Planning and Analysis (014), Board of Veterans' Appeals, 810 Vermont Avenue, NW., Washington, DC 20420.

\* \* \* \* \*

(Authority: 38 U.S.C. 5121A, 7107; Pub. L. 103-446, § 302)

Subpart L—Finality

8. Revise § 20.1106 to read as follows:

§ 20.1106 Rule 1106. Claim for death benefits by survivor—prior unfavorable decisions during veteran's lifetime.

Except with respect to benefits under the provisions of 38 U.S.C. 1311(a)(2) and 1318, and certain cases involving individuals whose Department of Veterans Affairs benefits have been forfeited for treason or for subversive activities under the provisions of 38 U.S.C. 6104 and 6105, issues involved in a survivor's claim for death benefits will be decided without regard to any prior disposition of those issues during the veteran's lifetime. Cases in which a person substitutes for a deceased veteran under 38 U.S.C. 5121A are not claims for death benefits and are not subject to this section. Cases in which a person substitutes for a deceased death benefits claimant under 38 U.S.C. 5121A are claims for death benefits subject to this section.

(Authority: 38 U.S.C. 5121A, 7104(b)).

Subpart N—Miscellaneous

9. Revise § 20.1302 to read as follows:

§ 20.1302 Rule 1302. Death of appellant during pendency of appeal before the Board.

(a) General. An appeal pending before the Board of Veterans' Appeals when the appellant dies will be dismissed without prejudice. A person eligible for substitution under § 3.1010 of this chapter may file with the agency of original jurisdiction a request to substitute for the deceased appellant. If the agency of original jurisdiction grants the request to substitute, the case will assume its original place on the docket pursuant to Rule 900 (§ 20.900(a)(2)). If the agency of original jurisdiction denies the request to

substitute and the person requesting to substitute appeals that decision to the Board, the appeal regarding eligibility to substitute will assume the same place on the docket as the original claim pursuant to Rule 900 (§ 20.900(a)(2)).

(b) Exception. (1) If a hearing request is pending pursuant to Rule 704 (§ 20.704) when the appellant dies, the agency of original jurisdiction may take action on a request to substitute without regard to whether the pending appeal has been dismissed by the Board, if the request is submitted in accordance with § 3.1010 of this chapter.

(2) If the agency of original jurisdiction grants the request to substitute, the Board of Veterans' Appeals can then take the testimony of the substitute at a hearing held pursuant to Rules 700 through 717 (§§ 20.700 through 20.717). If the substitute desires representation at the hearing, he or she must appoint a representative prior to the hearing pursuant to § 14.631(g) of this chapter.

(Authority: 38 U.S.C. 5121A, 7104(a)).

10. In § 20.1304, revise paragraph (b)(1) introductory text and the authority citation at the end of the section to read as follows:

§ 20.1304 Rule 1304. Request for change in representation, request for personal hearing, or submission of additional evidence following certification of an appeal to the Board of Veterans' Appeals.

\* \* \* \* \*

(b) \* \* \*

(1) General rule. Subject to the exception in paragraph (b)(2) of this section, following the expiration of the period described in paragraph (a) of this section, the Board of Veterans' Appeals will not accept a request for a change in representation, a request for a personal hearing, or additional evidence except when the appellant demonstrates on motion that there was good cause for the delay. Examples of good cause include, but are not limited to, illness of the appellant or the representative which precluded action during the period; death of an individual representative; illness or incapacity of an individual representative which renders it impractical for an appellant to continue with him or her as representative; withdrawal of an individual representative; the discovery of evidence that was not available prior to the expiration of the period; and delay in transfer of the appellate record to the Board which precluded timely action with respect to these matters. Such motions must be in writing and must include the name of the veteran; the name of the claimant or appellant if other than the veteran (e.g., a veteran's survivor, a guardian, or a fiduciary appointed to receive VA benefits on an individual's behalf) or the name of any substitute claimant or appellant; the applicable Department of Veterans Affairs file number; and an explanation of why the request for a change in representation, the request for a personal hearing, or the submission of additional evidence could not be accomplished in a timely manner. Such motions must be filed at the following address: Director, Office of Management, Planning and Analysis (014), Board of Veterans' Appeals, 810 Vermont Avenue, NW., Washington, DC 20420. Depending upon the ruling on the motion, action will be taken as follows:

\* \* \* \* \*

(Authority: 38 U.S.C. 5121A, 5902, 5903, 5904, 7104, 7105, 7105A)



[FR Doc. 2014-21139 Filed 09/04/2014 at 8:45 am; Publication Date: 09/05/2014]