



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Parts 3, 8, 14, 19, 20, and 21

RIN 2900-AQ26

VA Claims and Appeals Modernization

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) is proposing to amend its claims adjudication, appeals, and Rules of Practice of the Board of Veterans' Appeals (Board) regulations. In addition, VA proposes to revise its regulations with respect to accreditation of attorneys, agents, and Veterans Service Organization (VSO) representatives; the standards of conduct for persons practicing before VA; and the rules governing fees for representation. This rulemaking is needed to implement the Veterans Appeals Improvement and Modernization Act. That law amended the procedures applicable to administrative review and appeal of VA decisions denying claims for benefits, creating a new, modernized review system.

Unless otherwise specified, VA intends to make the proposed regulatory changes applicable to claims processed under the new review system, which generally applies where an initial VA decision on a claim is provided on or after the effective date or where a claimant has elected to opt into the new review system under established procedures.

DATES: Comments must be received by VA on or before [Insert date 60 days after date of publication in the FEDERAL REGISTER] to be considered in the formulation of the final rule.

ADDRESSES: Written comments may be submitted through www.Regulations.gov; by mail or hand-delivery to Director, Regulation Policy and Management (00REG), Department of Veterans Affairs, 810 Vermont Avenue NW, Room 1063B, Washington, DC 20420; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to “RIN 2900-AQ26– VA Claims and Appeals Modernization.” Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment. This is not a toll-free number. In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at www.Regulations.gov.

FOR FURTHER INFORMATION CONTACT: Veterans Benefits Administration information: Jennifer Williams, Senior Management and Program Analyst, Appeals Management Office, Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, (202) 530-9124 (this is not a toll-free number).

Board of Veterans’ Appeals information: Rachel Sauter, Counsel for Legislation, Regulations, and Policy, Board of Veterans’ Appeals. Department of Veterans Affairs,

810 Vermont Avenue, NW, Washington, DC 20420, (202) 632-5555 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: Modernizing the appeals process is a top priority for VA. In fiscal year (FY) 2017, claimants generally waited less than 125 days for an initial decision on VA disability compensation claims; however, they waited an average of 3 years for a final decision if they chose to appeal. Moreover, in FY2017 those claimants who chose to continue their appeal to the Board waited an average of 7 years for a decision from the date that they initiated their appeal, and the Board decision may not have resolved the appeal.

Public Law (Pub. L.) 115-55, the Veterans Appeals Improvement and Modernization Act of 2017 (hereinafter “Pub. L. 115-55”) provides much-needed comprehensive reform for the legacy appeals process, to help ensure that claimants receive a timely decision on review where they disagree with a VA claims adjudication. It replaces the current VA appeals process with a new review process that makes sense for veterans, their advocates, VA, and stakeholders.

In the current VA appeal process, which is set in law, appeals are non-linear and may require VA staff to engage in gathering and receiving evidence and re-adjudicating appeals based on new evidence. This process of gathering evidence and readjudication can add years to the appeals process, as appeals churn between the Board and the agency of original jurisdiction. Additionally, jurisdiction of appeals processing is shared between the Board and the agency of original jurisdiction, which, for purposes of the changes made by this proposed rule, is typically the Veterans Benefits Administration (VBA).

The new statutory appeals framework features three differentiated lanes from which a claimant may choose in seeking review of a VA denial (or partial denial) of a claim. One lane is for review of the same evidence by a higher-level claims adjudicator in the agency of original jurisdiction (higher-level review); one lane is for submitting new and relevant evidence with a supplemental claim to the agency of original jurisdiction (supplemental claim); and one lane is the appeals lane for seeking review by a Veterans Law Judge at the Board by filing a Notice of Disagreement (appeal to the Board). In an appeal to the Board, Pub. L. 115-55 eliminates intermediate and duplicative steps previously required, such as the Statement of the Case (SOC) and the substantive appeal. Furthermore, the new law will allow the Board to maintain three separate dockets for handling the following categories of appeals: (1) appeals where the claimant has requested a hearing, (2) appeals with no request for a hearing but where the claimant elects to submit other forms of evidence, and (3) appeals where the claimant requests Board review on the same evidence that was before the agency of original jurisdiction. These separate dockets will allow the Board to more efficiently and effectively manage distinctly different types of work. As a result of the new lane options, claimants will have increased choice for resolving disagreements with a VA decision on a claim.

In addition, the differentiated lanes will allow the agency of original jurisdiction to be the claim development entity within VA and the Board to be the appeals entity. This design is intended to reduce the uncertainty caused by the current process, in which a claimant initiates an appeal in the agency of original jurisdiction and the appeal is often a years-long continuation of the claim development process. It ensures that all claim

development by the agency of original jurisdiction occurs in the context of either an initial or supplemental claim filed with the agency of original jurisdiction, rather than in an appeal.

The agency of original jurisdiction's duty to assist in developing evidence will continue to apply when a claimant initiates a new or supplemental claim. However, where a claimant seeks review of an agency of original jurisdiction decision, the duty to assist generally no longer applies, unless and until the claimant elects to file a supplemental claim, at which point the duty to assist applies to the supplemental claim. The proposed regulations also contain a mechanism to correct any duty to assist errors occurring before the agency of original jurisdiction, if such errors are discovered on review or appeal, by requiring that the claim be returned to the agency of original jurisdiction for correction of the error, unless the maximum benefit is granted. The proposed regulations require claim decision notices to be clearer and more detailed. The improved notices will help claimants and their advocates make informed choices as to which review option makes the most sense.

The statutory requirements, which we propose to codify in these proposed regulations, provide a claimant who is not fully satisfied with the result of any review lane one year to seek further review while preserving an effective date for benefits based upon the original filing date of the claim. For example, a claimant could go straight from an initial agency of original jurisdiction decision on a claim to an appeal to the Board. If the Board decision was not favorable, but it helped the claimant understand what evidence was needed to support the claim, then the claimant would have one year to submit new and relevant evidence to the agency of original jurisdiction

in a supplemental claim without fearing loss of the effective date for choosing to go to the Board first.

The differentiated lane framework required by statute and proposed to be codified in these regulations has many advantages. It provides a streamlined process that allows for early resolution of a claimant's appeal and the lane options allow claimants to tailor the process to meet their individual needs and control their VA experience. It also enhances claimants' rights by preserving the earliest possible effective date for an award of benefits, regardless of the option(s) they choose, as long as the claimant pursues review of a claim in any of the lanes within the established timeframes. By having a higher-level review lane within the claims process and a lane at the Board providing for review on only the record considered by the initial claims adjudicator, the new process provides a feedback mechanism for targeted training and improved quality in the VBA or other claims adjudication agency.

To ensure that as many claimants as possible benefit from the streamlined features of the new process, Pub. L. 115-55 and the proposed regulations provide opportunities for claimants and appellants in the legacy system to take advantage of the new system. Some claimants who receive a decision prior to the effective date of the law will be able to participate in the new system. Other claimants who receive an SOC or Supplemental Statement of the Case (SSOC) in a legacy appeal after the effective date of the law will also have an opportunity to opt-in to the new system.

VA initially met in March 2016 with Veterans Service Organizations (VSOs), congressional staff, and other stakeholders to develop a plan to reform the current appeals process. The result of this collaborative work was a new appeals framework,

with the same fundamental features as the process described in section 2 of Pub. L. 115-55. This new process will provide veterans with timely, fair, and high quality decisions. The engagement of those organizations that participated in the March 2016 “Appeals Summit” ultimately led to a stronger proposal, as VA was able to incorporate stakeholder feedback and benefit from the perspective of those with extensive experience in helping veterans navigate the complex VA appeals process.

In November 2017, VA again met with stakeholders to highlight important changes required by the new law, answered questions, and discussed specific concerns. VA is grateful to all of the stakeholders for their contributions of time, energy, and expertise in this effort.

The majority of amendments addressed in this proposed rule are mandatory to comply with the law. Through careful collaboration with VA, VSOs, and other stakeholders, in enacting Pub. L. 115-55, Congress provided a highly detailed statutory framework for claims and appeals processing. VA is unable to alter proposed amendments that directly implement mandatory statutory provisions. In addition to implementing mandatory requirements, VA proposes a few interpretive or gap-filling amendments to the regulations which are not specifically mandated by Pub. L. 115-55, but that VA believes are in line with the law's goals to streamline and modernize the claims and appeals process. These amendments fill gaps in the new law left by Congress, reduce unnecessary regulations, streamline and modernize processes, and improve services for Veterans.

This proposed rule contains amendments to parts 3, 8, 14, 19, 20, and 21, as described in detail below.

PART 3 - ADJUDICATION

VA proposes to amend the regulations in 38 CFR Part 3 as described in the section-by-section supplementary information below. These regulations govern the adjudication of claims for monetary benefits (e.g., compensation, pension, dependency and indemnity compensation, and burial benefits), which are administered by the VBA. Other VA agencies of original jurisdiction may have adopted portions of these regulations, or their content, with respect to their adjudication and review processes.

§ 3.1 Definitions.

VA proposes to amend the definition of “claim” in § 3.1(p), to add definitions of the terms “initial claim” and “supplemental claim,” as the distinction between those terms is significant under the changes made by P.L. 115-55, which provides for the filing and adjudication of supplemental claims and adds a definition of supplemental claim at 38 U.S.C. 101(36). VA proposes to define an “initial claim” as a claim for a benefit other than a supplemental claim, including the first filing by a claimant (original claim) and a subsequent claim filed by a claimant for an increase in a disability evaluation, a new benefit, or a new disability. The definition of a claim for increase is moved into this section from § 3.160 and is expanded to more accurately reflect the nature of such claims.

Pub.L. 115-55, section 2(a), defines “supplemental claim” as “a claim for benefits under laws administered by the Secretary filed by a claimant who had previously filed a claim for the same or similar benefits on the same or similar basis.” The Secretary is required to readjudicate the claim if new and relevant evidence is presented or secured with respect to a supplemental claim. VA proposes to clarify in the regulatory definition of supplemental claim that VA must have issued a decision with respect to the previously filed claim before a supplemental claim can be filed. The inclusion of this requirement for a supplemental claim is consistent with the language of revised 38 U.S.C. § 5108, which requires the Secretary to “readjudicate” a claim where “new and relevant evidence is presented or secured with respect to a supplemental claim.” This language presupposes that VA has already adjudicated the claim and issued a notice of decision before a supplemental claim is filed.

With the inclusion of additional definitions under § 3.1(p), VA proposes to amend the cross references to include a reference to supplemental claims under the new § 3.2501.

§ 3.103 Procedural due process and other rights.

Under 38 U.S.C. 5104(a), when VA makes a decision affecting the provision of benefits to a claimant, VA must provide the claimant and his or her representative with notice of the decision. Under current 38 U.S.C. 5104(b), in any case where VA denies the benefit sought, that notice must include a statement of the reasons for the decision and a summary of the evidence considered by VA.

Pub. L. 115-55 revised 38 U.S.C. 5104(b) to specify that each notice provided under section 5104(a) must include all of the following: identification of the issues adjudicated; a summary of the evidence considered by VA; a summary of applicable laws and regulations; identification of findings favorable to the claimant; in the case of a denial, identification of elements not satisfied leading to the denial; an explanation of how to obtain or access evidence used in making the decision; and, if applicable, identification of the criteria that must be satisfied to grant service connection or the next higher-level of compensation.

VA proposes to amend its procedures for issuing decisions to conform with the amendments to 38 U.S.C. 5104(b). Enhanced decision notices will allow claimants and their representatives to make more informed choices about whether to seek further review and, if so, which of the new review lanes best fits the claimant's needs: filing a supplemental claim with the agency of original jurisdiction, requesting a higher-level review of the initial decision within the agency of original jurisdiction, or appealing to the Board.

In addition, to comply with 38 U.S.C. § 5104B(d), VA proposes to amend § 3.103 to explain that the evidentiary record for a claim before the agency of original jurisdiction closes when VA issues notice of a decision on said claim. A claimant may reopen the evidentiary record by submitting a supplemental claim or claim for an increase on the prescribed application form. Consistent with its discretionary authority under 38 U.S.C. 501(a), VA proposes to require a prescribed application form for submitting a supplemental claim consistent with current regulations applicable to claims. Submission of a substantially complete initial or supplemental claim also triggers VA's duty to assist

in the gathering of evidence under § 3.159. The evidentiary record also reopens when a claim must be readjudicated due to identification of a duty to assist error on higher-level review or by the Board. Whenever the record reopens, evidence submitted to the agency of original jurisdiction while the record was closed will become part of the record to be considered for a subsequent adjudication.

VA also proposes to make several nomenclature changes within § 3.103 to update language and clarify that a hearing before VA may be conducted in person or through videoconferencing tools available at a regional office closest to the claimant. The changes also clarify that a hearing will not be provided in connection with a request for higher-level review. Claimants will have the opportunity to request an informal conference in connection with a request for higher-level review as provided in proposed § 3.2601.

Finally, VA proposes to delete the last sentence of § 3.103(c)(2), allowing a claimant to request visual examination during a hearing by a physician designated by VA. Due to the complex considerations involved in making determinations on the nature, origin, or degree of disability, a physician's visual assessment during a hearing has significant limitations. Disability assessments typically involve a comprehensive clinical evaluation with appropriate standardized testing to establish the diagnosis or origin, or characterize the severity of impairment. For some conditions, this could include specialized equipment, tests, or training that would not be available by a physician during a visual examination; examples of specialized testing could include neuropsychological evaluations for traumatic brain injury (TBI) claimants. Accordingly, VA proposes to remove the reference that claimants may request visual examination by

a physician at the hearing. Although VA does not currently have data on the number of examinations requested by veterans during hearings, these types of examinations are obsolete as Veterans and VA can now utilize several other methods to add visual examination findings into the record. These include Disability Benefits Questionnaires (DBQs) that a claimant may ask any physician to complete to document visual findings and contract examinations which support VA's disability evaluation process and make obtaining examinations easier and more efficient by bypassing the requirement to formally schedule one with a VA provider.

§ 3.104 Finality and binding nature of decisions.

VA proposes to amend § 3.104(a), concerning the binding nature of decisions, to conform with other regulatory changes implementing Pub. L. 115-55. In addition, VA proposes to remove the word "final" from this section for consistency with the definition of finally adjudicated claim in § 3.160(d). Decisions issued by an agency of original jurisdiction are binding on VA field offices under § 3.104 when issued, even though the decision is not finally adjudicated because the period for a claimant to seek review of the decision is still open. The current wording of § 3.104 refers to such decisions as "final" and binding when they are issued. The definition of "finally adjudicated" in § 3.160(d) will be maintained and a decision on a claim is final when the claim is finally adjudicated.

In addition, Pub. L. 115-55 added a new section, 38 U.S.C. 5104A, providing that any findings favorable to the claimant will be binding on all subsequent adjudicators within VA, unless clear and convincing evidence is shown to the contrary to rebut the

favorable findings. VA proposes to amend § 3.104 to include a new paragraph implementing this provision. VA further proposes to define a finding as a conclusion on either a question of fact or on an application of law to facts.

§ 3.105 Revision of decisions.

VA proposes to amend § 3.105(a) to incorporate existing legal standards recognized in judicial decisions applicable to revision of final decisions under 38 U.S.C. 5109A. This statute allows for revision or reversal of final decisions by the Secretary based on clear and unmistakable error (CUE). These rules are set forth in proposed § 3.105(a)(1). Proposed § 3.105(a)(2) contains standards applicable to revision of decisions that are not yet final.

Proposed § 3.105(a)(1) incorporates judicial standards applicable to revision of final decisions based on CUE under 38 U.S.C. 5109A. No substantive changes are intended to the existing law governing revision of final agency of original jurisdiction decisions based on CUE. The proposed amendments conform regulations with respect to revision of final decisions by the agency of original jurisdiction with similar regulatory changes previously promulgated with respect to revision of final Board decisions based on CUE under 38 U.S.C. 7111. See 38 CFR §§ 20.1400 – 20.1411; 64 Fed. Reg. 2134 (January 13, 1999). Those changes similarly incorporated judicially recognized CUE principles and were upheld in Disabled American Veterans v. Gober, 234 F.3d 682 (Fed. Cir. 2000). The Court in Disabled American Veterans found that the enactment of statutory sections 5109A and 7111 “codified . . . the Court of Appeals for Veterans

Claims' long standing interpretation of CUE.” *Id.* at 687 (quoting Bustos v. West, 179 F.3d 1378, 1380 (Fed. Cir. 1999)).

Judicial decisions have recognized that CUE applies only to final administrative decisions. See, e.g., Richardson v. Nicholson, 20 Vet.App. 64, 70-71 (2006) (stating that “CUE must be based on a *final* adjudication” and citing the definition of “finally adjudicated claim” in 38 CFR 3.160(d)); see also Cook v. Principi, 318 F.3d 1334, 1342 (Fed. Cir. 2002).

Further, CUE is a specific and rare kind of error, requiring the claimant to demonstrate three elements: (1) the error must be of a specific type -- “either the correct facts, as they were known at the time, were not before the adjudicator or the statutory or regulatory provisions extant at the time were incorrectly applied;” (2) the error must be “undebatable;” and (3) the error must undebatably be outcome-determinative, meaning that the error would have “manifestly changed the outcome” at the time it was made. Willsey v. Peake, 535 F.3d 1368, 1371 (Fed. Cir. 2008) (citing Cook, 318 F.3d at 1344 and Russell v. Principi, 3 Vet.App. 310, 313-14 (1992)); see also Cushman v. Shinseki, 576 F.3d 1290, 1301-02 (Fed. Cir. 2009) (error must be outcome determinative); Bustos v. West, 179 F.3d 1378, 1381 (Fed. Cir. 1999) (affirming “manifestly changed outcome” requirement).

An error is undebatable if “no reasonable adjudicator could weigh the evidence in the way that the adjudicator did.” Willsey, 535 F.3d at 1372; Russell, 3 Vet.App. at 313-14 (CUE errors must be undebatable, such that “reasonable minds could only conclude that the original decision was fatally flawed at the time it was made”). Accordingly, CUE

cannot be based on a “disagreement as to how the facts were weighed or evaluated.”
Id. at 313.

The error must be shown based solely on the evidentiary record as it existed at the time of the disputed regional office (RO) adjudication and the law that existed at the time of subject adjudication. Cook, 318 F.3d at 1343-45; Russell, 3 Vet. App. at 314 (“New or recently developed facts or changes in the law subsequent to the original adjudication . . . do not provide grounds for revising a finally decided case”); Jordan v. Nicholson, 401 F.3d 1296, 1299 (Fed. Cir. 2005) (subsequent change in interpretation of statute not applicable to CUE request as to final VA decisions).

The caselaw also addresses burden of proof issues. As the Court stated in Andre v. Principi, “the party bringing a CUE challenge to a final RO decision bears the burden of proving that the decision was based on a clear and unmistakable error.” 301 F.3d. 1354, 1361 (Fed. Cir. 2002) (quoting Pierce v. Principi, 240 F.3d 1348,1355 (Fed. Cir. 2001)). “This burden is not satisfied by the mere assertion that the decision contained CUE; instead, the party must describe the alleged error “with some degree of specificity” and must provide persuasive reasons ‘as to why the result would have been manifestly different but for the alleged error.’” *Id.* (citation omitted). Mere allegations of failure to follow regulations or failure to give due process, or any other general, non-specific claims of error, are insufficient to raise a claim of CUE. Fugo v. Brown, 6 Vet. App. 40, 44 (1993). An allegation that the Secretary did not fulfill the duty to assist is insufficient to raise the issue of CUE. See, e.g., Crippen v. Brown, 9 Vet. App. 412, 418 (1996).

Proposed § 3.105(a)(2) applies to decisions that are not finally adjudicated at the agency of original jurisdiction. The proposed language reflects current policy and

practice with respect to matters adjudicated under part 3 of VA's regulations that the outcome of a decision will not be revised by another adjudicator in the agency of original jurisdiction on his or her own initiative, based on the same evidentiary record, unless a determination is made that the outcome of the decision is clearly erroneous. This reflects a policy decision by VA to restrict the discretion of subsequent adjudicators to reverse prior determinations in the absence of new evidence. In accordance with new 38 U.S.C. 5104A, the adjudicator may, in determining whether the result was clearly erroneous, take into account any favorable findings subject to reversal based on clear and convincing evidence to the contrary. Determinations under § 3.105(a)(2) are therefore legally distinct from determinations under § 3.105(a)(1) as to whether a final decision should be revised based on CUE.

In addition, VA proposes to amend paragraph (b) to clarify that difference of opinion authority is given to VA employees designated to complete higher-level reviews to implement the requirement in new 38 U.S.C. 5104B that a higher-level review is de novo, subject to the rule protecting favorable findings. A new paragraph is also added at the end of § 3.105 to reflect that VA decisions may now be revised through resolution of a timely-filed supplemental claim under 38 U.S.C. 5108 or higher-level review under 38 U.S.C. 5104B.

