



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 14

RIN 2900-AP96

Expanded Delegation Authority for Procedures Related to Representation of Claimants

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending its regulations on representation of claimants for VA benefits to specifically permit additional delegations of authority within the Office of the General Counsel (OGC), update the titles of certain individuals and offices in OGC, and make a minor procedural clarification. These amendments are necessary to allow OGC to streamline the procedures related to representation of claimants and to ensure correct titles of certain individuals and offices in OGC are reflected in the regulations. In addition, a procedural clarification is being made by adding a sentence that was inadvertently omitted from a previous final rule.

DATES: Effective Date: This rule is effective [Insert date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Jonathan Taylor, Benefits Law Group Staff Attorney, Office of the General Counsel (022), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 461-7699 (this is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION: VA OGC is streamlining its procedures related to representation of VA claimants because of increased and higher-than-anticipated workload. This document amends 38 CFR part 14 to specifically permit additional delegations of authority and to update titles of OGC positions to reflect the current organization of OGC.

Under 38 U.S.C. chapter 59, the VA Secretary has authority to recognize attorneys, agents, and Veterans Service Organization (VSO) representatives for the preparation, presentation, and prosecution of benefit claims; regulate fees charged by accredited attorneys and agents; and prescribe the rules of conduct applicable while providing claims assistance. In December 2006, Congress enacted the Veterans Benefits, Health Care, and Information Technology Act of 2006 (Pub. L. 109-461), which significantly amended chapter 59. Section 101 of the Act required VA to: (1) regulate the qualifications and standards of conduct applicable to accredited attorneys and agents; (2) annually collect information about accredited attorneys' and agents' standing to practice or appear before any court, bar, or Federal or State agency; (3) proscribe accreditation of individuals who have been suspended or disbarred from any such entity without reinstatement; (4) add to the list of grounds for suspension or exclusion of attorneys or agents from further practice before VA; and (5) subject VSO representatives and individuals recognized for a particular claim to suspension and exclusion from further practice before VA on the same grounds as apply to attorneys and agents.

In addition, section 101 amended the fee provisions in chapter 59 to allow paid representation by accredited attorneys and agents at an earlier stage in the VA claims

adjudication process. These amendments authorized accredited attorneys and agents to charge fees for services provided after the claimant files a notice of disagreement in the case, rather than after the Board of Veterans' Appeals (Board) first makes a final decision in the case. The amendments also authorized VA to: (1) restrict the amount of fees attorneys and agents may charge; (2) subject fee agreements between attorneys or agents and claimants to review by the Secretary, such review to be appealable to the Board; and (3) collect an assessment from any attorney or agent to whom VA pays fees directly from past-due benefits. Further, the amendments eliminated fee matters as grounds for criminal penalties under 38 U.S.C. 5905.

On May 22, 2008, VA published a final rule in the Federal Register (73 FR 29852) to implement the chapter 59 amendments. The final rule addressed accreditation of individuals, standards of conduct for all individuals authorized to assist claimants before VA, and attorneys' and agents' fees. Since the 2008 amendments, OGC has continued to develop and fine-tune the accreditation process. OGC's experience in administering the accreditation program over the past nine years has highlighted the need to streamline these procedures pertaining to the representation of VA claimants.

The workload of the VA's accreditation program is at an all-time high. The number of VA-accredited individuals has increased rapidly since the publication of the final rule on May 22, 2008. Prior to the June 23, 2008, effective date of the final rule, licensed attorneys did not need to apply for accreditation. Since then, VA has accredited 17,500 attorneys, an average of more than 2,000 per year. The number of VA-accredited claims agents has also increased, from 64 to approximately 400. OGC

reviews thousands of accreditation applications and cancellation requests each year. Additionally, OGC must review complaints about the conduct of accredited individuals and disputes about the reasonableness of fees and expenses. Complaints and fee disputes have also increased rapidly since 2008; currently 121 complaints and 193 fee disputes are pending with OGC.

Under 38 U.S.C. 5904, Congress granted the VA Secretary the authority to accredit agents and attorneys for practice before VA. Congress has also authorized the Secretary to delegate authority to act and to render decisions under the laws administered by VA as necessary (38 U.S.C. 512). The Secretary, then the Administrator of Veterans Affairs, first delegated this authority for the accreditation program to the General Counsel in 1954 in a new 38 CFR part 14 (19 FR 5556). This revised rule permits the General Counsel and the Deputy General Counsel for Legal Policy, as well as the Chief Counsels and Deputy Chief Counsels of the specific OGC law groups or districts, to designate others as additional individuals who are authorized to make necessary determinations on accreditation matters. Additionally, with regard to proceedings to review fee agreements under § 14.636(i) and expenses under § 14.637(d), the revised rule transfers from the Chief Counsel level to the Deputy Chief Counsel level the authority in OGC to (1) initiate a review; (2) extend the time for an agent, attorney, claimant, or appellant to respond; and (3) make a recommendation to the General Counsel. These changes will increase the timeliness of the decisions and the overall efficiency of VA's accreditation program.