No changes are necessary to §§ 3.105(c) through (h), which govern severance of service connection and reduction in evaluations, such as reductions in pension payments and reductions in evaluations of a service-connected disability. The standards and procedures set forth in these paragraphs will continue to apply and an adjudicator considering whether to reduce or discontinue an evaluation under § 3.105 is

not bound under the “favorable finding” rule in new section 5104A of the statute that protects findings relating to a disability evaluation for a particular period of time but does not preclude a subsequent finding that the disability thereafter improved.

Rating evaluations and pension awards are running awards, resulting in recurring payments being made subsequent to an initial award. See, e.g., Dent v. McDonald, 27 Vet.App. 362, 372 (2015) (pension is a “running award,” meaning “recurring payments made subsequent to an initial award”). Changes in the underlying facts that led to the original award may warrant a discontinuance or reduction of a running award. See, e.g., 38 U.S.C § 5112 (governing effective dates of reductions and discontinuances); 38 CFR § 3.273 (describing monthly pension as a “running award” and requiring adjustment when there is a change in income); § 3.105 (noting that the provisions regarding the date of discontinuance of awards are applicable to running awards such as monthly pension and those based on disability evaluations); § 3.344 (governing disability evaluation reductions on the basis of medical reports showing improvement in a service-connected condition). Determinations of whether a running award should be adjusted are based on different facts for a different time period than that for which the initial award was made. Accordingly, a determination of the appropriate level of a running award made in an initial decision is a finding different than a later finding as to whether the previously assigned level should be reduced or discontinued. Therefore, an adjudicator considering whether to reduce or discontinue an evaluation under § 3.105 is not assessing prior entitlement under the initial award of disability evaluation and is not bound by prior “favorable findings” under section 5104A of the statute. No

change to the standards and procedures in §§ 3.105(c) through (h) is therefore required.

§ 3.151 Claims for disability benefits.

Pub. L. 115-55 added 38 U.S.C. 5104C, which outlines the available review options following a decision by the agency of original jurisdiction. VA proposes to amend §§ 3.2500 and 3.151 consistent with the statute to provide that a claimant may request one of the three review options under § 3.2500 (higher-level review, supplemental claim, appeal to the Board) for each issue decided by VA, consistent with new 38 U.S.C 5104C. A claimant would not be limited to choosing the same review option for a decision that adjudicated multiple issues.

Proposed § 3.151(c) defines an issue for this purpose as an adjudication of a specific entitlement. For example, with respect to service-connected disability compensation, an issue would be entitlement to compensation for a particular disability (and any ancillary benefits). This definition of “issue” is consistent with the definition of issue in § 20.1401(a), as interpreted by the U.S. Court of Appeals for Veterans Claims. See Hillyard v. Shinseki, 24 Vet. App. at 353 (equating the term issue with a “claim” and “not a theory or an element of a claim,” citing Disabled American Veterans, 234 F.3d at 693). The option to select different review lanes would not extend to specific components of the same entitlement claim, because allowing a claim to be splintered into several pieces for review, each potentially subject to different evidentiary rules and timelines, would render the new review system unworkable, risk self-contradictory

decision-making by VA, and defeat Congressional intent to streamline the review process and reduce processing times.

A simple hypothetical serves to illustrate VA's intent. Suppose a claimant seeks disability compensation for a knee disability, and for a mental disorder. Once the claimant receives an initial decision on both, it is permissible for the claimant to elect to place the knee issue and the mental disorder issue in separate lanes under the new appeals system. The claimant may not, however, challenge the effective date assigned for the knee in one lane, and simultaneously challenge the assigned degree of disability for the knee in another lane.

In addition, VA proposes to include a new paragraph, § 3.151(d), providing that the evidentiary record for a claim closes upon issuance of notice of a decision on the claim. This provision is similar to proposed § 3.103(c).

§ 3.155 How to file a claim.

VA proposes to amend § 3.155, regarding the procedures for filing a claim, to make those procedures applicable to supplemental claims under Pub. L. 115-55, except for the "intent to file" provisions found in § 3.155(b). For example, this amendment would apply existing procedures in § 3.155(c) regarding the filing of incomplete claim forms to supplemental claims. Accordingly, incomplete supplemental claim forms would be considered filed on the date of receipt if a complete supplemental claim is submitted within one year of the filing date of the incomplete claim.

However, the "intent to file" provisions in § 3.155(b), would not be applied to supplemental claims. The new statutory framework provides that a claimant can

maintain the effective date of a potential benefits award by submitting a request for review under any of the three new lanes within one year of the date of the decision denying benefits. Consistent with this requirement, the intent to file provisions of § 3.155(b) would not apply to supplemental claims as this provision would allow for the submission of a supplemental claim beyond the one-year period provided by statute for protection of effective dates.

§ 3.156 Receipt of new evidence.

VA proposes to amend § 3.156 to include reference to supplemental claims based on new and relevant evidence as provided in Pub. L. 115-55 and to clarify when a supplemental claim may be filed. For supplemental claims received after the effective date, VA proposes new § 3.156(d) to replace the “new and material” evidence element, which is currently required under § 3.156(a) for requests for VA to reopen a finally adjudicated claim, with the more liberal “new and relevant” evidence standard in section 2(i) of Pub. L. 115-55. As noted in the House of Representatives Committee Report (H. Rept.115-135, May 19, 2017, page 3), Congress’s intent “behind the change is to lower the current burden” to have a claim adjudicated based on new evidence. Pub. L. 115-55 defines “relevant evidence” under 38 U.S.C. 101(35) as “evidence that tends to prove or disprove a matter in issue.” This new standard reduces a claimant’s threshold in identifying or submitting evidence as part of a supplemental claim. Proposed § 3.156(d), regarding supplemental claims, includes a reference to new § 3.2501 which provides further details regarding the filing and adjudication of supplemental claims and the “new and relevant” evidence standard.

VA proposes to maintain the “new and material” evidence standard, found in 38 U.S.C. § 5108 prior to the enactment of Pub. L. 115-55, in subsection (a) as the standard for requests to reopen finally adjudicated legacy claims where the request to reopen was decided prior to the applicability date of the new law. Claims to reopen that were filed, but not initially adjudicated, prior to the effective date will be adjudicated under the more favorable “new and relevant” standard applicable to supplemental claims. In addition, a supplemental claim subject to the more favorable standard may be filed after the effective date of the modernized review system, even with respect to legacy claims finally adjudicated prior to the effective date of the new system.

Under the new framework, the agency of original jurisdiction will take action on new evidence that is received with an application for a supplemental claim, or received or obtained prior to issuance of a decision on the supplemental claim. As indicated in the explanation of proposed § 3.103, the record closes upon issuance of a notice of decision on the claim, subject to reopening upon certain later events. Therefore, VA proposes to limit the applicability of the current rule under paragraph (b), allowing for the submission of new and material evidence during the appeal period, to pending legacy claims that are not subject to the modernized review system.

§ 3.159 Department of Veterans Affairs assistance in developing claims.

38 U.S.C. 5103(a) requires VA to provide notice to a claimant of the information or evidence necessary to substantiate the individual’s claim for benefits. Pub. L. 115-55 revised section 5103 to state that this notice requirement applies to initial and supplemental claims; however, VA is not required under the statute to provide that

notice with respect to a supplemental claim filed within one year of an agency of original jurisdiction or Board decision on an issue. VA proposes to amend § 3.159 to include this exception.

VA also proposes to require VA to assist a claimant who reasonably identifies existing records in connection with a supplemental claim, as required under 38 U.S.C. 5108(b). VA proposes to further amend § 3.159 to clarify that VA's duty to assist in the gathering of evidence begins upon receipt of a substantially complete application for an initial or supplemental claim and ends once VA issues a decision on the claim. The definition of a substantially complete application in 3.159 has been amended to add the requirement that a supplemental claim application include or identify potentially new evidence and that a higher-level review request identify the date of the decision for which review is sought. VA's duty to assist is reinstated when a substantially complete initial claim or supplemental claim is filed or when a claim is returned to correct a "duty to assist" error in a prior decision as required by 38 U.S.C 5103A(f) as amended by Pub. L. 115-55.

§ 3.160 Status of claims.

Pub. L. 115-55 deleted the reference in 38 U.S.C 5103(a) to a claim for reopening or a claim for increase and replaced it with reference to a "supplemental claim." Based on this change in terminology, VA proposes to update several sections in part 3 to replace the term "reopened claim" with "supplemental claim." Claimants may request review of VA's decision by submitting a supplemental claim after a decision by the VBA, the Board, or the Court of Appeals for Veterans Claims. VA proposes to

update paragraph (e) to reflect the requirement that as of the applicability date of the new law, VA will no longer accept requests to “reopen” claims and a claimant must file a supplemental claim under § 3.2501 to seek review of a finally adjudicated claim for a previously disallowed benefit.

VA proposes to clarify the definition of “finally adjudicated claim” for decision notices issued on or after the effective date, to be consistent with 38 U.S.C. 5104C, added by Pub. L. 115-55. With the new claims and appeals system, a claim is considered finally adjudicated at the expiration of the period to file a review option following notice of a decision by the agency of original jurisdiction, the Board, or the Court of Appeals for Veterans Claims. If an appeal is timely filed from a decision of the Court of Appeals for Veterans Claims, a claim is finally adjudicated upon its disposition on judicial review. During the time period for seeking review, a claimant may elect one of the three new review options depending on the type of decision issued as outlined in 38 U.S.C. 5104C. Once the period to seek review expires, an issue is considered finally adjudicated and a claimant loses the effective date protections associated with continuous pursuit of an issue. At that point, the claimant may seek review of the decision by filing a supplemental claim or a request to revise the final decision based on clear and unmistakable error under § 3.105(a)(1).

VA proposes to amend the definition of complete claim to add a requirement applicable to supplemental claims, in part to implement the duty to assist requirements under 38 U.S.C. 5108(b). In order for a supplemental claim to be considered complete and filed, it must identify or include potentially new evidence. Identification of potentially new evidence would trigger VA’s duty to assist under §§ 3.2501 and 3.159(a)(3).

Without that baseline level of information, the complete claim standard will not have been met for purposes of claim initiation of a supplemental claim. VA believes this baseline level of substantive specificity is necessary in order to minimize the possibility that claimants can effectively keep a claim stream alive indefinitely by repeatedly asserting that they will submit or identify new and relevant evidence at some future date, never doing so, and then repeating the process once VA issues a decision. However, we emphasize that the claim would be considered “complete” for claim initiation purposes, and VA’s duty to assist accordingly triggered, when the claimant identifies evidence within the scope of VA’s duty to assist to obtain. It would not be required that VA actually obtain the evidence, or make a finding that new and relevant in fact has been secured, prior to recognizing that a supplemental claim has in fact been filed.

§ 3.161 Expedited Claims Adjudication Initiative—Pilot Program.

VA proposes to remove and reserve § 3.161, which addresses the Expedited Claims Adjudication (ECA) Initiative Pilot Program as this program is no longer in use and will not continue based on changes to the claims and appeals processes under Pub. L. 115-55. VA launched the ECA Initiative Program on February 2, 2009. The two-year pilot program was designed to accelerate claims and appeals processing. Participation in the ECA Initiative was strictly voluntary and limited to claimants who resided within the jurisdiction of the Nashville, Lincoln, Seattle, or Philadelphia Regional Offices (ROs). VA concluded the ECA pilot program in 2013.

§ 3.328 Independent medical opinions.

Pub. L. 115-55 repealed 38 U.S.C. 7109, which authorized the Board to obtain independent medical opinions (IMOs). This repeal removed the ability for the Board to request IMOs. Under 38 U.S.C. 5103A(f)(2) and 5109(d), as added by Pub. L. 115-55, the Board will, when deemed necessary, direct the agency of original jurisdiction to obtain an IMO. VA proposes to amend § 3.328 to include a requirement that VBA process IMO instructions received from the Board.

§ 3.400 General.

VA proposes to amend § 3.400 to incorporate the new rule that a claimant may protect their initial filing date for effective date purposes if they continuously pursue a claim as outlined in 38 U.S.C. 5110(a), as amended by Pub. L. 115-55. VA will consider the date of receipt of the initial claim when determining the effective date for any benefits that VA may award under a continuously pursued claim. VA provides a reference to § 3.2500 where this is further defined.

VA proposes to limit the applicability of the rules regarding new and material evidence and reopened claims as VA will no longer accept or process claims to reopen claims received after the effective date of the new law.

§ 3.2400 Applicability of Modernized Review System.

Proposed § 3.2400 defines which claims are processed under the new review system and which claims are processed under the legacy appeals system. Pub. L. 115-55, section 2(x), provides generally that the new review system will apply to all claims

for which a notice of decision is provided by the agency of original jurisdiction on or after the later of (a) 540 days from the date of enactment, which falls on February 14, 2019, or (b) 30 days after the date on which the Secretary certifies to Congress that VA is ready to carry out the new appeals system. Proposed § 19.2(a) refers to this date as the “effective date” of the new review system. Proposed § 3.2400(a)(1) implements the statutory definition and clarifies that the new review system applies when an “initial” decision is provided after the effective date. The term “initial decision” in this context refers to the initial decision on each claim for entitlement to a particular benefit, not the first decision that was ever issued by VA for a claimant.

Proposed § 3.2400 also clarifies that the new review system will generally apply to initial decisions provided on or after the effective date denying requests to revise a decision by the agency of original jurisdiction based on clear and unmistakable error (CUE). Such requests are not “claims” subject to P.L. 115-55, because the requester is not pursuing a claim for benefits pursuant to part II or III of Title 38 of the U.S. Code. *Livesay v. Principi*, 15 Vet. App. 165, 178-179 (2001). Nevertheless, VA will, as a matter of discretion, allow the requestor to elect review of such decisions in the higher-level review lane in addition to the option to appeal to the Board. A supplemental claim may not be filed with respect to a CUE request since revision of a decision for CUE cannot be based on new evidence.

The proposed regulation also recognizes, in subsection (c), that some claimants who received a notice of decision prior to the effective date, defined as legacy claimants, may have opted-in to the new review system prior to the effective date and that some may do so after the effective date. Prior to the effective date, some claimants

are able to opt-in to the new review system under a VA test program known as the Rapid Appeals Modernization Program (RAMP), which is being carried out pursuant to section 4(a) of Pub. L. 115-55. Qualifying claimants can choose either the higher-level review lane or the supplemental claim lane to pursue review of their claims. Those claimants who opt-in under RAMP have received, or will receive, a notice of decision conforming with the enhanced decision notice requirements of Pub. L. 115-55 and advising the claimant regarding the review options available under the new system. Upon the effective date, those claims will continue to be processed under the new framework as implemented by final regulations.

Proposed subsection (c) provides, in accordance with section 2(x)(5) of Pub. L. 115-55, that, after the effective date, legacy claimants may opt-in to the new review system after VA issues a Statement of the Case or Supplemental Statement of the Case. Claimants may do so by filing for one of the review options under the new system on a form prescribed by VA within the time allowed to file a substantive appeal to the Board under the legacy appeals system. A claimant may not elect to pursue review under both the legacy and modernized review systems with respect to a particular claim.

§ 3.2500 Review of decisions.

In the legacy appeals process, claimants who are dissatisfied with the initial decision on their claim are given only one avenue to seek review of that decision. Pub. L. 115-55 created a new claims and appeals process with several different review options for pursuing VA benefits. Congress added 38 U.S.C. 5104C to provide

claimants with streamlined choices within the agency of original jurisdiction and through an appeal to the Board. VA proposes to add § 3.2500 to part 3, subpart D, to implement the new review options and set forth the rules that apply to those options under new 38 U.S.C. 5104C. In line with the statutory requirements, VA proposes to allow a claimant to file for one of the three review options upon receipt of a decision by the agency of original jurisdiction on an initial claim. Under proposed § 3.2500(b), a claimant would be able to elect a different review option for each different issue adjudicated in the decision. The term “issue” is defined in § 3.151(c) as a distinct determination of entitlement to a benefit, such as a determination of entitlement to service-connected disability compensation for a particular disability.

Proposed § 3.2500(b) provides that a claimant may not elect to have the same issue reviewed concurrently under different review options, consistent with new 38 U.S.C. 5104C(a)(2)(A). Proposed § 3.2500(d) implements new 38 U.S.C. 5104C(a)(2), providing that claimants may switch between the different review options. A claimant or the claimant’s duly appointed representative may, for example, withdraw a request for higher-level review or a supplemental claim at any time prior to VA issuing notice of decision. If the withdrawal takes place within the one year period following notice of the decision being reviewed, a claimant may timely elect another review option to continuously pursue the claim and preserve potential entitlement to benefits effective as of the date of the initial claim.

Under new 38 U.S.C. 5104C, after receiving notice of a decision on an issue, claimants generally have up to one year to submit new and relevant evidence with a supplemental claim, request a higher-level review, or file an appeal to the Board to

preserve the effective date associated with their initial claim. If a claimant remains dissatisfied with the decision on review, depending on the type of review requested, he or she would still have the option to file another review request. The review options available to a claimant after a decision on each type of review are set forth in § 3.2500(c). Paragraph (g) contains effective date protections for continuously pursued claims and the effective date rule for supplemental claims filed more than one year after notice of a decision (i.e., where the underlying claim is finally adjudicated). For example, a claimant who receives an unfavorable decision on a higher-level review request may submit a supplemental claim with new and relevant evidence or appeal to the Board within one year of the decision notice date to protect the effective date. If, following a further denial, the claimant elects to file a supplemental claim with new and relevant evidence within one year of the decision notice date and VA grants the benefit sought, VA will consider this to be a continuously pursued claim and continue to base the effective date of an award on the filing date of the initial claim.

VA proposes to include a paragraph in § 3.2500 that limits the review option available to parties to a simultaneously contested claim (contested claim) to the filing of a Notice of Disagreement with the Board. A contested claim is defined in VA regulations as a situation in which the allowance of one claim results in the disallowance of another claim involving the same benefit or the payment of a lesser benefit to another claimant. 38 CFR § 20.3(p). For example, two people may claim entitlement to the same benefit, such as in the situation where two people claim entitlement to a death benefit as the surviving spouse.

In this situation, Congress has provided for different adjudication rules aimed at speeding resolution of the dispute. Prior to Pub. L. 115-55, the statutory time frame to appeal a decision by the agency of original jurisdiction in such cases was 60 days rather than the normal one year period. 38 U.S.C. § 7105A. This required review to be initiated for all contested claims within 60 days and clearly reflected an intent that contested claims be resolved more quickly than ordinary claims.

In Pub. L. 115-55, Congress maintained the 60 day time period for filing a Notice of Disagreement to appeal a decision of the agency of original jurisdiction, but did not address how contested claims should be handled with respect to the newly available review lanes at the agency of original jurisdiction, for which the filing deadline is one year. This is problematic for the following reasons: (1) while the new system provides claimants with the right to select from three different review lanes, it is literally impossible to provide this right to each claimant in a contested claim, because the claimants' choice of review lanes may conflict (we note that both claimants may disagree with a particular determination in a contested claim, such as the amount of an apportionment under § 3.450); (2) while the new system protects favorable findings from being overturned in the absence of clear and convincing evidence to the contrary, a finding may be favorable to one claimant but unfavorable to the other, thus making it literally impossible to afford each claimant this right; (3) the review period for choosing the Board review lane (through filing a Notice of Disagreement) would be 60 days for a contested claim, but the review period for choosing higher-level review or filing a supplemental claim would be one year, thereby significantly undermining the impact of the 60 day time period for filing a Notice of Disagreement on achieving a faster

resolution of the claim. As a result, it appears that Congress either did not envision that contested claims would be governed by the three-lane review system or simply neglected to address this issue, leaving a gap for VA to fill. See, e.g., *Ramsey v. Nicholson*, 20 Vet.App. 16, 30 (2006) (refusing to literally apply the statutory requirement that appeals at the Board be considered and decided in docket order because, despite the arguably plain meaning of the statute, literal application would produce an absurd result, or at least a result at odds with the intention of the drafters, “when considering the statute’s overall structure and concepts relating to effective review of appeals”).

VA proposes to fill the gap left by the statute by limiting the review option available to a contested claimant to filing a Notice of Disagreement with the Board within 60 days of issuance of the decision of the agency of original jurisdiction. Simultaneously contested claims thus would be excepted from the general one year review period in § 3.2500. VA believes that this is a reasonable way to effectuate congressional intent that the review process for a contested claim be designed to achieve faster resolution of the claim. It also reduces the opportunity for one claimant to prevent the payment of benefits to another claimant by delaying action on filing for review of a decision favorable to the other claimant or by filing successive supplemental claims based on marginally relevant evidence. If either claimant discovers new evidence, the claimant may, under the new system, file such evidence in connection with an appeal to the Board. In addition, under the new system, initial decisions by the agency of original jurisdiction are required to contain more detailed information

regarding the basis of the decision, reducing the need for further decisions by the agency of original jurisdiction to provide more information.

§ 3.2501 Supplemental Claims.

VA proposes to add a new section to part 3, subpart D, to explain the rules that govern the supplemental claim review option required by 38 U.S.C. 5108 as amended by Pub. L. 115-55. Claimants may request review of VA's decision by submitting a supplemental claim after a decision by the VBA, the Board, or the Court of Appeals for Veterans Claims. Pub. L. 115-55 amended 38 U.S.C. 5108(a) to prescribe that VA will re-adjudicate a claim when new and relevant evidence is presented or secured with respect to a supplemental claim. VA proposes to include in § 3.2501 the requirement that new and relevant evidence must accompany a supplemental claim or be submitted or secured while a supplemental claim is pending for VA to take action on the evidence and readjudicate the claim.

VA proposes to include a requirement that a claimant file a supplemental claim on a form prescribed by the Secretary and that the duty to assist in gathering new and relevant evidence will be triggered upon the filing of a substantially complete application. As provided in proposed amendments to § 3.159(a)(3) and § 3.160(a), a substantially complete or complete supplemental claim application must identify or include potentially new evidence. An incomplete claim will be considered filed on the date of receipt if the complete application is filed within a year, consistent with § 3.155. The new statutory framework provides one year for submission of a request for review under any of the three new lanes. Consistent with this requirement, the intent to file

provisions of § 3.155(b) would not apply to supplemental claims. This new section will also address the evidentiary record for supplemental claims, consistent with proposed § 3.151(d).

§ 3.2502 Returns by Higher-Level Adjudicator or Remand by the Board of Veterans' Appeals.

VA proposes to add § 3.2502 to part 3, subpart D, to implement the requirement in new 38 U.S.C. 5109B for expedited processing of claims returned from a higher-level adjudicator and remands from the Board. Upon receipt of a returned claim or remand by the Board, the agency of original jurisdiction will take immediate action to expedite readjudication of the claim in accordance with new 38 U.S.C. 5109B. The agency of original jurisdiction will retain jurisdiction of the claim. In readjudicating the claim, the adjudication activity will correct all identified duty to assist errors, complete a new decision and issue notice to the claimant and or his or her legal representative in accordance with § 3.103(f). For all issues readjudicated, the effective date of any evaluation and award of pension, compensation, or dependency and indemnity compensation will be determined in accordance with the date of receipt of the initial claim as prescribed under proposed § 3.2500(g).

§ 3.2600 Legacy review of benefit claims decisions.

Current § 3.2600 governs certain aspects of review under the legacy system, for claims in which a Notice of Disagreement is filed on or after June 1, 2001. VA proposes to amend § 3.2600 to make clear that this section only applies to legacy claims as

defined in § 3.2400 and not to claims that are processed under the new review system. VA plans to implement the new claims and appeals system on February 14, 2019. Claimants who receive decisions prior to the effective date of the new system will have the option to file an appeal under the legacy process, in which case § 3.2600 will apply. In general, the agency of original jurisdiction will stop accepting Notices of Disagreement for legacy claims one year after the effective date of the final rule implementing the new claims and appeals system, subject to extension of the filing period for good cause in individual cases.

§ 3.2601 Higher-level review.

VA proposes to add a new section to part 3, subpart D, to implement the rules that govern the higher-level review option required by 38 U.S.C. 5104B. This new section explains the requirements for electing a higher-level review, describes the type of agency of original jurisdiction employees who will conduct the review, and addresses the review process.

Under 38 U.S.C. 5104B, a claimant in the modernized review system may request a higher-level review of a decision on a claim by the agency of original jurisdiction during the one year period to seek review following issuance of the notice of decision. The higher-level review option gives claimants a second look at their claims, but that review is based solely on the same evidence that was before the initial adjudicator. The higher-level review is conducted by a different experienced VA employee with the ability to change the initial decision based on difference of opinion authority, subject to the rule that favorable findings are binding absent clear and

convincing evidence to the contrary. The higher-level review provides the opportunity for resolution of the issue(s) in dispute at the agency of original jurisdiction without having to file an appeal to the Board, or having to submit a supplemental claim with new and relevant evidence.

The higher-level review consists of a closed evidentiary record and does not allow for the submission of new evidence or a hearing. While the closed evidentiary record does not allow for submission of new evidence, VA proposes to provide claimants and/or their representatives with an opportunity to speak with the higher-level adjudicator and point out any specific errors in the case as part of the higher-level review. VA has utilized an informal conference as part of the Decision Review Officer review in the current legacy appeals process. VA has received positive feedback on providing claimants and/or their representatives an opportunity to speak directly with the decisionmaker for the claim. To further support this level of engagement, VA proposes to include the availability of an informal conference with a higher-level adjudicator in the new § 3.2601. The sole purpose of an informal conference is to provide a claimant or his or her representative with an opportunity to talk with the higher-level adjudicator so that the claimant and/or his or her representative can identify errors of fact or law in the prior decision. To comply with the statutory requirement of a closed evidentiary record, VA would not allow claimants or representatives to supplement the evidentiary record during the informal conference through the submission of new evidence or introduction of facts not present at the time of the prior decision. VA proposes to make efforts to contact a claimant or his or her representative, when requested, telephonically and to honor all requests for informal conferences unless determined not feasible in an

individual case, such as when VA, after reasonable efforts, is unable to make contact with the claimant or his or her representative.

VA proposes to include a paragraph that explains the requirement for expedited processing of all identified duty to assist errors. VA has a statutory duty to assist claimants in gathering evidence in support of a claim for benefits. Under 38 U.S.C. 5103A(f), if the higher-level adjudicator discovers a duty to assist error, the claim returns to the adjudication activity for correction unless the higher-level adjudicator determines that it would be appropriate for VA to grant the maximum benefit for the claim. In accordance with 38 U.S.C. 5109B, VA proposes to include a rule requiring expedited processing to correct these types of errors and to define “maximum benefit” for disability compensation as the maximum scheduler evaluation for the issue, and for other types of benefits, the granting of the benefit sought.

Because the filing date of a request for higher-level review is relevant to maintaining the effective date of any award, VA proposes to include provisions for determining the filing date that are similar to the provisions in § 3.155 that apply to applications for benefits.

PART 8—NATIONAL SERVICE LIFE INSURANCE

To comply with Pub. L. 115-55, VA proposes to amend 38 CFR 8.30 to allow applicants for insurance coverage and/or claimants for insurance proceeds (both hereafter referred to as claimants) who disagree with (1) denials of applications for insurance, total disability income provision, or reinstatement; (2) disallowances of claims

for insurance benefits; and/or (3) decisions holding fraud or imposing forfeiture to receive either a higher-level review, supplemental claim review, or Board review.

VA has consolidated all life insurance activity at a single office located in Philadelphia, PA. This office has original jurisdiction over all life insurance applications and claims for proceeds received in conjunction with life insurance programs administered by VA. Because insurance expertise and processing is consolidated at the Philadelphia office, higher level reviews and supplemental claims will be processed by employees at the Philadelphia office. Selection of an employee to conduct a higher-level review is at VA's discretion. The VA Insurance Service will assign higher-level reviews to employees who are experienced decision-makers who did not participate in the prior decision. The VA Insurance activity would make reasonable efforts to honor requests for informal conferences as part of a higher-level review, consistent with proposed 3.2601(h). As noted in proposed § 3.2601(h), claimants are responsible for any costs they incur in conjunction with an informal conference. This proposed rule would not limit the option of pursuing actions under 38 U.S.C. 1984.

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

Under 38 U.S.C. chapter 59, the Secretary of Veterans Affairs has authority to recognize VSOs and their representatives as well as attorneys and agents for the preparation, presentation, and prosecution of benefit claims, prescribe the rules of conduct applicable while providing claims assistance, and regulate fees charged by accredited attorneys and agents.

VA proposes to make several revisions to the regulations contained in part 14, Title 38 of the Code of Federal Regulations, regarding: accreditation of attorneys, agents, and VSO representatives; representation of claimants before VA; and fees charged by attorneys and agents for representation. The proposed revisions will address the recent changes in law enacted by Pub. L. 115-55, address a few discrepancies relating to the appellate process in the current regulations, and further clarify the rules.

While Pub. L. 115-55 sets out to “to reform the rights and processes relating to appeals of decisions regarding claims for benefits under the laws administered by the Secretary of Veterans Affairs,” the accreditation and fee regulations contained in part 14 are focused exclusively on accreditation of attorneys, agents, and VSO representatives; representation of claimants before VA; and fees charged by attorneys and agents for representation. Although VA recognizes that certain changes to part 14 are needed to reflect the new law, which changes the starting point at which fees for representation may be charged and changes in the appellate structure for deciding benefit claims, VA does not believe that the provisions of the appeals reform law prescribing processes for “claims for benefits” directly apply to adjudications of VA accreditation and attorney/agent fee matters. See 38 U.S.C. 5904; 38 CFR 14.626 - 14.637.

Section 14.629 – Requirements for Accreditation of Service Organization Representatives; Agents; and Attorneys

Current § 14.629 contains an introductory paragraph describing the process within the Office of General Counsel for evaluating whether an applicant for accreditation meets the qualifications for becoming accredited by VA and for appealing

decisions denying accreditation. VA proposes to move that paragraph from the beginning of 14.629 to a new paragraph, proposed paragraph (d), to improve the readability of the section.

In addition, VA proposes to modify the substance of the current introductory paragraph when relocating it in paragraph (d) to state that a denial of accreditation by the Chief Counsel is a final adjudicative determination of an agency of original jurisdiction that may only be appealed to the Board. The provision currently states that decisions denying accreditation may be appealed to the General Counsel and denials by the General Counsel are ultimately appealable to the district courts under the Administrative Procedures Act (APA). This provision reflects VA's prior position that a decision denying accreditation is not a "decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans," 38 U.S.C. 511(a), and, therefore, is not appealable under the system enacted by the Veterans Judicial Review Act (VJRA). See 38 U.S.C. 7104(a). While recognizing that the United States Court of Appeals for the Federal Circuit (Federal Circuit) had concluded that decisions suspending or cancelling accreditation are appealable under the VJRA, VA had previously distinguished decisions denying accreditation. *Accreditation of Agents and Attorneys; Agent and Attorney Fees*, 73 FR 29852, 29853-54 (May 22, 2008).

However, upon further reflection in light of decisions by the Federal Circuit and other Federal courts broadly construing the VJRA's exclusive jurisdictional scheme, VA now concludes that decisions denying accreditation also fall within the scope of that exclusive review scheme. This conclusion ensures consistency with respect to the

applicable law and other decisions relating to accreditation, and thus comports with a central purpose of the VJRA's exclusive review scheme, i.e., to promote a uniform body of jurisprudence on matters related to VA benefits. Therefore, proposed § 14.629(d)(2)(ii) would shift the authority to issue the decision on appeal from the General Counsel to the Board.

The basis for permitting an appeal to the Board is grounded in 38 U.S.C. 511, which applies to decisions “under a law that affects the provision of benefits by [VA] to veterans or the dependents or survivors of veterans.” 38 U.S.C. 511(a). The Federal Circuit has construed section 511 to extend beyond matters relating to claims for benefits, including to accreditation-related decisions. Cox v. West, 149 F.3d 1360, 1365 (Fed. Cir. 1998) (That “the decision of the regional office did not affect a veteran's benefits is not the point. The relevant issue under section 511(a) is whether the decision necessarily interpreted a law that affects veterans' benefits.”); see also Bates v. Nicholson, 398 F.3d 1355, 1359-61 (Fed. Cir. 2005). But the Federal Circuit has also held that simply because a decision is appealable to the Board does not mean the decision is subject to all the same statutory procedures applicable to claims for veterans benefits. See DAV v. Gober, 234 F.3d 682 , 694-95 (Fed. Cir. 2000) (demonstrating that certain appealable matters are not governed by all of the same provisions that apply to regular claims for veterans benefits).

Notably, in Pub. L. 115-55, Congress specifically identified “decisions regarding claims for benefits,” and did not include all decisions that are appealable to the Board, as being subject to the new appellate system. The provisions of Pub. L. 115-55 pertaining to the “supplemental claim” and “higher-level review” options specify that they

apply to “claims for benefits” and to “claimants,” which is defined in 38 U.S.C. 5100 to refer to a person applying for a “benefit” under laws administered by VA. Id., § 2(a) (defining “supplemental claim” as “a claim for benefits . . .”), § 2(g) and (h) (authorizing a “claimant” to elect higher-level review or submit a supplemental claim following a decision). VA does not view decisions to grant, deny, or otherwise affect accreditation status to be decisions “regarding claims for benefits” within the meaning of Pub. L. 115-55. VA’s interpretation of the statute is consistent with the Federal Circuit’s interpretation that the statutory provision governing removal of accreditation is not itself a law affecting benefits. Bates, 398 F.3d at 1360 (“The argument that 38 U.S.C. 5904(b) is itself a ‘law that affects the provision of benefits’ is unpersuasive.”). Accordingly, VA concludes that Pub. L. 115-55 does not require that the full range of modernized review procedures available for benefit decisions be extended to decisions regarding accreditation of representatives.

Moreover, revising the current adjudication process for accreditation matters simply to mirror the choice and flexibility required under Pub. L. 115-55 for benefits claims is unwarranted. Pub. L. 115-55 is designed to allow claimants for benefits to switch between the lanes of review, while still having an option to submit new evidence regarding their claims, all while preserving potential entitlement to benefits retroactive to the date of the benefits claim as long as the matter is pursued continuously. See Pub. L. No. 115-55, §§ 2(h)(1), (2)(l). In contrast, decisions on accreditation matters are effective on the date of the decision; therefore, the adjudication of these matters does not implicate the same issues as for claims for benefits regarding preservation of effective dates. Although flexibility and choice are key objectives of the new statutory

framework with regard to claims for benefits, the paramount concern for matters regarding accreditation is ensuring that claimants for benefits have competent representation. Therefore, we propose that denials of accreditation will only be appealable to the Board.

Consistent with the proposal in new paragraph (d) to have the Chief Counsel make the final decision on an accreditation determination, VA proposes to transfer from the General Counsel level to the Chief Counsel level the authority 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.

Section 14.631 – Powers of Attorney; Disclosure of Claimant Information

In current § 14.631(c), the regulation refers to 38 CFR 20.608. However, VA proposes to change that to 38 CFR 20.6 to reflect the revisions being proposed by the Board in this rulemaking.

Section 14.632 – Standards of Conduct for Persons Providing Representation Before the Department.

In current § 14.632, the regulation lists standards of conduct by which accredited attorneys, agents, and representatives must abide in preparing, presenting, and prosecuting VA benefit claims. VA proposes to revise current 14.632(c)(6) to eliminate the specific reference to the Notice of Disagreement and to clarify that gifts from a VA claimant to a VA-accredited individual are not permitted in any situation when a fee could not be lawfully charged. VA proposes to change the word “representation” to

“services,” in order to be clear that this provision applies to all aspects of claims preparation, presentation, and prosecution.

Section 14.633 – Termination of Accreditation or Authority to Provide Representation Under § 14.630.

VA proposes changes to current § 14.633(e)(2) to clarify that when the Chief Counsel closes the record with regard to a suspension or cancellation of accreditation, that this is the record before the Office of the General Counsel. The rationale for this change is to clarify procedures for closure of the record in suspending or cancelling an individual’s accreditation to ensure that the regulation does not contradict changes under the modernized system. Under existing law, the record is closed prior to the General Counsel’s decision and on appeal to the Board, no expansion of the record is permitted unless a Board hearing is requested. Under the modernized system, evidence may be submitted for the Board to consider in the first instance with or without a hearing request. VA proposes this change twice in § 14.633(e)(2) in order to maintain consistency.

VA also proposes new language in § 14.633(h)(1) and (2) to clarify the procedures for decisions issued before the effective date of the modernized review system and on or after that date. In addition, in proposed § 14.633(h)(1), VA proposes replacing the reference to 38 CFR 19.9 with 38 CFR 20.904, to reflect the redesignation in the Board’s proposed regulations.

VA further proposes moving the second sentence in 14.633(h) to a new subsection 14.633(j) and adding “suspension” to clarify that the General Counsel can in fact provide notice of both suspensions and cancellations of accreditation. The overall

move is intended to provide clarity, as the paragraph in which this is currently located otherwise addresses appellate rights. The proposed addition fills in a gap in the existing regulations. In the preamble to the May 2007 proposed rule on Part 14, VA stated that the General Counsel could notify all agencies, courts, and bars to which the agent or attorney is admitted to practice of suspensions or cancellations, 72 FR 25930, 25933 (May 7, 2007), but, in the regulation text, VA only specified cancellation. Id. at 25940; see also 73 FR at 29875 (final rule text).

As discussed above with denials of accreditation, it is neither required nor prudent to provide all the same options and safeguards that apply to the new appellate system under Pub. L. 115-55 to decisions regarding the suspension or cancellation of accreditation.

Section 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.

Currently, 38 U.S.C. 5904(c)(1) directs that agents and attorneys may be paid for services provided after a Notice of Disagreement is filed in a case. This is also reflected in current 38 CFR 14.636(c). VA proposes language in § 14.636(c)(1)(i) to implement the change in section 2(n) of Pub. L. 115-55 that fees may be charged by an accredited agent or attorney upon VA's issuance of notice of an initial decision on a claim. In the same subsection of § 14.636, VA proposes additional language, based on the effective date provisions in section 2(l) of Pub. L. 115-55, to clarify the relationship between section 2(n) of Pub. L. 115-55 and the new adjudication procedures. Specifically, this clarifies whether a decision on a supplemental claim is considered a new initial decision,

or whether it is part of the original adjudication string based on the effective date. The language VA proposes makes clear that a decision by an agency of original jurisdiction adjudicating a supplemental claim will be considered an initial decision on a claim unless the decision is made while the claimant continuously pursued the claim by choosing one of the three procedural options available under Pub. L. 115-55.

In addition, VA proposes to add § 14.636(c)(1)(ii), to clarify the effective dates emanating from Pub. L. 115-55 for attorney fee matters based on clear and unmistakable error. The language in proposed § 14.636(c)(1)(ii) mirrors the already existing regulatory text at current § 14.636(c)(1).

Next, proposed § 14.636(c)(2)(i) contains minor language edits to accommodate for the implementation of the Pub. L. 115-55. Note that, although not specified in the proposed modified subsection, a Notice of Disagreement which has been withdrawn to opt in to the appeals modernization program will still satisfy the Notice of Disagreement requirement under paragraph (c)(2).

Proposed § 14.636(i)(3) contains language to clarify that when the Chief Counsel closes the record in proceedings to review fee agreements, this is the record before the Office of the General Counsel. VA proposes this minor change in both § 14.636(i)(3) and (k) in order to maintain consistency. VA proposes to remove the instruction for filing a Notice of Disagreement with the Office of the General Counsel because, although that is correct under the legacy system, under the modernized appeals system the Notice of Disagreement should be filed directly with the Board. The Office of General Counsel form with the appellate rights will specify where the Notice of Disagreement should be filed. In addition, proposed § 14.636(k) contains language

similar to that in proposed § 14.633(h), for the reasons stated in those sections above, to clarify the procedures for decisions issued before the effective date of the modernized review system, and on or after that date, the date that Pub. L. 115-55 is scheduled to take effect. As required by Pub. L. 115-55, VA proposes to replace the term “reopened” with “readjudicated” in several places in the proposed § 14.636.

Finally, because fee matters are simultaneously contested matters they are processed under the appellate procedures applicable to simultaneously contested claims. See Mason v. Shinseki, 743 F.3d 1370, 1374 (2014) (holding that disputes regarding eligibility for attorney's fees withheld from past-due disability benefits are subject to the appeal deadlines for simultaneously contested claims). As explained elsewhere in this rulemaking, the additional options provided under Pub. L. 115-55 are not appropriate to simultaneously contested matters.

Moreover, it is clear that decisions on fee matters differ from decisions on claims for VA benefits because they ultimately concern whether the terms of the private contract should be altered for public policy reasons. See Scates v. Principi, 282 F.3d 1362, 1366-66 (finding that a contingency percentage agreed upon in a fee contract contains an “implicit . . . understanding” that the representative may not be entitled to the full percentage if the claimant terminates the representative’s services during the case). Compare Pub. L. 115-55, § 2(h)(1) (providing for three options for review), with 38 U.S.C. 5904(c)(3) (specifying that a fee reasonableness decision may be reviewed by the Board pursuant to section 7104 to determine whether it is excessive or unreasonable); and 38 U.S.C. 7263(d) (explaining that the Court of Appeals for

Veterans Claim's decision with regard to the reasonableness of the fee is a final determination that may not be reviewed by any other court).

Section 14.637 – Payment of the Expenses of Agents and Attorneys in Proceedings before Agencies of Original Jurisdiction and Before the Board of Veterans' Appeals

Proposed § 14.637(d)(3) contains language to clarify that when the Chief Counsel closes the record in proceedings to review fee agreements, this is the record before the Office of the General Counsel. Also, in proposed § 14.637(f), language similar to that in proposed §§ 14.633(h) and 14.636(k) is proposed to comply with Pub. L. 115-55 and for the reasons stated with respect to those sections above. In addition, in § 14.637(d)(3), VA proposes to remove the instruction for filing a Notice of Disagreement with the Office of the General Counsel for the same reasons as stated in § 14.636(i)(3).