In most instances, the revised rule allows the General Counsel to delegate authority to the Deputy General Counsel for Legal Policy, a Chief Counsel to delegate

authority to the Deputy Chief Counsel or another appropriate designee, and a Deputy Chief Counsel to delegate authority to another appropriate designee. More broad delegation authority is provided for in the following cases of the General Counsel's authority:

1. Under § 14.629(b)(5) to grant or reinstate accreditation for an individual who remains suspended in a jurisdiction on grounds solely derivative of suspension or disbarment in another jurisdiction to which he or she has been subsequently reinstated,
2. Under § 14.636(i)(3) to make the final decision in proceedings to review fee agreements, and
3. Under § 14.637(d)(3) to make the final decision in proceedings to review expenses.

This broader delegation authority extends to the Deputy General Counsel for Legal Policy if he or she has already been designated by the General Counsel to perform these functions.

Additional revisions are being made to reflect the recent reorganization of OGC. The former titles of "Assistant General Counsel" and "Regional Counsel" have both been changed to "Chief Counsel", the previously numbered staff groups have been given titles based on subject matter (e.g., Benefits Law Group), and the former 23 Regional Counsel Offices have been changed to 10 District Chief Counsel Offices, two for each of VA's 5 districts.

Finally, a new sentence providing that, after an attorney or agent has had an opportunity to respond in proceedings to review expenses and a claimant or appellant has had an opportunity to reply to that response, the Deputy Chief Counsel will forward

the record and a recommendation to the General Counsel (or, as discussed above, a designee of either the General Counsel or the Deputy General Counsel for Legal Policy) for a final decision, is being added to § 14.637(d)(3). A similar sentence was inadvertently omitted from the May 22, 2008 final rule, although the procedure was described in the preamble to the proposed rule (72 FR 25930, 25934), and can be inferred from the regulatory text of the proposed and final rule (72 FR at 25943; 73 FR at 29879). This procedure parallels that described in 38 CFR 14.636(i)(3) regarding review of fee agreements.

Administrative Procedure Act

These changes to 38 CFR part 14 are being published without regard to notice-and-comment procedures of 5 U.S.C. 553(b) because they involve only matters of agency organization, procedure, and practice, which are exempted from such notice-and-comment procedures by virtue of 5 U.S.C. 553(b)(A). This final rule consists of only nonsubstantive changes that affect internal procedures. For this reason, in accordance with 5 U.S.C. 553(d)(3), VA has determined that there is good cause to waive the 30-day delayed effective date requirement under 5 U.S.C. 553(d).

Executive Orders 12866 and 13563

Executive Orders 13563 and 12866 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” requiring review by the Office of Management and Budget (OMB), unless OMB waives such review, as “any regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order.”

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined and determined not to be a significant regulatory action under Executive Order 12866. 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://www.va.gov/orpm/>, by following the link for “VA Regulations Published From FY 2004 Through Fiscal Year to Date.”

Regulatory Flexibility Act

The initial and final regulatory flexibility analyses requirements of sections 603 and 604 of the Regulatory Flexibility Act, 5 U.S.C. 601-612, are not applicable to this rule, because a notice of proposed rulemaking is not required for this rule. Even so, the VA 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. This rule affects only internal VA OGC procedures. 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.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in an expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This rule would have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

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

Catalog of Federal Domestic Assistance Numbers and Titles

There are no Federal Domestic Assistance programs associated with this final rule.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Gina S. Farrisee, Deputy Chief of Staff, Department of Veterans Affairs, approved this document on June 5, 2017, for publication.

List of Subjects in 38 CFR Part 14

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

Dated: June 5, 2017

Jeffrey Martin
Office Program Manager
Office of Regulation Policy & Management
Office of the Secretary
Department of Veterans Affairs

For the reasons set forth in the preamble, VA amends 38 CFR part 14 as follows:

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

1. 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.

2. Amend § 14.627 by:

- a. Redesignating paragraphs (l) through (r) as paragraphs (o) through (u).
- b. Redesignating paragraph (k) as paragraph (m).
- c. Redesignating paragraphs (g) through (j) as paragraphs (h) through (k).
- d. Adding new paragraphs (g), (l), and (n) to read as follows:

§ 14.627 Definitions.

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(g) Chief Counsel includes a designee of the Chief Counsel.

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(l) Deputy Chief Counsel includes a designee of the Deputy Chief Counsel.

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(n) General Counsel includes the Deputy General Counsel for Legal Policy if designated by the General Counsel. When so designated, references to “the General

Counsel or his or her designee” may further include a designee of the Deputy General Counsel for Legal Policy.

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3. Amend § 14.629 by:

a. Revising the introductory text.

b. In paragraph (a)(2)(ii), removing the words “a Regional Counsel with jurisdiction for the State” and adding, in its place, the words “the appropriate District Chief Counsel”.

c. In paragraph (b)(1)(i), adding the words “Office of the” before the words “General Counsel”.

d. In paragraph (b)(1)(ii), adding the words “Office of the” before all references to “General Counsel”.

e. In paragraph (b)(2)(ix), removing the words “a VA Regional Counsel” and adding, in their place, the words “the appropriate District Chief Counsel”.

f. In paragraph (b)(5) adding the words “or his or her designee” after the word “Counsel”.

g. In paragraph (c)(1), adding the words “Office of the” before the words “General Counsel”.