PART 19—BOARD OF VETERANS' APPEALS: APPEALS REGULATIONS.

VA proposes to restructure and revise 38 CFR part 19. As noted, Pub. L. 115-55 applies to all claims for which notice of decision was provided on or after the effective date and to certain claims where a notice of decision was provided prior to that date, but the appellant opted to subject the claim to the new system. While Pub. L. 115-55 is primarily aimed at creating a new claims and appeals adjudication system, VA must also provide timely and quality decisions on legacy appeals. A legacy appeal is any appeal where the agency of original jurisdiction provided notice of a decision prior to the effective date and the appellant has not opted to have review of his or her appeal completed in the new system. When the new system becomes effective, VA will have

approximately 500,000 pending legacy appeals, and many of these legacy appellants will still be at a stage in their appeals where regulations concerning filing forms, motions, or other actions will be relevant. Thus, VA proposes to preserve and consolidate regulations concerning legacy appeals.

This proposed rule would make part 19 applicable only to legacy appeals; specifically, the processing of legacy appeals by the agency of original jurisdiction. Subparts F, G, and J of part 20 would apply only to the processing and adjudication of legacy appeals by the Board. Except as otherwise provided in specific sections, subparts A, B, H, K, L, M, N, and O of part 20 would apply to the processing and adjudication of both appeals in the new system and legacy appeals. Subparts C, D, E, and I of part 20 would apply only to the processing and adjudication of appeals in the new system.

VA proposes to revise the authority citations for individual sections in part 19 and for certain sections in part 20 applicable only to legacy appeals to identify the versions of statutes existing prior to the effective date of the modernized appeals system, as those statutes will continue to apply to legacy appeals.

Finally, VA proposes minor updates to addresses. This minor change is not substantive. Currently, provisions containing the Board's address for mail related to appeals direct that mail should be addressed to a particular office within the Board. In practice, all mail is processed in a central location at the Board and routed to the appropriate office internally. Therefore, VA proposes to strike all references to specific offices or personnel at the Board in references to the Board's address.

The following distribution table shows where each section of current part 19 is proposed to be moved.

Old Section	New Section
19.1	20.100
19.2	20.101
19.3	20.106
19.4	20.103
19.5	20.105
19.7	20.903; similar in 20.802
19.8	20.905; similar in 20.804
19.9	20.904; similar in 20.803
19.11	20.1004
19.12	20.107
19.13	20.108
19.14	20.109
19.27	Removed
19.33	Removed
19.50	Removed
19.51	Removed
19.52	Removed
19.53	Removed
19.75	20.603
19.76	20.602

Subpart A—Applicability

VA proposes to amend subpart A—Operation of the Board of Veterans' Appeals, by moving all sections into part 20. Generally applicable provisions are proposed to be moved into subpart B of part 20, while provisions applicable to adjudication of legacy appeals are proposed to be moved to subpart J of part 20.

VA proposes to add new provisions to subpart A of part 19 that explain the applicability of part 19.

§ 19.1. Provisions applicable to legacy appeals.

New § 19.1 is proposed to help claimants understand which appeals system applies to their claim, and to provide specific instructions for legacy claimants to locate the regulations applicable to their appeal.

§ 19.2. Appellant's election for review of a legacy appeal in the modernized system.

New § 19.2 is proposed to explain options that may be available for legacy claimants to have their claim or appeal considered in the new system. This includes electing the modernized review system pursuant to 38 CFR 3.2400(c)(1), following issuance of a Statement of the Case or Supplemental Statement of the Case on or after the effective date, or pursuant to any test program implemented by the Board.

Subpart B—Legacy Appeals Processing by Agency of Original Jurisdiction

VA proposes to restructure subpart B of part 19 in order to consolidate procedures relating to legacy appeal processing by the agency of original jurisdiction. Subpart C of part 20 deals with commencement and perfection of appeals. As these procedures require action by the agency of original jurisdiction rather than the Board, and are only applicable to appeals in the legacy system, VA proposes to move these provisions to subpart B of part 19.

§ 19.20 What constitutes an appeal.

VA proposes to redesignate § 20.200 as § 19.20, and update citations.

§ 19.21 Notice of Disagreement.

VA proposes to redesignate § 20.201 as § 19.21, and update citations.

§ 19.22 Substantive Appeal.

VA proposes to redesignate § 20.202 as § 19.22, and update citations.

§ 19.23 Applicability of provisions concerning Notice of Disagreement.

VA proposes to update the citations in § 19.23.

§ 19.24 Action by agency of original jurisdiction on Notice of Disagreement required to be filed on a standardized form.

VA proposes to update the citations in § 19.24.

§ 19.25 Notification by agency of original jurisdiction of right to appeal.

VA does not propose any changes to § 19.25.

§ 19.26 Action by agency of original jurisdiction on Notice of Disagreement.

VA does not propose any changes to § 19.26.

§ 19.27 [Reserved]

Section 2, paragraph (s) of Pub. L. 115-55 repeals procedures for administrative appeals by striking section 7106 of title 38 of the United States Code. Therefore, VA proposes to remove § 19.27, relating to administrative appeals.

§ 19.28 Determination that a Notice of Disagreement is inadequate protested by claimant or representative.

VA does not propose any changes to § 19.28.

§ 19.29 Statement of the case.

VA does not propose any changes to § 19.29.

§19.30 Furnishing the Statement of the Case and instructions for filing a substantive appeal.

Section 2, paragraph (x)(5) of Pub. L. 115-55 provides that a legacy appellant may elect to subject his or her appeal to the new system upon receipt of a Statement of the Case (SOC) or Supplemental Statement of the Case (SSOC). Therefore, VA proposes to amend § 19.30 by requiring that all SOC's contain information on how to opt into the new system.

§ 19.31 Supplemental Statement of the Case.

VA proposes to amend § 19.31 by requiring that all SSOC's contain information on how to opt into the new system.

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

VA does not propose any changes to § 19.32.

§ 19.33 [Reserved]

Section 2, paragraph (s) of Pub. L. 115-55 repeals procedures for administrative appeals by striking section 7106 of title 38 of the United States Code. Therefore, VA proposes to remove § 19.33, relating to administrative appeals.

§ 19.34 Determination that Notice of Disagreement or substantive appeal was not timely filed protested by claimant or representative.

VA does not propose any changes to § 19.34.

§ 19.35 Certification of appeals.

Currently, certification to the Board may only be accomplished by completion of a VA Form 8. This requirement creates cumbersome administrative and technological processes which often delay certification of appeals, but do not serve Veterans in any way. Therefore, VA proposes to amend § 19.35 to eliminate the requirement for a Form 8, and will accomplish certification through other means.

§ 19.36 Notification of certification of appeal and transfer of appellate record.

VA proposes to update the citations in § 19.36.

§ 19.37 Consideration of additional evidence received by the agency of original jurisdiction after an appeal has been initiated.

VA does not propose any changes to § 19.37.

§ 19.38 Action by agency of original jurisdiction when remand received.

VA proposes to update the citations in § 19.38.

Subpart C—Claimant Action in a Legacy Appeal

As noted, section 2, paragraph (s) of Pub. L. 115-55 repeals procedures for administrative appeals by striking section 7106 of title 38 of the United States Code. As this amendment is applicable to all appeals, VA proposes to remove subpart C of part 19, dealing with administrative appeals.

VA proposes to restructure subpart C of part 19 in order to consolidate procedures relating to commencement and filing of legacy appeals. Subpart D of part 20 deals with commencement and filing of appeals, including procedures for Statements of the Case. As these procedures require action by the agency of original jurisdiction rather than the Board, and are only applicable to appeals in the legacy system, VA proposes to move these provisions to subpart C of part 19.

§ 19.50 Who can file an appeal.

VA proposes to redesignate § 20.301 as § 19.50.

§ 19.51 Place of filing Notice of Disagreement and substantive appeal.

VA proposes to redesignate § 20.300 as § 19.51.

§ 19.52 Time limit for filing Notice of Disagreement, substantive appeal, and response to Supplemental Statement of the Case.

VA proposes to redesignate § 20.302 as § 19.52.

§ 19.53 Extension of time for filing substantive appeal and response to Supplemental Statement of the Case.

VA proposes to redesignate § 20.303 as § 19.53.

§ 19.54 Filing additional evidence does not extend time limit for appeal.

VA proposes to redesignate § 20.304 as § 19.54.

§ 19.55 Withdrawal of appeal.

VA proposes to redesignate § 20.204 as § 19.55, add an address update, and add an internal reference.

Subpart D—[Reserved]

VA proposes to remove and reserve the two provisions of subpart D, dealing with field hearings. These provisions will be incorporated into subpart G of part 20, in order to streamline regulations concerning Board hearing procedures.

Subpart E—Simultaneously Contested Claims

VA does not propose any substantive changes to the procedures for simultaneously contested legacy claims, consisting of §§ 19.100-19.102.

APPENDIX A TO PART 19—CROSS-REFERENCES

VA proposes to remove Appendix A to part 19, as it has outlived its usefulness. Cross-references currently located in the table are outdated or incorrect. Whereas a user may have previously used the appendix to search for other sections pertinent to a particular regulation, such research may be accomplished much more efficiently via a search of the electronic document.

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

As noted, VA proposes to restructure subparts A and B of part 20 by adding generally applicable provisions from part 19 and new provisions explaining applicability and new definitions. The following distribution table shows where each section of current part 20 is proposed to be moved.

Old Section	New Section
20.100	20.102
20.101	20.104
20.102	20.110
20.200	19.20; similar in 20.201
20.201	19.21; similar in 20.202
20.202	19.22
20.204	19.55; similar in 20.205
20.300	19.51; similar in 20.203
20.301	19.50; similar in 20.204
20.302	19.52; similar in 20.203
20.303	19.53
20.304	19.54
20.305	20.110
20.306	20.111
20.400	Removed
20.401	Removed
20.500	20.501
20.501	20.502
20.502	20.503
20.503	20.504
20.504	20.505

20.600	20.5
20.608	20.6
20.702	20.704; similar in 20.603
20.703	20.602
20.704	20.603
20.705	20.601; similar in 20.702
20.706	20.705
20.707	20.604; similar in 20.706
20.708	20.707
20.709	20.605
20.710	20.708
20.711	20.709
20.712	20.710
20.713	20.711
20.714	20.712
20.715	20.713
20.716	20.714
20.717	20.715
20.800	20.901
20.900	20.902; similar in 20.801
20.901	20.906; similar in 20.805
20.902	20.907
20.903	20.908
20.904	20.1000
20.1000	20.1001
20.1001	20.1002
20.1003	20.1003
20.1502	Removed
20.1504	Removed
20.1505	Removed
20.1506	Removed
20.1507	Removed
20.1508	Removed
20.1509	Removed

Subpart A—General

§ 20.1 Rule 1. Purpose and construction of Rules of Practice.

VA proposes a minor edit to § 20.1, to provide the common name for the Board of Veterans' Appeals.

§ 20.2 Rule 2. Procedure in absence of specific Rule of Practice.

VA proposes no changes.

§ 20.3 Rule 3. Definitions.

VA proposes minor edits to § 20.3 Definitions, to remove terms that are no longer used in part 20, or are defined elsewhere in the part. VA also proposes to adopt the definition of “claim” used in part 3 of this title.

§ 20.4 Rule 4. Appeal systems definitions and applicability provisions.

VA proposes to add new § 20.4, appeal systems definitions and applicability provisions, to provide definitions and an explanation of the applicability of the new system. Proposed § 20.4 assists appellants in understanding which system applies to their appeal. It provides specific instructions for appellants to locate the regulations applicable to their appeal, and explains options that may be available for legacy claimants to take advantage of the new system.

§ 20.5 Rule 5. Right to representation.

VA proposes to redesignate § 20.600 as § 20.5.

§ 20.6 Rule 6. Withdrawal of services by a representative.

VA proposes to redesignate § 20.608 as § 20.6, and make minor changes to reflect the different procedures for withdrawal of representatives in legacy appeals and

appeals in the new system. Specifically, current § 20.608 draws a distinction between withdrawal of services by a representative prior to certification to the Board, and withdrawal after certification. In the new appeals system, Notices of Disagreement are filed directly to the Board, and thus the certification process will not be applicable to new appeals. Proposed § 20.6 clarifies that the rules governing withdrawal of representation after certification apply to both appeals in the legacy system that have been certified, and all appeals in the new system. The rules governing withdrawal of representation prior to certification apply only to legacy appeals that have not yet been certified.

Subpart B—The Board

§ 20.100 Rule 100. Establishment of the Board.

VA proposes to redesignate § 19.1 as § 20.100.

§ 20.101 Rule 101. Composition of the Board; Titles.

VA proposes to redesignate § 19.2 as § 20.101.

§ 20.102 Rule 102. Name, business hours, and mailing address of the Board.

VA proposes to redesignate § 20.100 as § 20.102 and update the mailing address.

§ 20.103 Rule 103. Principal functions of the Board.

VA proposes to redesignate § 19.4 as § 20.103.

§ 20.104 Rule 104. Jurisdiction of the Board.

VA proposes to redesignate § 20.101 as § 20.104, and make minor changes. Specifically, VA proposes to reverse paragraphs (c) and (d) to condense information applicable only to legacy appeals. VA also proposes to redesignate § 19.5 as § 20.105. This move would make the third sentence of § 20.104(a) redundant. Thus, VA proposes to remove that sentence from § 20.104, and incorporate it with § 20.105. Citations are also updated.

§ 20.105 Rule 105. Criteria governing disposition of appeals.

As noted above, VA proposes to redesignate § 19.5 as § 20.105 and clarify that the criteria governing the disposition of appeals also applies to decisions of the Board. Proposed § 20.105 includes the rules governing precedent opinions of the General Counsel of the Department of Veterans Affairs which are currently duplicated in § 20.104(a) and § 19.5. This nonsubstantive change reduces redundant paragraphs and simplifies the rule.

§ 20.106 Rule 106. Assignment of proceedings.

VA proposes to redesignate § 19.3 as § 20.106.

§ 20.107 Rule 107. Disqualification of Members.

VA proposes to redesignate § 19.12 as § 20.107 and remove paragraph (b), dealing with administrative appeals.

§ 20.108 Rule 108. Delegation of authority to Chairman and Vice Chairman, Board of Veterans' Appeals.

VA proposes to redesignate § 19.13 as § 20.108.

§ 20.109 Rule 109. Delegation of authority to Vice Chairman, Deputy Vice Chairman, or Members of the Board.

VA proposes to combine current § 19.14 with § 20.102 and redesignate the section as § 20.109, and update citations. This nonsubstantive change reduces redundant paragraphs and simplifies the rule.

§ 20.110 Rule 110. Computation of time limit for filing.

VA proposes to redesignate § 20.305 as § 20.110.

§ 20.111 Rule 111. Legal holidays.

VA proposes to redesignate § 20.306 as § 20.111 and update the citations.

Subpart C—Commencement and Filing of Appeals

VA proposes to add a new subpart C, applicable only to appeals in the new system. Provisions in current subpart C applicable to legacy appeals would be redesignated and moved to part 19 as described elsewhere in this document. Proposed subpart C contains provisions dealing with the filing of a Notice of Disagreement. Although Pub. L. 115-55 makes some changes to Notice of Disagreement filing

procedures, many of these procedures will remain the same; therefore, the proposed regulations contained in subpart C are similar to the Notice of Disagreement regulations currently in place.

§ 20.200 Rule 200. Notification by agency of original jurisdiction of right to appeal.

VA proposes to add new § 20.200, similar to current § 19.25.

§ 20.201 Rule 201. What constitutes an appeal.

VA proposes to add new § 20.201, similar to current § 20.200. The amendments made to 38 U.S.C. 7105 direct that an appeal to the Board is accomplished by filing a Notice of Disagreement directly to the Board. Therefore, proposed § 20.201 reflects this change in procedure.

§ 20.202 Rule 202. Notice of Disagreement.

VA proposes to add new § 20.202, similar to current § 20.201. Pub. L. 115-55 requires that appellants indicate on their Notice of Disagreement the specific determination with which they disagree, and whether they request a Board hearing (which includes the opportunity to submit additional evidence within 90 days following the Board hearing), an opportunity to submit additional evidence within 90 days following submission of the Notice of Disagreement, or direct review of the evidence that was before the agency of original jurisdiction by the Board. Thus, paragraphs (a) and (b) of proposed § 20.202 reflect these changes to the information that must be indicated on the Notice of Disagreement.

Pub. L. 115-55 requires that VA create a policy allowing appellants to change the information indicated on the Notice of Disagreement, meaning that an appellant may request to change the evidentiary record before the Board. In crafting this policy, VA sought to provide appellants with an opportunity to change their initial election if their circumstances or preference changed. However, VA also wanted to prevent an appellant from unfairly gaining the advantage of two dockets. For example, an appellant should not be permitted to take advantage of the faster direct review docket if he or she has already submitted evidence or testified at a Board hearing.

Additionally, VA sought to limit the time period in which appellants may request to modify the Notice of Disagreement. VA has established a 365-day timeliness goal for appeals in the direct review docket. VA also intends to provide wait time predictions for the evidence and hearing dockets. If appellants are able to modify their Notices of Disagreement, and thereby change dockets at any time prior to the Board's decision on the issue or issues, VA will not be able to provide accurate wait time information. This would diminish the ability of other Veterans to make informed choices as to which of the Board's dockets best suits their individual needs.

Proposed § 20.202(c)(1) provides that the appellant's election of an evidentiary record on the Notice of Disagreement determines the docket on which the appeal is placed, and that the Board will not consider additional evidence or schedule a hearing unless the appellant indicated one of those options on the Notice of Disagreement. Paragraph (c)(2) provides that an appellant may modify the Notice of Disagreement for the purpose of selecting a different evidentiary record option. The request to modify must be made within one year of the agency of original jurisdiction decision on appeal,

or 30 days after the Notice of Disagreement is received by the Board, whichever is later. The request will be denied if the appellant has already submitted evidence or testimony.

Additionally, nothing in the regulations prevent an appellant from filing multiple Notices of Disagreement within the one-year period. Therefore, if an appellant wants to add additional issues not initially included on the Notice of Disagreement, the appellant is free to submit an additional Notice of Disagreement identifying these issues, as long as this additional Notice of Disagreement is timely submitted.

Paragraphs (f) and (g) of proposed § 20.202 provide procedures for how the Board will handle unclear or deficient Notices of Disagreement. The new framework shifts jurisdiction to the Board for any question as to the adequacy of Notices of Disagreement. Veterans Law Judges will retain their discretion to interpret some unclear statements on Notices of Disagreements in the light most favorable to the Veteran. However, proposed paragraphs (f) and (g) are necessary to outline the procedures the Board will take when an inadequate Notice of Disagreement is received at the Board. Specifically, the proposed rule addresses the problem created when the Board receives a Notice of Disagreement electing more than one evidentiary option, no evidentiary option, or when it is otherwise unclear how the appeal should be docketed.

The proposed rule is closely aligned with the process for clarifying Notices of Disagreement in the legacy appeals system. When the Board receives an unclear or deficient Notice of Disagreement, the Board will notify the claimant and request clarification. The claimant must respond with the requested clarification within one year after the agency of original jurisdiction decision, or 60 days after the date of the Board's clarification request, whichever is later. If the claimant does not provide a timely

response, the previous statement from the claimant will not be considered a Notice of Disagreement.

Paragraph (h) of proposed § 20.202 provides that, when an unclear Notice of Disagreement is properly clarified, the Notice of Disagreement will be considered to have been properly filed on the date of clarification. This means that the docket date will be based upon the date of the clarification, and if the appellant requests to submit evidence, the 90-day window for evidence submission will begin on the date of clarification.

§ 20.203 Rule 203. Place and time of filing Notice of Disagreement.

VA proposes to add new § 20.203, similar to the provisions of current §§ 20.300 and 20.302. Proposed § 20.203 differs from current §§ 20.300 and 20.302 in that Pub. L. 115-55 requires that Notices of Disagreement are filed with the Board. In contrast, current §§ 20.300 and 20.302 provide that Notices of Disagreement are filed with the agency of original jurisdiction.

§ 20.204 Rule 204. Who can file a Notice of Disagreement.

VA proposes to add new § 20.204, similar to current § 20.301. Proposed § 20.204 differs from current § 20.301 in that the provisions of § 20.301 also apply to the filing of a Substantive Appeal. Pub. L. 115-55 eliminates procedures relating to Substantive Appeals; therefore, proposed § 20.204 does not discuss Substantive Appeals.

§ 20.205 Rule 205. Withdrawal of appeal.

VA proposes to add new § 20.205, similar to current § 20.204. Proposed § 20.205 differs from the rules for withdrawal of a legacy appeal in that paragraph (c) of proposed § 20.205 provides that, in addition to filing a new Notice of Disagreement, a claimant may request a higher-level review or file a supplemental claim following the withdrawal of the Notice of Disagreement, provided such filing would be timely.

Subpart D—Evidentiary Record

VA proposes to add new subpart D, Evidentiary Record, in place of current subpart D, Filing, which VA proposes to move to part 19. New subpart D is proposed to implement 38 U.S.C. 7113, a new section added by Pub. L. 115-55 to establish the evidentiary record before the Board. The evidentiary record before the Board is determined by the appellant's election on his or her Notice of Disagreement. The appellant's election will determine whether the Board considers (1) only the evidence that was of record at the time of the prior agency of original jurisdiction decision; (2) the evidence that was of record before at the time of the prior agency of original jurisdiction decision and any additional evidence submitted within 90 days of submission of the Notice of Disagreement; or (3) the evidence that was of record at the time of the prior agency of original jurisdiction decision and any evidence submitting during, or within 90 days thereafter, the Board hearing.

§ 20.300 Rule 300. General.

Proposed § 20.300 provides that decisions of the Board will be based on a de novo review of the evidence, as provided in § 20.801.

§ 20.301 Rule 301. Appeals with no request for a Board hearing and no additional evidence.

Proposed § 20.301 provides that, for appeals with no request to appear at a hearing or submit additional evidence, the Board will consider only the evidence that was before the agency of original jurisdiction in the decision on appeal.

§ 20.302 Rule 302. Appeals with a request for a Board hearing.

Proposed § 20.302 provides that, for appeals with a request for a Board hearing, the Board will consider the evidence that was before the agency of original jurisdiction in the decision on appeal, testimony presented at a Board hearing, and any additional evidence submitted within 90 days of the Board hearing.

Pub. L. 115-55 does not describe the evidentiary record in the event that a hearing request is withdrawn or the appellant does not appear for a scheduled hearing. Thus, the Board proposes paragraphs (b) and (c) of § 20.302 to specify that appellants who requested a hearing on the Notice of Disagreement, but ultimately do not appear for a hearing will retain the opportunity to submit additional evidence within a 90-day window.

§ 20.303 Rule 303. Appeals with no request for a Board hearing, but with a request for submission of additional evidence.

Proposed § 20.303 provides that, for appeals with no request for a Board hearing, but with a request to submit additional evidence, the Board will consider the evidence that was before the agency of original jurisdiction in the decision on appeal,

and any additional evidence submitted with the Notice of Disagreement or within 90 days following receipt of the Notice of Disagreement. As noted above, when an appellant requests to modify the Notice of Disagreement for the purpose of requesting an opportunity to submit additional evidence, the Board will notify the appellant whether the request has been granted, and if so, that the appeal has been moved to the docket for appeals described in this section. The 90-day window for submission of additional evidence will begin on the date of such notice.

Pub. L. 115-55 requires that VA create at least two new dockets – a docket for appeals with a request for a Board hearing and a docket for appeals with no request for a Board hearing – but affords VA discretion to create additional dockets. VA proposes to establish three dockets for appeals adjudicated under the modernized appeals system. The first docket is for Veterans who do not want a hearing and do not wish to submit additional evidence, as provided by proposed § 20.301. The second docket is for Veterans who wish to have a hearing, as provided by proposed § 20.302. Finally, the third docket is for Veterans who wish to submit additional evidence, but do not want a hearing before a Veterans Law Judge.

Creation of these three separate dockets has multiple benefits. Most importantly, this docket structure provides greater opportunity for Veterans to tailor their appeals experience to best suit their individual needs. The first docket, described in proposed § 20.301, captures quality feedback from appeals in which no additional evidence is added to the record. This allows VA to identify areas in which the claims process can be improved and will allow VA to develop targeted training. Allowing additional evidence submission for appeals in the docket described in proposed § 20.301 would break this

quality feedback loop. Veterans with a strong preference to appear at a Board hearing before a Veterans Law Judge may choose the docket described in proposed § 20.302.

The docket described in proposed § 20.303 allows Veterans to submit additional evidence that may assist in establishing entitlement to benefits, without the wait time that is associated with Board hearings. Pub. L. 115-55 does not permit appeals with no request for a hearing to be placed on the same docket as appeals with a request for a hearing. See P.L. 115-55, section 2(t), amending 38 U.S.C. 7107(a)(3). Therefore, creation of the third docket described in proposed § 20.303 is necessary to provide Veterans with the option to submit additional evidence without a hearing.

There is no cost associated with establishing the docket described in proposed § 20.303. The technological system required to track and manage appeals at the Board is designed to maintain multiple dockets in both the legacy and modernized appeals systems, as required by law. Adding a third docket to process appeals with no request for a Board hearing, but with a request to submit additional evidence does not result in any additional cost from an information technology development perspective. Moreover, there is no additional cost associated with the adjudication of such appeals, as the Board will apply the same substantive law regarding entitlement to benefits to all appeals. There is no additional administrative or adjudicative burden caused by maintaining a separate docket for evidence submission.

Subpart E—Appeal in Simultaneously Contested Claims

VA proposes to add new subpart E, Appeal in Simultaneously Contested Claims, in place of current subpart E, Administrative Appeals, which Pub. L. 115-55 repeals.

Proposed subpart E would largely mirror subpart F, which VA proposes to make applicable only to legacy appeals. Subpart E would differ from subpart F insofar as the procedures for filing an appeal in the new system differ from those in the legacy system. For example, subpart F continues to describe notice and filing requirements for formal appeals and Statements of the Case. As Pub. L. 115-55 repeals procedures for formal appeals and Statements of the Case, subpart E does not have provisions related to these procedures. As discussed above, under the proposed new framework, simultaneously contested claims may only be appealed to the Board. Additionally, proposed subpart E addresses the circumstances – unique to the new framework, in which contesting parties request different evidentiary options.

§ 20.400 Rule 400. Notification of the right to appeal in a simultaneously contested claim.

Proposed § 20.401, similar to current § 19.100, describes the notification procedures when the agency of original jurisdiction takes an action in a simultaneously contested claim.

§ 20.401 Rule 401. Who can file an appeal in simultaneously contested claims.

Proposed § 20.401, similar to current § 20.500, describes who can file an appeal in simultaneously contested claims.

§ 20.402 Rule 402. Time limits for filing Notice of Disagreement in simultaneously contested claims.

Proposed § 20.402, similar to current § 20.501, describes the time limits for filing a Notice of Disagreement in a simultaneously contested claim.

§ 20.403 Rule 403. Notice to contesting parties on receipt of Notice of Disagreement in simultaneously contested claims.

Proposed § 20.403, similar to current § 20.502, also specifies that the notice to contesting parties upon receipt of a Notice of Disagreement must indicate the type of review requested by the appellant who initially filed the Notice of Disagreement, including whether a hearing was requested.

§ 20.404 Rule 404. Time limit for response to appeal by another contesting party in a simultaneously contested claim.

Proposed § 20.404 provides that a party to a simultaneously contested claim may file a brief, argument, or request for a different type of review under § 20.202(b) in answer to a Notice of Disagreement filed by another contesting party.

§ 20.405 Rule 405. Docketing of simultaneously contested claims at the Board.

Proposed § 20.405 resolves any conflict between two parties who request different evidentiary options under § 20.202(b). The proposed rule provides that, if any party requests a hearing before the Board, the appeal will be placed on the hearing docket and a hearing will be scheduled. If neither party requests a hearing, but any party requests an opportunity to submit additional evidence, the appeal will be placed on the evidence docket. VA will notify both parties when an appeal is placed on any

docket. If the appeal is placed on the evidence docket, the parties will have 90 days from the date of such notice in which to submit additional evidence.

§ 20.406 Rule 406. Notices sent to last addresses of record in simultaneously contested claims.

Proposed § 20.406, similar to current § 20.504, describes the procedures for sending notice to parties in contested claims.

§ 20.407 Rule 407. Favorable Findings are not binding in Contested Claims.

The favorable finding rule is impossible to apply in the context of contested claims, because a particular factual finding might be favorable to one appellant but unfavorable to another. Because the application of this rule in the context of simultaneously contested claims would produce absurd results, proposed § 20.407 clearly provides that favorable findings are not binding in the context of simultaneously contested appeals.

Subpart F—Legacy Appeal in Simultaneously Contested Claims

VA proposes to add new “§ 20.500 Rule 500. Applicability.” in order to better inform appellants as to which subpart is applicable to their appeal. Aside from renumbering to accommodate the new applicability section and necessary citation updates, VA does not propose additional changes to subpart F.

Subpart G—Legacy Hearings on Appeal

As noted above, VA proposes to redesignate § 20.600 and § 20.608, dealing with representation, to subpart B, as these provisions are generally applicable to both appeals systems. Proposed new subpart G would contain special provisions for hearings in legacy appeals, while amendments to subpart H are proposed to make that subpart applicable to hearings on appeals in both systems.

Amendments to hearing regulations for legacy and new system appeals are necessary in light of the Jeff Miller and Richard Blumenthal Veterans Health Care and Benefits Improvement Act of 2016, Pub. L. 114-315. In relevant part, Pub. L. 114-315, by amending 38 U.S.C. § 7107, establishes the Board's authority, upon request for a hearing, to determine what type of hearing it will provide an appellant, while affording the appellant the opportunity to request an alternative type of hearing once the Board makes its initial determination. Notably, field hearings will only be available in the legacy system. Therefore, provisions applicable to field hearings, currently contained in subpart D of part 19, and subpart H of part 20, are proposed to be moved into subpart G.

§ 20.600 Rule 600. Applicability.

VA proposes new § 20.600 to assist appellants in determining the hearing regulations applicable to their appeal.

§ 20.601 Rule 601. Methods by which hearings in legacy appeals are conducted; scheduling and notice provisions for such hearings.

VA proposes to redesignate § 20.705 as § 20.601, and amend to reflect the procedures applicable only to legacy appeals. Proposed § 20.601 would clarify that a

hearing before the Board may be conducted via an in-person hearing held at the Board's principal location in Washington, DC, via electronic means, or at a Department of Veterans Affairs facility having adequate physical resources and personnel for the support of such hearings. Further, proposed § 20.601 informs the reader that procedures for scheduling and providing notice of Board hearings in legacy appeals conducted at the Board's principal location or via electronic means are contained in § 20.704, while procedures for scheduling and providing notice of Board hearings in legacy appeals conducted at field facilities are contained in § 20.603.

§ 20.602 Rule 602. When a hearing before the Board of Veterans' Appeals may be requested in a legacy appeal; procedure for requesting a change in method of hearing.

VA proposes to retitle, revise, and expand § 20.703, redesignated as § 20.602, to clarify when and how legacy appellants may request hearings before the Board. These revisions implement the changes to 38 U.S.C. 7107 that require the Board to determine the method of a hearing and notify the appellant of its decision. As noted, although the Board will now be making the initial determinations regarding the method by which hearings will be conducted, appellants' rights to request a different type of hearing are preserved. Also, the Board alone will provide notification of the method and scheduling of hearings.

§ 20.603 Rule 603. Scheduling and notice of hearings conducted by the Board of Veterans' Appeals at Department of Veterans Affairs field facilities in a legacy appeal.

VA proposes to combine § 19.75 and § 20.704, and to redesignate as § 20.603. Proposed § 20.603 will clarify the procedures for the scheduling of hearings at VA field facilities. Field hearings for legacy appeals are scheduled in relationship to the need for the entire docket. Field hearing requests for legacy appeals are now handled by the Board alone and timing for requests is clarified. Citations and address are updated.

§ 20.604 Rule 604. Designation of Member or Members to conduct the hearing in a legacy appeal.

VA proposes to redesignate § 20.707 as § 20.604, and amend the section to differentiate the procedures for legacy appeals. Citations are also updated.

§ 20.605 Rule 605. Procurement of additional evidence following a hearing in a legacy appeal.

VA proposes to redesignate § 20.709 as § 20.605, and amend the section title to reflect that the provision is only applicable to legacy appeals. As notice, the evidentiary record in the new system is governed by subpart D.

Subpart H—Hearings on Appeal

No changes are proposed to § 20.701.

§ 20.700 Rule 700. General.

VA proposes to amend § 20.700 by removing outdated procedures for representatives to present oral arguments on an audio cassette. It is the Board's

practice to accept written arguments from a representative in the form of informal hearing presentations. Additionally, the presiding member may accept oral argument from a representative. This amendment will not disrupt those practices.

VA also proposes to remove paragraph (e), regarding electronic hearings, as these procedures are described in § 20.702(b).

§ 20.702 Rule 702. Methods by which hearings are conducted.

VA proposes new § 20.702, describing the types of hearings available to appellants in the new system. Similar to current § 20.705 (proposed here to be redesignated as § 20.601), this section will provide appellants and other readers with a clear understanding of the different methods by which Board hearings are conducted. Proposed § 20.702 would clarify that a hearing before the Board may be conducted via electronic means or via an in-person hearing held at the Board's principal location in Washington, DC.

§ 20.703 Rule 703. When a hearing Before the Board of Veterans' Appeals may be requested; procedure for requesting a change in method of hearing.

VA proposes new § 20.703 to clarify when and how appellants may request hearings before the Board. These revisions implement the changes to 38 U.S.C. 7107 that require the Board to determine the method of a hearing and notify the appellant of its decision. As noted, although the Board will now be making the initial determinations regarding the method by which hearings will be conducted, appellants' rights to request a different type of hearing are preserved.

§ 20.704 Rule 704. Scheduling and notice of hearings conducted by the Board of Veterans' Appeals.

VA proposes to redesignate § 20.702 as § 20.704, and amend to reflect scheduling and notice procedures applicable to appeals in the new system, similar to § 20.603, applicable only to hearings in the legacy system.

§ 20.705 Rule 705. Functions of the presiding Member.

VA proposes to redesignate § 20.706 as § 20.705, and amend the section to provide a more comprehensive list of functions of the presiding Member conducting the Board hearing.

§ 20.706 Rule 706. Designation of Member or Members to conduct the hearing.

VA proposes to add new § 20.706 to differentiate the procedures for appeals in the new system, similar to proposed § 20.604, applicable to legacy appeals.

§ 20.707 Rule 707. Prehearing conference.

Currently, § 20.708 requires different procedures for requesting a prehearing conference, depending on the method of hearing. It is the Board's practice not to require formal requests for prehearing conferences. VA proposes to eliminate regulations describing procedures that are confusing and burdensome for appellants, and instead provide a streamlined approach that is in line with current practices. Thus, VA proposes to redesignate § 20.708 as § 20.707 and amend the section.

§ 20.708 Rule 708. Witnesses at hearings.

VA proposes to redesignate § 20.710 as § 20.708.

§ 2.709 Rule 709. Subpoenas.

VA proposes to redesignate § 20.711 as § 20.709. Addresses are updated.

§ 20.710 Rule 710. Expenses of appellants, representatives, and witnesses incident to hearings not reimbursable by the Government.

VA proposes to redesignate § 20.712 as § 20.710.

§ 20.711 Rule 711. Hearings in simultaneously contested claims.

As noted above, VA proposes to streamline the timelines for requesting a change in hearing date. For simultaneously contested claims, however, it is necessary to provide time limits in order to preserve the rights of all appellants. Therefore, VA proposes to redesignate § 20.713 as § 20.711 and amend the section by clarifying the procedures for hearings in simultaneously contested claims, in particular hearing date change requests.

§ 20.712 Rule 712. Record of hearing.

VA proposes to redesignate § 20.714 as § 20.712 and amend the section to reflect current practices. Current § 20.714 contains lengthy and confusing rules dictating

when a hearing transcript is prepared. However, it is the Board's practice to create hearing transcripts for all appeals, and to provide a copy of a transcript when requested.

§ 20.713 Rule 713. Recording of hearing by appellant or representative.

VA proposes to redesignate § 20.715 as § 20.713 and amend the section to streamline the process for an appellant or representative to record a hearing with his or her own equipment. Currently, different procedures are applicable depending on where the hearing was held.

§ 20.714 Rule 714. Correction of hearing transcripts.

VA proposes to redesignate § 20.716 as § 20.714 and amend the section to remove outdated references to tape recordings, and streamline the process for requesting correction of hearing transcripts. Currently, different procedures are applicable depending on where the hearing was held. The address is also updated.

§ 20.715 Rule 715. Loss of hearing recordings or transcripts—motion for new hearing.

Current § 20.717 contemplates the loss or partial loss of a hearing recording or transcript, and requires that the appellant file a motion for a new hearing if desired, specifying why prejudice would result from the failure to provide a new hearing. It has been VA's practice to waive this motion requirement in the event that the Board discovers a loss of recordings or transcripts of hearings. VA proposes to redesignate § 20.717 as § 20.715 and amend the section to reflect the current, more appellant-friendly practice. Revised § 20.715 would require the Board to notify the appellant and

his or her representative when such loss has occurred, and provide the appellant a choice of appearing at a new Board hearing, or having the Board proceed to appellate review of the appeal based on the evidence of record.

Subpart I—Appeals Processing

VA proposes to add new subpart I, Appeals Processing. Currently, subpart I contains only one section, which VA proposes to move into subpart J. New subpart I would describe processing of appeals in the new system at the Board.

§ 20.800 Rule 800. Order of consideration of appeals.

VA proposes to add new § 20.800, to describe the docketing of appeals. While this new section is similar to current § 20.900, it follows Pub. L. 115-55's direction in creating separate dockets, and docketing appeals in the order in which they are received on their respective dockets.

Pub. L. 115-55 requires that VA create at least two new dockets – a docket for appeals with a request for a Board hearing, and a docket for appeals with no request for a Board hearing – but affords VA discretion to create additional dockets. VA proposes to establish three dockets to handle appeals adjudicated under the new system. The “direct” docket will be for Veterans who do not want a hearing and do not wish to submit additional evidence. The “evidence” docket will be for Veterans who wish to submit additional evidence, but do not want a Board hearing. Finally, the “hearing” docket will be for Veterans who wish to have a hearing before a Veterans Law Judge. Creation of these three separate dockets will have multiple benefits. Most importantly, it provides

greater opportunity for Veterans to tailor their appeals experience to best suit their individual needs. Additionally, the direct docket will capture quality feedback from appeals in which no additional evidence is added to the record. This will allow VA to identify areas in which the claims process can be improved.

Pub. L. 115-55 requires that VA develop a policy allowing appellants to move their appeal from one docket to another. As noted, VA developed a policy allowing appellants to modify the information identified in the Notice of Disagreement. By requesting a different evidentiary option under the procedures described above, appellants are essentially requesting to change dockets as well. When a request to modify a Notice of Disagreement includes a request to change the hearing or evidence submission request, the Board will move the appeal to the appropriate docket, retaining the original docket date.

Proposed § 20.800(e) is added to explain that a case will not be returned to the Board following the agency of original jurisdiction's readjudication of an appeal previously remanded by the Board. Pursuant to amended 38 U.S.C. 5104C, a claimant's options for further review of the agency of original jurisdiction's decision include filing a new Notice of Disagreement. Where a new Notice of Disagreement is filed following readjudication by the agency of original jurisdiction, the case will be docketed in the order in which the most recent Notice of Disagreement was received. There is no statutory provision requiring that a case be returned to the Board following readjudication by the agency of original jurisdiction or that the Board provide expeditious treatment when a new appeal is filed following such readjudication.

§ 20.801 Rule 801. The decision.

Proposed § 20.801 describes general rules regarding Board decisions in the new system, similar to current § 19.7. Proposed § 20.801 differs from current § 19.7 in that it reflects Pub. L. 115-55's provisions regarding the evidentiary record, prior favorable findings, and notice requirements. As noted, Pub. L. 115-55 creates new section 7113 outlining the evidentiary record before the Board. Proposed § 20.801(a) explains that the Board's decision will be based on a de novo review of the evidence of record before the agency of original jurisdiction, as well as any additional evidence submitted pursuant to section 7113. Additionally, Pub. L. 115-55 creates a new requirement that VA provide a general statement as to whether any evidence was received at a time not permitted by section 7113. This statement must also inform the appellant that any such evidence was not considered by the Board, and explain the options available to have that evidence reviewed. Thus, § 20.801(b)(3) reflects this notice requirement. Finally, Pub. L. 115-55 amends chapter 51 by adding a new section, 5104A, requiring that any finding favorable to the claimant will be binding on subsequent adjudicators. Thus, proposed § 20.801(a) reflects that any findings favorable to the claimant with regard to the issue or issues on appeal, as identified by the agency of original jurisdiction, are binding on the Board's decision, unless rebutted by clear and convincing evidence. In practice, the Board would rarely disturb such findings prior to enactment of the Appeals Modernization Act. This regulation is largely serving to codify a longstanding practice of the Board not to disturb favorable findings or elements of the claim made by the agency of original jurisdiction.

§ 20.802 Rule 802. Remand for correction of error.