The revision reads as follows:

§ 14.629 Requirements for accreditation of service organization representatives; agents; and attorneys.

The Chief Counsel with subject-matter jurisdiction will conduct an inquiry and make an initial determination regarding any question relating to the qualifications of a prospective service organization representative, agent, or attorney. If the Chief Counsel determines that the prospective service organization representative, agent, or attorney meets the requirements for accreditation in paragraphs (a) or (b) of this section, notification of accreditation will be issued by the Chief Counsel and will constitute authority to prepare, present, and prosecute claims before an agency of original jurisdiction or the Board of Veterans' Appeals. If the Chief Counsel determines that the prospective representative, agent, or attorney does not meet the requirements for accreditation, notification will be issued by the Chief Counsel concerning the reasons for disapproval, an opportunity to submit additional information, and any restrictions on further application for accreditation. If an applicant submits additional evidence, the Chief Counsel will consider such evidence and provide further notice concerning his or her final decision. The determination of the Chief Counsel regarding the qualifications of a prospective service organization representative, agent, or attorney may be appealed by the applicant to the General Counsel. Appeals must be in writing and filed with the Office of the General Counsel (022D), 810 Vermont Avenue, NW., Washington, DC 20420, not later than 30 days from the date on which the Chief Counsel's decision was mailed. In deciding the appeal, the General Counsel's decision shall be limited to the evidence of record before the Chief Counsel. A decision of the General Counsel is a final agency action for purposes of review under the Administrative Procedure Act, 5 U.S.C. 701-706.

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§ 14.631 [Amended]

4. In § 14.631(d) remove the words “Regional Counsel of jurisdiction” and add, in their place, the words “appropriate District Chief Counsel”.

§ 14.633 [Amended]

5. Amend § 14.633 by:

a. In paragraph (e), removing all references to “Assistant General” and adding, in each place, the word “Chief”.

b. In paragraph (e) introductory text, removing the words “of jurisdiction” and adding in their place, the words “with subject-matter jurisdiction”.

c. In paragraph (f), removing all references to “Assistant General” and adding, in each place, the word “Chief”.

d. In paragraph (f), removing the words “or his or her designee” and adding in their place, the words “with subject-matter jurisdiction”.

6. Amend § 14.636 by:

a. In paragraph (i)(2), removing the words “Assistant General Counsel” and adding, in their place, the words “Deputy Chief Counsel with subject-matter jurisdiction”.

b. Revising paragraph (i)(3) to read as follows:

§ 14.636 Payment of fees for representation by agents and attorneys in proceedings before Agencies of Original Jurisdiction and before the Board of Veterans’ Appeals.

* * * * *

(i) * * *

(3) The Office of the General Counsel shall close the record in proceedings to review fee agreements 15 days after the date on which the agent or attorney served a response on the claimant or appellant, or 30 days after the claimant, appellant, or the Office of the General Counsel served the motion on the agent or attorney if there is no response. The Deputy Chief Counsel with subject-matter jurisdiction may, for a reasonable period upon a showing of sufficient cause, extend the time for an agent or attorney to serve an answer or for a claimant or appellant to serve a reply. The Deputy Chief Counsel shall forward the record and a recommendation to the General Counsel or his or her designee for a final decision. Unless either party files a Notice of Disagreement with the Office of the General Counsel, the attorney or agent must refund any excess payment to the claimant or appellant not later than the expiration of the time within which the Office of the General Counsel's decision may be appealed to the Board of Veterans' Appeals.

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7. Amend § 14.637 by:

a. In paragraph (d)(2) removing the words "Assistant General Counsel" and adding, in their place, the words "Deputy Chief Counsel with subject-matter jurisdiction".

b. Revising paragraph (d)(3) to read as follows:

§ 14.637 Payment of the expenses of agents and attorneys in proceedings before Agencies of Original Jurisdiction and before the Board of Veterans' Appeals.

* * * * *

(d) * * *

(3) The Office of the General Counsel shall close the record in proceedings to review expenses 15 days after the date on which the agent or attorney served a response on the claimant or appellant, or 30 days after the claimant, appellant, or the Office of the General Counsel served the motion on the agent or attorney if there is no response. The Deputy Chief Counsel with subject-matter jurisdiction may, for a reasonable period upon a showing of sufficient cause, extend the time for an agent or attorney to serve an answer or for a claimant or appellant to serve a reply. The Deputy Chief Counsel shall forward the record and a recommendation to the General Counsel or his or her designee for a final decision. Unless either party files a Notice of Disagreement with the Office of the General Counsel, the attorney or agent must refund any excess payment to the claimant or appellant not later than the expiration of the time within which the Office of the General Counsel's decision may be appealed to the Board of Veterans' Appeals.

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