Proposed § 20.802 describes general rules regarding Board remands in the new system, similar to current § 19.9. Proposed § 20.802 differs from current § 19.9 in that it reflects Pub. L. 115-55's provisions regarding the duty to assist. Amended section 5103A(e)(2) specifies that the Secretary's duty to assist does not apply to review on appeal by the Board. Thus, under the amendments made by Pub. L. 115-55, the Board may no longer remand an appeal for the purposes of developing additional evidence. Rather, under amended 38 U.S.C. 5103A(f)(2)(A), the Board shall remand an appeal to correct an error on the part of the agency of original jurisdiction to satisfy its duties under section 5103A, if that error occurred prior to the agency of original jurisdiction decision on appeal. A remand is not required if the Secretary is able to grant the issue or issues in full. Thus, proposed § 20.802(a) closely follows the amended statutory authority in describing the circumstances under which the Board must remand an appeal.

Amended 38 U.S.C. 5103A(f)(2)(B) further notes that the Board's remand for correction of a pre-decisional duty to assist error may include directing the agency of original jurisdiction to obtain an advisory medical opinion under amended section 5109. Pub. L. 115-55 adds new paragraph (d)(1) to section 5109, noting that the Board "shall remand a claim to direct the agency of original jurisdiction to obtain an advisory medical opinion from an independent medical expert under the section if the Board finds that the Veterans Benefits Administration should have exercised its discretion to obtain such an opinion." Thus, proposed § 20.802(b) closely follows the amended statutory authority in

describing the circumstances under which the Board must remand an appeal to obtain an advisory medical opinion.

Additionally, the Board may remand for the correction of any other error by the agency of original jurisdiction in satisfying a regulatory or statutory duty where there is a reasonable possibility that correction of the error would aid in substantiating the claim, but need not remand solely for correction of a procedural defect as this would be inconsistent with the statutory framework of Pub. L. 115-55.

Finally, proposed § 20.802(c) reflects that, under Pub. L. 115-55, the agency of original jurisdiction must correct any error identified by a Board remand, readjudicate the claim, and provide notice of the decision, including notice of the claimant's options for further review. Notably, cases remanded by the Board will not be automatically returned to the Board after the agency of original jurisdiction has taken the appropriate action. Instead, a claimant who remains dissatisfied with an agency of original jurisdiction decision after adjudication and wants review by the Board must file a new Notice of Disagreement with the Board as to the issue or issues. Proposed § 20.802(c) also reflects the amendment to 38 U.S.C. 5109B, which directs that the agency of original jurisdiction must provide for the expeditious treatment of any claim that is remanded by the Board.

§ 20.803 Rule 803. Content of Board decision, remand, or order in simultaneously contested claims.

Proposed § 20.803 mirrors the language of current § 19.8 in describing the content of a Board decision, remand, or order in simultaneously contested claims.

§ 20.804 Rule 804. Opinions of the General Counsel.

Proposed § 20.804 describes the circumstances under which the Board will obtain an opinion from the General Counsel, similar to provisions contained in current §§ 20.901-20.903. Proposed § 20.804 differs from current § 20.901 in that it reflects Pub. L. 115-55's provisions repealing the authority for independent medical opinions contained in 38 U.S.C. 7109. As noted above, medical opinions will only be ordered by the Board when a remand is required to correct a pre-decisional duty to assist error by the agency of original jurisdiction. Thus, proposed § 20.804 only contains provisions relating to opinions of the General Counsel.

Subpart J—Action by the Board in Legacy Appeals

VA proposes to amend subpart J to apply only to legacy appeals. Proposed § 20.900 would explain that the subpart is applicable to legacy appeals. As noted, VA also proposes to consolidate provisions related to Board decisions in legacy appeals into subpart J. This reorganization will clarify the distinction between agency of original jurisdiction action on appeals, which is proposed to be consolidated into part 19, and Board action on appeals, which is proposed to be consolidated to part 20. Thus, VA proposes to move § 19.7, describing Board decisions, to § 20.903. VA proposes to move § 19.9, describing Board remands, to § 20.904. Finally, VA proposes to move § 19.8, describing Board decisions in simultaneously contested claims, to § 20.905. This reorganization will assist appellants by providing a clear delineation between Board and agency of original jurisdiction action, and by laying out relevant regulations in

chronological order. VA also proposes to redesignate § 20.800, regarding submission of additional evidence after the initiation of the appeal to § 20.901. This provision is only applicable to legacy appeals, as evidence submission for appeals in the new system is governed by 7113. Other provisions currently in subpart J would remain largely unchanged.

§ 20.900 Rule 900. Applicability.

VA proposes to add new § 20.900, to explain that provisions of this subpart only apply to legacy appeals.

§ 20.901 Submission of additional evidence after initiation of appeal.

VA proposes to redesignate § 20.800 as § 20.901.

§ 20.902 Rule 902. Order of consideration of appeals.

VA proposes to redesignate §20.900 as § 20.902 and update the Board's address.

§ 20.903 Rule 903. The decision.

VA proposes to redesignate § 19.7 as § 20.903.

§ 20.904 Rule 904. Remand or referral for further action.

VA proposes to redesignate § 19.9 as § 20.904 and update citations.

§ 20.905 Rule 905. Content of Board decision, remand, or order in simultaneously contested claims.

VA proposes to redesignate § 19.8 as § 20.905.

§ 20.906 Rule 906. Medical opinions and opinions of the General Counsel.

VA proposes to redesignate § 20.901 as § 20.906 and update the current name of the military institution that reviews pathologic material.

§ 20.907 Rule 907. Filing of requests for the procurement of opinions.

VA proposes to redesignate § 20.902 as § 20.907 and update citations.

§ 20.908 Rule 908. Notification of evidence to be considered by the Board and opportunity for response.

VA proposes to redesignate § 20.903 as § 20.908 and update citations.

Subpart K—Vacatur and Reconsideration

§ 20.1000 Rule 1000. Vacating a decision.

VA proposes to redesignate § 20.904, regarding vacatur of a Board decision, to § 20.1000. Current § 20.904 is generally applicable to both legacy and new system appeals. Moving this provision into subpart K allows VA to avoid duplicating the provision in subpart I, for new system appeals. Moreover, vacatur and reconsideration both describe actions that take place after a Board decision has been issued. Thus, this

move is in line with VA's efforts to reorganize appeals regulations into a more common-sense, Veteran-centric order. VA proposes a minor change to proposed 20.1000 to reflect that Statements of the Case are no longer required in the new system. VA proposes to reverse paragraphs (a)(2) and (a)(3), and note that failure to provide a Statement of the Case or Supplemental Statement of the Case is considered a denial of due process only in legacy appeals.

§ 20.1001 Rule 1001. When reconsideration is accorded.

VA proposes to redesignate and amend § 20.1000(b), by striking the words "and material". Pub. L. 115-55 replaces the new and material standard with a requirement for new and relevant evidence. Although the new and material standard is still applicable to legacy appeals, in this context, VA notes that inclusion of the word "material" is redundant, as paragraph (b) describes discovery of "relevant" service department records. Any relevant service department records would be considered "material" under the legacy standard. Thus, the proposed change would make the paragraph applicable to both systems, while retaining the intended result.

§ 20.1002 Rule 1002. Filing and disposition of motion for reconsideration.

VA proposed to redesignate § 20.1001 as § 20.1002. Citations and address are also updated.

§ 20.1003 Rule 1003. Hearings on reconsideration.

VA proposes minor changes to § 20.1003, to reflect that a hearing on reconsideration would only be provided in legacy appeals, and in new system appeals where the appellant had requested a Board hearing on the Notice of Disagreement. This change is necessary to comply with amended section 7107(c), which states that a hearing before the Board may be scheduled only if a hearing was requested on the Notice of Disagreement.

§ 20.1004 Rule 1004. Reconsideration panel.

VA proposes to redesignate § 19.11 as § 20.1004, and make a minor change as required by Pub. L. 115-55. Pub. L. 115-55 amends 7103(b)(1) by striking the word “heard” and replacing it with “decided”. Thus, VA proposes to make the same change to proposed § 20.1004, regarding reconsideration panels. This change will have no substantive impact on legacy appeals.

Subpart L—Finality

No changes are proposed to §§ 20.1102, 20.1104, and 20.1106.

§ 20.1103 Rule 1103. Finality of determinations of the agency of original jurisdiction where issue is not appealed.

VA proposes to amend § 20.1103, regarding finality of agency of original jurisdiction decisions, in order to make the rule applicable to both legacy and new appeals. The proposed rule clarifies that the agency of original jurisdiction decision may

be readjudicated if, within one year, the claimant files a supplemental claim, request for higher-level review, or Notice of Disagreement. A citation is also updated.

§ 20.1105 Rule 1105. Supplemental claim after promulgation of appellate decision.

VA proposes to amend § 20.1105, regarding a new claim after promulgation of an appellate decision. In the new system, a claimant may file a supplemental claim with the agency of original jurisdiction by submitting new and relevant evidence related to the previously adjudicated issue. This includes issues in which the final appellate decision was issued in a legacy appeal, but the new claim was filed on or after the effective date. In the current system, new and material evidence is required to reopen a claim after an appellate decision. VA proposes paragraph (b) to address any legacy appeals pending on the effective date which are based upon a claim to reopen. The requirement that an appellant submit new and material evidence to reopen a claim only applies to legacy appeals that are pending on the effective date. A citation is also updated.

Subpart M—Privacy Act

No changes are proposed to § 20.1200.

§ 20.1201 Rule 1201. Amendment of appellate decisions.

Citations are updated.

Subpart N—Miscellaneous

No changes are proposed to § 20.1303.

§ 20.1301 Rule 1301. Disclosure of information.

VA proposes to amend § 20.1301, regarding the Board's policy to disclose adjudicative documents to appellants, to reflect the difference in procedure for legacy and new appeals. As noted, supplemental Statements of the Case are not required in the new system, but continue to be a requirement in the legacy system. Thus, VA proposes to strike references to Statements of the Case in paragraph (a), and add new paragraph (b) to note that, for legacy appeals, the policy described in paragraph (a) is also applicable to Statements of the Case. The address is also updated.

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

Citations and cross-references are updated.

§ 20.1304 Rule 1304. Request for a change in representation.

VA proposes to redesignate § 20.1304 as § 20.1305, and add new § 20.1304, to delineate the different procedures for appellants in the legacy and new system to request a change in representation, personal hearing, or submission of additional evidence. In the new system, hearings and evidence submission will only be permitted as described in section 7113. Requests to modify a Notice of Disagreement, for the purpose of selecting a different option for evidence submission or hearing request, is governed by § 20.202(c). Thus, proposed § 20.1304 describes the procedures for requesting a change in representation only. Requests for changes in representation are collections of information under the Paperwork Reduction Act, and are currently

approved under OMB Control Number 2900-0085. VA intends to submit this collection of information under OMB Control Number 2900-0674 in the future.

§ 20.1305 Rule 1305. Procedures for legacy appellants to request a change in representation, personal hearing, or submission of additional evidence following certification of an appeal to the Board of Veterans' Appeals.

VA proposes to amend § 20.1304, redesignated as § 20.1305, to apply only to legacy appeals. Thus, minor changes are proposed to reflect that the provisions of § 20.1305 are applicable only to legacy appeals. The address and citations are also updated.

Subpart O—Revision of Decisions on Grounds of Clear and Unmistakable Error

VA proposes minor changes to subpart O. Specifically, a reference to administrative appeals under § 19.51 is struck in § 20.1401(b) since Pub. L. 115-55 repeals procedures for administrative appeals by striking section 7106 of title 38 of the United States Code. VA proposes to clarify that the provisions of §§ 20.1403(b)(2) and 20.1411(b) are only applicable in the legacy system. Additionally, VA proposes to strike § 20.1405(d), as section 2, paragraph (v) of Pub. L. 115-55 repealed the authority for that provision. Addresses and citations are also updated. No changes are proposed to §§ 20.1400, 20.1402, 20.1406, 20.1407, and 20.1410.

Subpart P—Expedited Claims Adjudication Initiative—Pilot Program

VA proposes to remove and reserve subpart P, which addresses the Expedited Claims Adjudication (ECA) Initiative Pilot Program as this program is no longer in use and will not continue based on changes to the claims and appeals processes under Pub. L. 115-55. VA launched the ECA Initiative Program on February 2, 2009. The two-year pilot program was designed to accelerate claims and appeals processing. Participation in the ECA Initiative was strictly voluntary and limited to claimants who resided within the jurisdiction of the Nashville, Lincoln, Seattle, or Philadelphia Regional Offices (ROs). VA concluded the ECA pilot program in 2013. As the program is no longer operational, VA proposes to remove subpart P.

APPENDIX A TO PART 20—CROSS-REFERENCES

VA proposes to remove Appendix A to part 20, as it has outlived its usefulness. Cross-references currently located in the table are outdated or incorrect. Whereas a user may have previously used the appendix to search for other sections pertinent to a particular regulation, such research may be accomplished much more efficiently via a search of the electronic document.

PART 21 - VOCATIONAL REHABILITATION AND EDUCATION

Subpart A—Vocational Rehabilitation and Employment Under 38 U.S.C. Chapter 31

VA proposes to amend part 21 to align current regulations with new review and appeals processes outlined in Pub. L. 115-55. To accomplish this goal, VA proposes to update Subpart A by deleting 38 CFR 21.59 and 21.98; adding one new section, 38

CFR 21.416; amending 38 CFR 21.414 and 21.420; and updating cross references in several additional regulations (in subparts A and I).

VA's Vocational Rehabilitation and Employment (VR&E) program, under the authority of title 38 of the United States Code (U.S.C.) Chapter 31, serves an important function: to assist Servicemembers and Veterans who have service connected disabilities and barriers to employment in obtaining and maintaining suitable employment and achieving maximum independence in daily living. There are several points in this process where program participants may disagree with a decision made by VR&E field staff regarding benefits and/or services. Although VR&E's current practices with regard to reviews and appeals are well established in policy and procedural guidance, current regulations on the review and appeal processes focus only on three very specific points in the rehabilitation process (eligibility; entitlement; and the development of, or change in, the rehabilitation plan). Therefore, VA proposes to remove those current regulations, 38 CFR 21.59 and 21.98, and add proposed § 21.416, one new comprehensive regulation that is inclusive of reviews and appeals that may occur throughout the entire rehabilitation process and accords with the new review options provided in Pub. L. 115-55.

Proposed § 21.416 will outline who can perform a higher-level review; provide a process that allows for the submission of new and relevant evidence; discuss duty to assist errors; outline an informal conference procedure for the higher-level review process; provide information on how to proceed on issues surrounding a difference of opinion; and establish a review time period. The review time period is an administrative goal, but does not create an enforceable right.

VA also proposes to amend 38 CFR 21.414 and 21.420 to include the new review options and the new requirements for notification letters under Pub. L. 115-55.

Subpart B – Claims and Applications for Educational Assistance

In addition to the proposed amendments to subpart A, VA proposes to amend subpart B regulations that govern VA's educational assistance benefits. VA's Education Service handles oversight of VA's education programs, which provide veterans, servicemembers, reservists, and certain family members of veterans with educational opportunities post-separation. To align current educational assistance regulations with the new review and appeals processes outlined in Pub. L. 115-55, VA proposes to revise § 21.1034. VA also proposes to remove the cross reference in one additional regulation and add § 21.1035 to address reviews in the legacy appeals process.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that VA consider the impact of paperwork and other information collection burdens imposed on the public. According to the 1995 amendments to the Paperwork Reduction Act (5 CFR 1320.8(b)(2)(vi)), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number. This proposed rule includes provisions constituting new collections of information under the Paperwork Reduction Act of 1995 that require approval by the OMB. Accordingly, under 44 U.S.C. 3507(d), VA has submitted a copy of this rulemaking action to OMB for review.

OMB assigns control numbers to collections of information it approves. VA may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Proposed 38 CFR §§ 3.160(c), 3.2501, 3.2601, 8.30, 20.202, and 21.1034 contain collections of information under the Paperwork Reduction Act of 1995. If OMB does not approve the collections of information as requested, VA will immediately remove the provisions containing a collection of information or take such other action as is directed by the OMB.

Comments on the collections of information contained in this proposed rule should be submitted to the Office of Management and Budget, Attention: Desk Officer for the Department of Veterans Affairs, Office of Information and Regulatory Affairs, Washington, DC 20503 or emailed to OIRA_Submission@omb.eop.gov, with copies sent by mail or hand delivery to the Director, Regulation Policy and Management (00REG), Department of Veterans Affairs, 810 Vermont Avenue, NW., Room 1063B, Washington, DC 20420; fax to (202) 273-9026; or submitted through www.Regulations.gov. Comments should indicate that they are submitted in response to “RIN 2900-AQ26.”

OMB is required to make a decision concerning the collections of information contained in this proposed rule between 30 and 60 days after publication of this document in the Federal Register. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment on the proposed rule.

VA considers comments by the public on proposed collections of information in--

- Evaluating whether the proposed collections of information are necessary for the proper performance of the functions of the Department, including whether the information will have practical utility;
- Evaluating the accuracy of the Department's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of the collections of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

The collections of information contained in 38 CFR §§ 3.160(c), 3.2501, 3.2601, 8.30, 20.202, 21.416, and 21.1034 are described immediately following this paragraph. VA intends to revise OMB Control No. 2900-0674 so that it will contain all appeals-related information collections for the legacy and new systems, including the four claims and appeals related information collections previously approved under OMB Control No. 2900-0085. OMB Control No. 2900-0085 will be discontinued upon approval of the request to renew 2900-0674. As discussed in the regulatory impact analysis, VA believes that the net impact of the reorganization of the collections of information is likely to be deregulatory.

For each of the new or proposed collections of information below, VBA used general wage data from the Bureau of Labor Statistics (BLS) to estimate the respondents' costs associated with completing the information collection. According to the latest available BLS data, the mean hourly wage of full-time wage and salary workers was \$24.34 based on the BLS wage code – “00-0000 All Occupations.” This information was taken from the following website: https://www.bls.gov/oes/current/oes_nat.htm (May 2017).

Title: Veteran's Supplemental Claim Application (VA Form 20-0995).

OMB Control No.: 2900-XXXX (NEW)

CFR Provisions: 38 CFR §§ 3.160(c), 3.2501, 8.30, 21.416, and 21.1034

Summary of collection of information: VA administers an integrated program of benefits and services, established by law, for veterans, service personnel, and their dependents and/or beneficiaries. Title 38 U.S.C. 5101(a) provides that a specific claim in the form provided by the Secretary must be filed in order for benefits to be paid to any individual under the laws administered by the Secretary. VA is proposing a new information collection in this proposed regulatory action under 38 CFR §§ 3.160(c), 3.2501, 8.30, 21.416, and 21.1034 for supplemental claims in accordance with Public Law 115-55. Public Law 115-55 includes a new review option for Veterans or claimants who disagree with a VA claims decision known as a “supplemental claim” that is conducted within the agency of original jurisdiction. This review option is designed to allow submission of new and relevant evidence in connection with a previously decided claim. The new collection of information in proposed 38 CFR 3.160(c), 3.2501, and

8.30 would require claimants to submit VA Form 20-0995 in either paper or electronic submission, where applicable, in order to initiate a supplemental claim for VA disability compensation benefits. Description of need for information and proposed use of information: The collection of information is necessary to determine the issue(s) that a claimant is dissatisfied with and seeks to initiate a supplemental claim for VA disability compensation benefits. VA will use this information to initiate or determine the veteran's eligibility to apply for a supplemental claim in accordance with Pub. L. 115-55.

Description of likely respondents: Veterans or claimants who indicate dissatisfaction with a decision issued by a local VA office and would like review of new and relevant evidence in support of his or her claim for disability compensation benefits. VA cannot make further assumptions about the population of respondents because of the variability of factors such as the educational background and wage potential of respondents. Therefore, VBA used general wage data to estimate the respondents' costs associated with completing the information collection.

Estimated number of respondents per month/year: 80,000 annually.

Estimated frequency of responses per month/year: One time for most Veterans or claimants; however, the frequency of responses is also dependent on the number of claims submitted on this form by the claimant as VA does not limit the number of claims that a claimant can submit.

Estimated average burden per response: 15 minutes.

Estimated total annual reporting and recordkeeping burden: 20,000 hours.

Estimated cost to respondents per year: VBA estimates the total cost to all respondents to be \$486,800 per year (20,000 burden hours x \$24.34 per hour). Legally,

respondents may not pay a person or business for assistance in completing the information collection. Therefore, there are no expected overhead costs for completing the information collection.

Title: Application for Higher-Level Review (VA Form 20-0996)

OMB Control No.: 2900-XXXX (NEW)

CFR Provisions: 38 CFR §§ 3.2601, 8.30, 21.416, and 21.1034

Summary of collection of information: VA administers an integrated program of benefits and services, established by law, for veterans, service personnel, and their dependents and/or beneficiaries. Title 38 U.S.C. 5101(a) provides that a specific claim in the form provided by the Secretary must be filed in order for benefits to be paid to any individual under the laws administered by the Secretary. The new collection of information in proposed 38 CFR §§ 3.2601, 8.30, 21.416, and 21.1034 would require claimants to submit VA prescribed applications in either paper or electronic submission of responses, where applicable, in order to request a higher-level review of a VA decision on a claim for benefits.

Description of need for information and proposed use of information: The collection of information is necessary to determine the issue(s) that a claimant is dissatisfied with and seeks higher-level review of by VA. VA will use this information to initiate a higher-level review by an agency adjudicator in accordance with Pub. L. 115-55.

Description of likely respondents: Veterans or claimants who indicate dissatisfaction with a decision issued by a local VA office.

Estimated number of respondents per month/year: 35,000 annually.

Estimated frequency of responses per month/year: one response total.

Estimated average burden per response: 15 minutes.

Estimated total annual reporting and recordkeeping burden: 8,750 hours.

Estimated cost to respondents per year: As above, VBA used May 2017 general wage data to estimate the respondents' costs associated with completing the information collection. VBA estimates the total cost to all respondents to be \$212,975 per year (8,750 burden hours x \$24.34 per hour). Legally, respondents may not pay a person or business for assistance in completing the information collection. Therefore, there are no expected overhead costs for completing the information collection.

Title: Notice of Disagreement (VA Form 10182).

OMB Control No.: 2900-0674

CFR Provisions: 38 CFR 20.202

Summary of collection of information: Proposed 38 CFR 20.202 would require that in order for a claimant to appeal one or more previously decided issues to the Board, that claimant must file a Notice of Disagreement in the form prescribed by VA. In order to promote efficiency in the adjudication process while ensuring that the process is simple and reliable for claimants, VA will require the use of a specific form for this purpose. VA Form 10182 will be titled the Notice of Disagreement. To be accepted by the Board, a complete Notice of Disagreement will be required to identify the specific determination with which the claimant disagrees, and must indicate if the claimant requests to have a hearing before the Board, an opportunity to submit additional

evidence, or neither. 38 U.S.C. 7105(b)(2). Additionally, in order to permit appellants and their representatives to exercise their appeal-related rights, the information collected will include withdrawals of services by representatives (*proposed* 38 CFR 20.6), requests by appellants for changes in hearing dates or methods (*proposed* 38 CFR 20.703), and motions for reconsideration of Board decisions (*proposed* 38 CFR 20.1002).

Description of need for information and proposed use of information: This collection of information is necessary to permit claimants to appeal to the Board, to identify their request for a hearing and selection of the evidentiary record on appeal, to request new times or methods for hearings, to seek reconsideration of Board decisions, and so that representatives may effectively move to withdraw their representation of a claimant.

Description of likely respondents: Veterans or claimants who indicate dissatisfaction with a decision issued by a local VA office, and who are appealing one more issues in that decision to the Board.

Estimated number of respondents per month/year: 43,000 annually.

Estimated frequency of responses per month/year: one response per respondent accounted for above.

Estimated average burden per response: an average of 30 minutes.

Estimated total annual reporting and recordkeeping burden: 21,500 hours annually.

Estimated cost to respondents per year: The respondent population for this information collection is composed of individual appellants or their representative. In this

regard, VA notes that the earning capacity of individual appellants spans an extremely wide spectrum. Additionally, an appellant's representative may be an employee of a recognized Veterans' service organization who provides appellate services as part of their overall free services to Veterans, or may be an attorney-at-law or accredited agent that charges a fee. VA cannot make further assumptions about the population of respondents because of the variability of factors such as the educational background and wage potential of respondents. Therefore, VBA used the BLS general wage data from May 2017 to estimate the respondents' costs associated with completing the information collection. VA seeks comment as to whether use of the general wage data is appropriate in light of this wide spectrum of earning capacity in individual respondents. VA estimates the total cost to respondents using VA Form 10182 in the new appeals system to be \$523,310 per year (21,500 burden hours x \$24.34 per hour).

The total costs of these information collections to respondents is estimated to be \$8.4 million over a five-year period (FY2019-FY2023).

Regulatory Flexibility Act

The Secretary hereby certifies that these regulatory amendments would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. These amendments would not directly affect any small entities. Only VA beneficiaries and their survivors could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), these amendments are

exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Orders 12866, 13563, 13771

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 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 proposed rule have been examined, and it has been determined that this is an economically significant regulatory action under Executive Order 12866. This proposed rule is expected to be an EO 13771 deregulatory action. Details on the estimated cost savings of this proposed rule can be found in the rule's economic analysis. 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.

Unfunded Mandates

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

Catalog of Federal Domestic Assistance Numbers and Titles

The Catalog of Federal Domestic Assistance program numbers and titles for this rule are 64.100, Automobiles and Adaptive Equipment for Certain Disabled Veterans and Members of the Armed Forces; 64.101, Burial Expenses Allowance for Veterans;

64.102, Compensation for Service-Connected Deaths for Veterans' Dependents;
64.103, Life Insurance for Veterans; 64.104, Pension for Non-Service-Connected
Disability for Veterans; 64.105, Pension to Veterans Surviving Spouses, and Children;
64.106, Specially Adapted Housing for Disabled Veterans; 64.109, Veterans
Compensation for Service-Connected Disability; 64.110, Veterans Dependency and
Indemnity Compensation for Service-Connected Death; 64.114, Veterans Housing-
Guaranteed and Insured Loans; 64.115, Veterans Information and Assistance;
64.116, Vocational Rehabilitation for Disabled Veterans; 64.117, Survivors and
Dependents Educational Assistance; 64.118, Veterans Housing-Direct Loans for
Certain Disabled Veterans; 64.119, Veterans Housing-Manufactured Home Loans;
64.120, Post-Vietnam Era Veterans' Educational Assistance; 64.124, All-Volunteer
Force Educational Assistance; 64.125, Vocational and Educational Counseling for
Servicemembers and Veterans; 64.126, Native American Veteran Direct Loan Program;
64.127, Monthly Allowance for Children of Vietnam Veterans Born with Spina Bifida;
and 64.128, Vocational Training and Rehabilitation for Vietnam Veterans' Children with
Spina Bifida or Other Covered Birth Defects.

List of Subjects

38 CFR Part 3

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

38 CFR Part 8

Life insurance; Military personnel; Veterans.

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.

38 CFR Parts 19 and 20

Administrative practice and procedure, Claims, Veterans.

38 CFR Part 21

Administrative practice and procedure, Armed forces, Civil rights, Claims, Colleges and universities, Conflict of interests, Defense Department, Education, Employment, Grant programs-education, Grant programs-veterans, Health care, Loan programs-education, Loan programs-veterans, Manpower training programs, Reporting and recordkeeping requirements, Schools, Travel and transportation expenses, Veterans, Vocational education, Vocational rehabilitation.

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. Peter M. O'Rourke, Chief of Staff, Department of Veterans Affairs, approved this document on April 24, 2018, for publication.

Date: July 18, 2018

Jeffrey M. Martin
Impact Analyst
Office of Regulation Policy & Management
Office of the Secretary
Department of Veterans Affairs

For the reasons set forth in the preamble, VA proposes to amend 38 CFR parts 3, 8, 14, 19, 20, and 21 as follows:

PART 3 – ADJUDICATION

Subpart A – Pension, Compensation, and Dependency and Indemnity

Compensation

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

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

2. Amend § 3.1 by revising paragraph (p) to read as follows:

§ 3.1 Definitions.

* * * * *

(p) *Claim* means a written communication requesting a determination of entitlement or evidencing a belief in entitlement, to a specific benefit under the laws administered by the Department of Veterans Affairs submitted on an application form prescribed by the Secretary. (See scope of claim, § 3.155(d)(2); complete claim, § 3.160(a)).

(1) *Initial claim.* An initial claim is any complete claim, other than a supplemental claim, for a benefit on a form prescribed by the Secretary. Initial claims include:

(i) An original claim for one or more benefits, which is the first complete claim received by VA (see original claim, § 3.160(b)).

(ii) A new claim requesting service connection for a disability or grant of a new benefit, and

(iii) A claim for increase in a disability evaluation rating or rate of a benefit paid.

(2) *Supplemental claim.* A supplemental claim is any complete claim for a VA benefit on an application form prescribed by the Secretary where an initial claim for the same or similar benefit on the same or similar basis was previously decided. (See supplemental claim; § 3.2501).

* * * * *

3. Amend § 3.103 by revising the section heading and paragraphs (b)(1), (c), (d), and (f) to read as follows:

§ 3.103 Procedural due process and other rights.

* * * * *

(b) * * *

(1) *General.* Claimants and their representatives are entitled to notice of any decision made by VA affecting the payment of benefits or the granting of relief. Such notice will clearly set forth the elements described under paragraph (f) of this section, the right to a hearing on any issue involved in the claim when applicable, the right of representation, and the right, as well as the necessary procedures and time limits to

initiate a higher-level review, supplemental claim, or appeal to the Board of Veterans' Appeals.

* * * * *

(c) *Submission of evidence.* (1) *General rule.* VA will include in the record, any evidence whether documentary, testimonial, or in other form, submitted by the claimant in support of a pending claim and any issue, contention, or argument a claimant may offer with respect to a claim, except as prescribed in paragraph (2) of this section and § 3.2601(f).

(2) *Treatment of evidence received after notice of a decision.* The evidentiary record for a claim before the agency of original jurisdiction closes when VA issues notice of a decision on the claim. The agency of original jurisdiction will not consider, or take any other action on evidence submitted by a claimant after notice of decision on a claim, and such evidence will not be considered part of the record at the time of any decision by the agency of original jurisdiction, except under the following circumstances:

(i) The agency of original jurisdiction subsequently receives a complete application for a supplemental claim or claim for increase; or

(ii) A claim is pending readjudication after identification of a duty to assist error during a higher-level review or appeal to the Board of Veterans' Appeals. Those events reopen the record and any evidence previously submitted to the agency of original jurisdiction while the record was closed will become part of the record to be considered upon readjudication.

(d) *The right to a hearing.* (1) Upon request, a claimant is entitled to a hearing on any issue involved in a claim within the purview of part 3 of this chapter before VA

issues notice of a decision on an initial or supplemental claim. A hearing is not available in connection with a request for higher level review under §3.2601. VA will provide the place of hearing in the VA field office having original jurisdiction over the claim, or at the VA office nearest the claimant's home having adjudicative functions, or videoconference capabilities, or, subject to available resources and solely at the option of VA, at any other VA facility or federal building at which suitable hearing facilities are available. VA will provide one or more employees who have original determinative authority of such issues to conduct the hearing and be responsible for establishment and preservation of the hearing record. Upon request, a claimant is entitled to a hearing in connection with proposed adverse actions before one or more VA employees having original determinative authority who did not participate in the proposed action. All expenses incurred by the claimant in connection with the hearing are the responsibility of the claimant.

(2) The purpose of a hearing is to permit the claimant to introduce into the record, in person, any available evidence which he or she considers relevant and any arguments or contentions with respect to the facts and applicable law which he or she may consider pertinent. All testimony will be under oath or affirmation. The claimant is entitled to produce witnesses, but the claimant and witnesses must be present. The agency of original jurisdiction will not normally schedule a hearing for the sole purpose of receiving argument from a representative. It is the responsibility of the VA employees conducting the hearings to explain fully the issues and suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant's position. To assure clarity and completeness of the hearing record,

questions which are directed to the claimant and to witnesses are to be framed to explore fully the basis for claimed entitlement rather than with an intent to refute evidence or to discredit testimony.

* * * * *

(f) *Notification of decisions.* The claimant or beneficiary and his or her representative will be notified in writing of decisions affecting the payment of benefits or granting of relief. Written notification must include in the notice letter or enclosures or a combination thereof, all of the following elements:

- (1) Identification of the issues adjudicated;
- (2) A summary of the evidence considered;
- (3) A summary of the laws and regulations applicable to the claim;
- (4) A listing of any findings made by the adjudicator that are favorable to the claimant under § 3.104(c);
- (5) For denied claims, identification of the element(s) required to grant the claim(s) that were not met;
- (6) If applicable, identification of the criteria required to grant service connection or the next higher-level of compensation;
- (7) An explanation of how to obtain or access evidence used in making the decision; and
- (8) A summary of the applicable review options under § 3.2500 available for the claimant to seek further review of the decision.

* * * * *

4. Amend § 3.104 as follows:
 - a. Revise the section heading;
 - b. Revise paragraph (a);
 - c. Add a heading to paragraph (b); and
 - d. Add paragraph (c).

The revisions and additions read as follows:

§ 3.104 Binding nature of decisions.

(a) *Binding decisions.* A decision of a VA rating agency is binding on all VA field offices as to conclusions based on the evidence on file at the time VA issues written notification in accordance with 38 U.S.C. 5104. A binding agency decision is not subject to revision except by the Board of Veterans' Appeals, by federal court order, or as provided in §§ 3.105, 3.2500, and 3.2600.

(b) *Binding administrative determinations.* * * *

(c) *Favorable findings.* Any finding favorable to the claimant made by either a VA adjudicator, as described in 3.103(f)(4), or by the Board of Veterans' Appeals, as described in 20.801(a) of this chapter, is binding on all subsequent VA and Board of Veterans' Appeals adjudicators, unless rebutted by clear and convincing evidence to the contrary. For purposes of this section, a finding means a conclusion either on a question of fact or on an application of law to facts made by an adjudicator concerning the issue(s) under review.

5. Amend § 3.105 by revising paragraphs (a) and (b), and adding paragraph (j) to read as follows:

§ 3.105 Revision of decisions.

* * * * *

(a) (1) *Error in final decisions.* Decisions are final when the underlying claim is finally adjudicated as provided in § 3.160(d). Final decisions will be accepted by VA as correct with respect to the evidentiary record and the law that existed at the time of the decision, in the absence of clear and unmistakable error. At any time after a decision is final, the claimant may request, or VA may initiate, review of the decision to determine if there was a clear and unmistakable error in the decision. Where evidence establishes such error, the prior decision will be reversed or amended.

(i) *Definition of clear and unmistakable error.* A clear and unmistakable error is a very specific and rare kind of error. It is the kind of error, of fact or of law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error. If it is not absolutely clear that a different result would have ensued, the error complained of cannot be clear and unmistakable. Generally, either the correct facts, as they were known at the time, were not before VA, or the statutory and regulatory provisions extant at the time were incorrectly applied.

(ii) *Effective date of reversed or revised decisions.* For the purpose of authorizing benefits, the rating or other adjudicative decision which constitutes a reversal or revision 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.

(iii) *Record to be reviewed.* Review for clear and unmistakable error in a prior final decision of an agency of original jurisdiction must be based on the evidentiary record and the law that existed when that decision was made. The duty to assist in § 3.159 does not apply to requests for revision based on clear and unmistakable error.

(iv) *Change in interpretation.* Clear and unmistakable error does not include the otherwise correct application of a statute or regulation where, subsequent to the decision being challenged, there has been a change in the interpretation of the statute or regulation.

(v) *Limitation on Applicability.* Decisions of an agency of original jurisdiction on issues that have been decided on appeal by the Board or a court of competent jurisdiction are not subject to revision under this subsection.

(vi) *Duty to assist not applicable.* For examples of situations that are not clear and unmistakable error see 38 CFR 20.1403(d).

(vii) *Filing Requirements.* (A) *General.* A request for revision of a decision based on clear and unmistakable error must be in writing, and must be signed by the requesting party or that party's authorized representative. The request must include the name of the claimant; the name of the requesting party if other than the claimant; the applicable Department of Veterans Affairs file number; and the date of the decision to which the request relates. If the applicable decision involved more than one issue, the request must identify the specific issue, or issues, to which the request pertains.

(B) *Specific allegations required.* The request must set forth clearly and specifically the alleged clear and unmistakable error, or errors, of fact or law in the prior decision, the legal or factual basis for such allegations, and why the result would have been manifestly different but for the alleged error. Non-specific allegations of failure to follow regulations or failure to give due process, or any other general, non-specific allegations of error, are insufficient to satisfy the requirement of the previous sentence.

(2) *Error in binding decisions prior to final adjudication.* Prior to the time that a claim is finally adjudicated, previous decisions which are binding will be accepted as correct by an adjudicative agency, with respect to the evidentiary record and law existing at the time of the decision, unless the outcome is clearly erroneous, after considering whether any favorable findings may be reversed as provided in § 3.104(c).

(b) *Difference of opinion.* Whenever an adjudicative agency is of the opinion that a revision or an amendment of a previous decision is warranted on the basis of the evidentiary record and law that existed at the time of the decision, a difference of opinion being involved rather than a clear and unmistakable error, the proposed revision will be recommended to Central Office. However, a decision may be revised under § 3.2600 or § 3.2601 without being recommended to Central Office.

* * * * *

(j) *Supplemental claims and higher-level review.* VA may revise an earlier decision denying benefits, if warranted, upon resolution of a supplemental claim under § 3.160(c) or higher-level review under § 3.2601.

6. Amend § 3.110(b) by removing “§§ 20.302 and 20.305” from the last sentence and adding in its place “§§ 19.52, 20.203, and 20.110”.

7. Amend § 3.151 as follows:

a. Revise paragraph (a); and

b. Add paragraphs (c) and (d);

The revisions and additions read as follows:

§ 3.151 Claims for disability benefits.

(a) *General.* A specific claim in the form prescribed by the Secretary must be filed in order for benefits to be paid to any individual under the laws administered by VA. (38 U.S.C. 5101(a)). A claim by a veteran for compensation may be considered to be a claim for pension; and a claim by a veteran for pension may be considered to be a claim for compensation. The greater benefit will be awarded, unless the claimant specifically elects the lesser benefit. (See scope of claim, § 3.155(d)(2); complete claim, § 3.160(a); supplemental claims, § 3.2501(b)).

* * * * *

(c) *Issues within a claim.* (1) To the extent that a complete claim application encompasses a request for more than one determination of entitlement, each specific entitlement will be adjudicated and is considered a separate issue for purposes of the review options prescribed in § 3.2500. A single decision by an agency of original jurisdiction may adjudicate multiple issues in this respect, whether expressly claimed or determined by VA to be reasonably within the scope of the application as prescribed in § 3.155(d)(2). VA will issue a decision that addresses each such identified issue within a claim. Upon receipt of notice of a decision, a claimant may elect any of the applicable review options prescribed in § 3.2500 for each issue adjudicated.

(2) With respect to service-connected disability compensation, an issue for purposes of paragraph (c)(1) of this section is defined as entitlement to compensation for a particular disability. For example, if a decision adjudicates service-connected disability compensation for both a knee condition and an ankle condition, compensation for each condition is a separate entitlement or issue for which a different review option may be elected. However, different review options may not be selected for specific components of the knee disability claim, such as ancillary benefits, whether a knee injury occurred in service, or whether a current knee condition resulted from a service-connected injury or condition.

(d) *Evidentiary record.* The evidentiary record before the agency of original jurisdiction for an initial or supplemental claim includes all evidence received by VA before VA issues notice of a decision on the claim. Once the agency of original jurisdiction issues notice of a decision on a claim, the evidentiary record closes as described in § 3.103(c)(2) and VA no longer has a duty to assist in gathering evidence under § 3.159. (See § 3.155(b), submission of evidence).

* * * * *

8. Amend § 3.155 by revising the second sentence of the introductory text and paragraph (d)(1) to read as follows:

§ 3.155 How to file a claim.

* * * The provisions of this section are applicable to all claims governed by part 3, with the exception that paragraph (b) of this section, regarding intent to file a claim, does not apply to supplemental claims.

* * * * *

(d) * * *

(1) *Requirement for complete claim and date of claim.* A complete claim is required for all types of claims, and will generally be considered filed as of the date it was received by VA for an evaluation or award of benefits under the laws administered by the Department of Veterans Affairs. For supplemental claims, if VA received a complete claim within 1 year of the filing of an incomplete claim, as provided in paragraph (c) of this section, it will be considered filed as of the date of receipt of the incomplete claim. For other types of claims, if VA receives a complete claim within 1 year of the filing of an intent to file a claim that meets the requirements of paragraph (b) of this section, it will be considered filed as of the date of receipt of the intent to file a claim. Only one complete claim for a benefit (e.g., compensation, pension) may be associated with each intent to file a claim for that benefit, though multiple issues may be contained within a complete claim. In the event multiple complete claims for a benefit are filed within 1 year of an intent to file a claim for that benefit, only the first claim filed will be associated with the intent to file a claim. In the event that VA receives both an intent to file a claim and an incomplete application form before the complete claim as defined in §3.160(a) is filed, the complete claim will be considered filed as of the date of receipt of whichever was filed first provided it is perfected within the necessary timeframe, but in no event will the complete claim be considered filed more than one year prior to the date of receipt of the complete claim.

9. Amend § 3.156 as follows:

a. Revise the section heading;

- b. Add introductory text;
- c. Revise paragraph (a);
- d. In the authority immediately following paragraph (a), remove “5103A(f)” and add in its place “5103A(h)”;
- e.. Revise the heading of paragraph (b);
- f.. Add new paragraph (d);

The revisions and additions read as follows:

§ 3.156 New evidence.

New evidence means evidence not previously submitted to agency adjudicators.

(a) *New and material evidence.* For claims to reopen decided prior to the effective date provided in § 19.2(a), the following standards apply. A claimant may reopen a finally adjudicated legacy claim by submitting new and material evidence. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim.

(Authority: 38 U.S.C. 501, 5103A(h), 5108)

(b) *Pending legacy claims not under the modernized review system.*

* * * * *

(d) *New and relevant evidence.* On or after the effective date provided in § 19.2(a), a claimant may file a supplemental claim as prescribed in § 3.2501. If new and relevant evidence is presented or secured with respect to the supplemental claim, the

agency of original jurisdiction will readjudicate the claim taking into consideration all of the evidence of record.

* * * * *

10. Amend § 3.158 by revising the first sentence of paragraph (a) to read as follows:

§3.158 Abandoned claims.

(a) *General.* Except as provided in §3.652, where evidence requested in connection with an initial claim or supplemental claim or for the purpose of determining continued entitlement is not furnished within 1 year after the date of request, the claim will be considered abandoned.

* * * * *

11. Amend § 3.159 as follows:

- a. Revise paragraph (a)(3);
- b. Revise the first sentence of paragraph (b)(1);
- c. Revise paragraph (b)(3);
- d. Revise paragraph (c) introductory text;
- e. Revise paragraph (c)(4)(iii);
- f. Add paragraph (c)(4)(iv); and
- g. Remove the text “for a claim” and adding in its place the text “for an initial or supplemental claim” in paragraph (d) introductory text.

The revisions read as follows:

§ 3.159 Department of Veterans Affairs assistance in developing claims.

(a) * * *

(3) *Substantially complete application* means an application containing:

(i) The claimant's name;

(ii) His or her relationship to the veteran, if applicable;

(iii) Sufficient service information for VA to verify the claimed service, if applicable;

(iv) The benefit sought and any medical condition(s) on which it is based;

(v) The claimant's signature; and

(vi) In claims for nonservice-connected disability or death pension and parents' dependency and indemnity compensation, a statement of income;

(vii) In supplemental claims, identification or inclusion of potentially new evidence;

(viii) For higher-level reviews, identification of the date of the decision for which review is sought.

* * * * *

(b) *VA's duty to notify claimants of necessary information or evidence.* (1)

Except as provided in paragraph (3) of this section, when VA receives a complete or substantially complete initial or supplemental claim, VA will notify the claimant of any information and medical or lay evidence that is necessary to substantiate the claim (hereafter in this paragraph referred to as the "notice").

* * * * *

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

(i) Upon receipt of a supplemental claim under § 3.2501 within one year of the date VA issues notice of a prior decision;

(ii) Upon receipt of a request for higher-level review under § 3.2601;

(iii) Upon receipt of a Notice of Disagreement under § 20.202 of this chapter;

or

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

(c) *VA's duty to assist claimants in obtaining evidence.* VA has a duty to assist claimants in obtaining evidence to substantiate all substantially complete initial and supplemental claims, and when a claim is returned for readjudication by a higher-level adjudicator or the Board after identification of a duty to assist error on the part of the agency of original jurisdiction, until the time VA issues notice of a decision on a claim or returned claim. VA will make reasonable efforts to help a claimant obtain evidence necessary to substantiate the claim. VA will not pay any fees charged by a custodian to provide records requested. When a claim is returned for readjudication by a higher-level adjudicator or the Board after identification of a duty to assist error, the agency of original jurisdiction has a duty to correct any other duty to assist errors not identified by the higher-level adjudicator or the Board.

* * * * *

(4) * * *

(iii) For requests to reopen a finally adjudicated claim received prior to the effective date provided in § 19.2(a) of this chapter, paragraph (c)(4) of this section applies only if new and material evidence is presented or secured as prescribed in § 3.156.

(iv) Paragraph (c)(4) of this section applies to a supplemental claim only if new and relevant evidence under § 3.2501 is presented or secured.

* * * * *

12. Amend § 3.160 as follows:

- a. Revise paragraphs (a), (d), and (e);
- b. Remove paragraph (f); and
- c. Revise the authority citation for paragraph (e). The revisions read as follows:

§ 3.160 Status of claims.

(a) *Complete Claim.* A submission of an application form prescribed by the Secretary, whether paper or electronic, that meets the following requirements:

- (1) A complete claim must provide the name of the claimant; the relationship to the veteran, if applicable; and sufficient information for VA to verify the claimed service, if applicable.
- (2) A complete claim must be signed by the claimant or a person legally authorized to sign for the claimant.
- (3) A complete claim must identify the benefit sought.
- (4) A description of any symptom(s) or medical condition(s) on which the benefit is based must be provided to the extent the form prescribed by the Secretary so requires.

- (5) For nonservice-connected disability or death pension and parents' dependency and indemnity compensation claims, a statement of income must be provided to the extent the form prescribed by the Secretary so requires; and
- (6) For supplemental claims, potentially new evidence must be identified or included.

* * * * *

(d) *Finally adjudicated claim.* A claim that is adjudicated by the Department of Veterans Affairs as either allowed or disallowed is considered finally adjudicated when:

(1) For legacy claims not subject to the modernized review system, whichever of the following occurs first:

- (i) The expiration of the period in which to file a Notice of Disagreement, pursuant to the provisions of § 19.52(a) or § 20.502(a) of this chapter, as applicable; or
- (ii) Disposition on appellate review.

(2) For claims under the modernized review system, the expiration of the period in which to file a review option available under § 3.2500 or disposition on judicial review where no such review option is available.

(e) *Reopened claims prior to effective date of modernized review system.* An application for a benefit received prior to the effective date provided in § 19.2(a) of this chapter, after final disallowance of an earlier claim that is subject to readjudication on the merits based on receipt of new and material evidence related to the finally adjudicated claim, or any claim based on additional evidence or a request for a personal hearing submitted more than 90 days following notification to the appellant of the

certification of an appeal and transfer of applicable records to the Board of Veterans' Appeals which was not considered by the Board in its decision and was referred to the agency of original jurisdiction for consideration as provided in § 20.1304(b)(1) of this chapter. As of the effective date provided in § 19.2(a) of this chapter, claimants may no longer file to reopen a claim, but may file a supplemental claim as prescribed in § 3.2501 to apply for a previously disallowed benefit. A request to reopen a finally decided claim that has not been adjudicated as of the effective date will be processed as a supplemental claim subject to the modernized review system.

(Authority: 38 U.S.C. 501, 5108)

* * * * *

13. Remove and reserve § 3.161.

§ 3.161 [Removed and Reserved].

14. Amend § 3.328 as follows:

a. In paragraph (b), remove the text “at the regional office level” and add in its place “before VA”;

b. Revise paragraph (c);

The revision reads as follows:

§ 3.328 Independent medical opinions.

* * * * *

(c) *Approval.* (1) Requests for independent medical opinions shall be approved when one of the following conditions is met:

(i) The director of the Service or his or her designee determines that the issue under consideration poses a medical problem of such obscurity or complexity, or has generated such controversy in the medical community at large, as to justify solicitation of an independent medical opinion; or

(ii) The independent medical opinion is required to fulfill the instructions contained in a remand order from the Board of Veterans' Appeals.

(2) A determination that an independent medical opinion is not warranted may be contested only as part of an appeal to the Board of Veterans' Appeals on the merits of the decision rendered on the primary issue by VA.

(Authority: 38 U.S.C. 5109, 5701(b)(1); 5 U.S.C. 552a(f)(3))

* * * * *

15. Amend 3.400 as follows:

- a. Revise the introductory text;
- b. Revise paragraphs (h)(1) through (h)(3);
- c. Revise paragraph (z)(2); and
- d. Add paragraph (z)(3).

The revisions read as follows:

§ 3.400 General.

Except as otherwise provided, the effective date of an evaluation and award of pension, compensation, or dependency and indemnity compensation based on an initial

claim or supplemental claim will be the date of receipt of the claim or the date entitlement arose, whichever is later. For effective date provisions regarding revision of a decision based on a supplemental claim or higher-level review, see § 3.2500.

* * * * *

(h) *Difference of opinion* (§ 3.105). (1) As to decisions not finally adjudicated (see § 3.160(d)) prior to timely receipt of an application for higher-level review, or prior to readjudication on VA initiative, the date from which benefits would have been payable if the former decision had been favorable.

(2) As to decisions which have been finally adjudicated (see § 3.160(d)), and notwithstanding other provisions of this section, the date entitlement arose, but not earlier than the date of receipt of the supplemental claim.

(3) As to decisions which have been finally adjudicated (see 3.160(d)) and readjudication is undertaken solely on VA initiative, the date of Central Office approval authorizing a favorable decision or the date of the favorable Board of Veterans' Appeals decision.

* * * * *

(z) * * *

(2) Reopened claims received prior to the effective date provided in § 19.2(a) of this chapter: Latest of the following dates:

(i) November 23, 1977.

(ii) Date entitlement arose.

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

(3) Supplemental claims received more than one year after notice of decision:

Latest of the following dates:

- (i) Date entitlement arose.
- (ii) One year prior to date of receipt of a supplemental claim.

16. In subpart A, remove the word “reopened” and add, in its place, the word “supplemental” in the following places:

- a. § 3.31
- b. § 3.114
- c. § 3.321
- d. § 3.326
- e. § 3.372
- f. § 3.401
- g. § 3.402
- h. § 3.404
- i. § 3.655
- j. § 3.812

§3.814 [Amended]

17. Amend § 3.814 by removing the words “original claim, a claim reopened after final disallowance, or a claim for increase” and add, in its place, the words “initial claim or supplemental claim” from paragraph (e) introductory text.

§3.815 [Amended]

18. Amend § 3.815 by removing the words “original claim, a claim reopened after final disallowance, or a claim for increase,” and add, in its place, the words “initial claim or supplemental claim” from paragraph (i) introductory text.

Subpart D – Universal Adjudication Rules That Apply to Benefit Claims Governed by Part 3 of This Title

19. The authority citation for part 3, subpart D continues to read as follows:

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

20. Amend subpart D by adding § 3.2400 to read as follows:

§ 3.2400 Applicability of modernized review system.

(a) The modernized review system defined in 38 CFR 19.2(b) applies to all claims, requests for reopening of finally adjudicated claims, and requests for revision based on clear and unmistakable error:

(1) For which VA issues notice of an initial decision on or after the effective date of the modernized review system as provided in 38 CFR 19.2(a); or

(2) Where a claimant has elected review of a legacy claim under the modernized review system as provided in paragraph (c) of this section.

(b) *Legacy claims.* A legacy claim is a claim, or request for reopening or revision of a finally adjudicated claim, for which VA provided notice of a decision prior to the effective date of the modernized review system and the claimant has not elected to participate in the modernized review system as provided in paragraph (c) of this section.

(c) *Election into the modernized review system.* For claims governed by this part, pursuant to election by a claimant, the modernized review system applies where:

(1) *Rapid appeals modernization program election.* A claimant with a legacy appeal elects to opt-in to the modernized review system on or after November 1, 2017, as part of a program authorized by the Secretary pursuant to section 4 of Public Law 115-55; or

(2) *Election after receiving a statement of the case.* A claimant with a legacy appeal elects to opt-in to the modernized review system, following issuance, on or after the effective date of the modernized system, of a VA Statement of the Case or Supplemental Statement of the Case, by filing for a review option under the new system in accordance with § 3.2500 within the time allowed for filing a substantive appeal under 38 CFR 19.52(b) and other applicable provisions in part 19 of this chapter.

(d) *Effect of election.* Once an eligible claimant elects the modernized review system with respect to a particular claim, the provisions of 38 CFR parts 19 and 20 applicable to legacy claims and appeals no longer apply to that claim.

21. Amend subpart D by adding § 3.2500 to read as follows:

§ 3.2500 Review of decisions.

(a) *Reviews available.* (1) Within one year from the date on which the agency of original jurisdiction issues a notice of a decision on a claim or issue as defined in § 3.151(c), except as otherwise provided in paragraphs (c), (e), and (f) of this section, a claimant may elect one of the following administrative review options by timely filing the appropriate form prescribed by the Secretary:

- (i) A request for higher-level review under § 3.2601 or
- (ii) An appeal to the Board under § 20.202 of this chapter.

(2) At any time after VA issues notice of a decision on an issue within a claim, a claimant may file a supplemental claim under § 3.2501.

(b) *Concurrent election prohibited.* With regard to the adjudication of a claim or an issue as defined in § 3.151(c), a claimant who has filed for review under one of the options available under paragraph (a) of this section may not, while that review is pending final adjudication, file for review under a different available option. While the adjudication of a specific benefit is pending on appeal before a federal court, a claimant may not file for administrative review of the claim under any of options listed in paragraph (a) of this section.

(c) *Continuously pursued issues.* A claimant may continuously pursue a claim or an issue by timely and properly filing one of the following administrative review options, as specified, after any decision by the agency of original jurisdiction, Board of Veterans' Appeals, or entry of judgment by the U.S. Court of Appeals for Veterans Claims, provided that any appeal to the U.S. Court of Appeals for Veterans Claims is timely filed as determined by the court:

(1) Following notice of a decision on a supplemental claim, the claimant may file another supplemental claim, request a higher-level review, or appeal to the Board of Veterans' Appeals.

(2) Following notice of a decision on a higher-level review, the claimant may file a supplemental claim or appeal to the Board of Veterans' Appeals. (See appeal to the Board, 38 CFR 20.202).

(3) Following notice of a decision on an appeal to the Board of Veterans' Appeals, the claimant may file a supplemental claim.

(4) Following entry of judgment on an appeal to the Court of Appeals for Veterans Claims, the claimant may file a supplemental claim.

(d) *Voluntary withdrawal.* A claimant may withdraw a supplemental claim or a request for a higher-level review at any time before VA renders a decision on the issue. A claimant may change the review option selected by withdrawing the request and filing the appropriate application for the requested review option within one year from the date on which VA issued notice of a decision on an issue.

(e) *Applicability.* This section applies to claims and requests under the modernized review system as set forth in § 3.2400, with the exception that a supplemental claim may not be filed in connection with a denial of a request to revise a final decision of the agency of original jurisdiction based on clear and unmistakable error .

(f) *Review of simultaneously contested claims.* Notwithstanding other provisions of this part, a party to a simultaneously contested claim may only seek administrative review of a decision by the agency of original jurisdiction on such claim by filing an appeal to the Board as prescribed in § 20.402 of this chapter within 60 days of the date VA issues notice of the decision on the claim. (See contested claims, 38 CFR 20.402).

(g) *Effective dates.* (1) *Continuously pursued claims.* Except as otherwise provided by other provisions of this part, including § 3.400, the effective date will be fixed in accordance with the date of receipt of the initial claim or date entitlement arose,

whichever is later, if a claimant continuously pursues an issue by timely filing in succession any of the available review options as specified in paragraph (c) of this section.

(2) Supplemental claims received more than one year after notice of decision.

Except as otherwise provided in this section, for supplemental claims received more than one year after the date on which the agency of original jurisdiction issues notice of a decision or the Board of Veterans' Appeals issued notice of a decision, the effective date will be fixed in accordance with date entitlement arose, but will not be earlier than the date of receipt of the supplemental claim.

22. Amend subpart D by adding § 3.2501 to read as follows:

§ 3.2501 Supplemental claims.

Except as otherwise provided, a claimant or his or her legal representative, if any, may file a supplemental claim (see § 3.1(p)(2)) by submitting a complete application (see § 3.160(a)) in writing on a form prescribed by the Secretary any time after the agency of original jurisdiction issues notice of a decision, regardless of whether the claim is pending or has become finally adjudicated. If new and relevant evidence is presented or secured with respect to the supplemental claim, the agency of original jurisdiction will readjudicate the claim taking into consideration all of the evidence of record. If new and relevant evidence is not presented or secured, the agency of original jurisdiction will issue a decision finding that there was insufficient evidence to readjudicate the claim.

(a) *New and relevant evidence.* The new and relevant standard will not impose a higher evidentiary threshold than the previous new and material evidence standard under § 3.156(a).

(1) *Definition.* New evidence is evidence not previously submitted to agency adjudicators. Relevant evidence is information that tends to prove or disprove a matter at issue in a claim. Relevant evidence includes evidence that raises a theory of entitlement that was not previously addressed.

(2) *Receipt prior to notice of a decision.* New and relevant evidence received before VA issues its decision on a supplemental claim will be considered as having been filed in connection with the claim.

(b) *Evidentiary record.* The evidentiary record for a supplemental claim includes all evidence received by VA before VA issues notice of a decision on the supplemental claim. For VA to readjudicate the claim, the evidentiary record must include new and relevant evidence that was not of record as of the date of notice of the prior decision.

(c) *Duty to assist.* Upon receipt of a substantially complete supplemental claim, VA's duty to assist in the gathering of evidence under § 3.159 of this part is triggered and includes any such assistance that may help secure new and relevant evidence as defined in paragraph (a) of this section to complete the supplemental claim application.

(d) *Date of filing.* The filing date of a supplemental claim is determined according to § 3.155, with the exception of the intent to file rule found in § 3.155(b) which applies to initial claims.

(Authority: 38 U.S.C. 501, 5103A(h), 5108)

23. Amend subpart D by adding § 3.2502 to read as follows:

§ 3.2502 Return by higher-level adjudicator or remand by the Board of Veterans'

Appeals.

Upon receipt of a returned claim from a higher-level adjudicator or remand by the Board of Veterans' Appeals, the adjudication activity will take immediate action to expedite readjudication of the claim in accordance with 38 U.S.C. 5109B. The adjudication activity retains jurisdiction of the claim. In readjudicating the claim, the adjudication activity will correct all identified duty to assist errors, complete a new decision and issue notice to the claimant and or his or her legal representative in accordance with 3.103(f). The effective date of any evaluation and award of pension, compensation or dependency and indemnity compensation will be determined in accordance with the date of receipt of the initial claim as prescribed under § 3.2500(g).

24. Amend § 3.2600 as follows:

- a. Revise the section heading;
- b. Add introductory text;
- c. Remove paragraph (g).

The revisions and additions read as follows:

§ 3.2600 Legacy review of benefit claims decisions.

This section applies only to legacy claims as defined in § 3.2400 in which a Notice of Disagreement is timely filed on or after June 1, 2001, under regulations applicable at the time of filing. * * * * *

25. Amend subpart D by adding § 3.2601 to read as follows:

§ 3.2601 Higher-level review.

(a) *Applicability.* This section applies to all claims under the modernized review system, with the exception of simultaneously contested claims.

(b) *Requirements for election.* A claimant who is dissatisfied with a decision by the agency of original jurisdiction may file a request for higher-level review in accordance with § 3.2500, by submitting a complete request for review on a form prescribed by the Secretary.

(c) *Complete request.* A complete request for higher-level review is a submission of a request on a form prescribed by the Secretary, whether paper or electronic, that meets the following requirements:

(1) A complete request must provide the name of the claimant and the relationship to the veteran, if applicable;

(2) A complete request must be signed by the claimant or a person legally authorized to sign for the claimant; and

(3) A complete request must specify the date of the underlying decision for which review is requested and specify the issues for which review is requested.

(d) *Filing period.* A complete request for higher-level review must be received by VA within one year of the date of VA's issuance of the notice of the decision. If VA receives an incomplete request form, VA will notify the claimant and the claimant's representative, if any, of the information necessary to complete the request form prescribed by the Secretary. If a complete request is submitted within 60 days of the date of the VA notification of such incomplete request or prior to the expiration of the

one year filing period, VA will consider it filed as of the date VA received the incomplete application form that did not meet the standards of a complete request.

(e) *Who may conduct a higher-level review.* Higher-level review will be conducted by an experienced adjudicator who did not participate in the prior decision. Selection of a higher-level adjudicator to conduct a higher-level review is at VA's discretion. As a general rule, an adjudicator in an office other than the office that rendered the prior decision will conduct the higher-level review. An exception to this rule applies for claims requiring specialized processing, such as where there is only one office that handles adjudication of a particular type of entitlement. A claimant may request that the office that rendered the prior decision conduct the higher-level review, and VA will grant the request in the absence of good cause to deny.

(f) *Evidentiary record.* The evidentiary record in a higher-level review is limited to the evidence of record as of the date the agency of original jurisdiction issued notice of the prior decision under review and the higher-level adjudicator may not consider additional evidence. The higher-level adjudicator may not order development of additional evidence that may be relevant to the claim under review, except as provided in paragraph (g).

(g) *Duty to assist errors.* The higher-level adjudicator will ensure that VA complied with its statutory duty to assist (see § 3.159) in gathering evidence applicable prior to issuance of the decision being reviewed. If the higher-level adjudicator both identifies a duty to assist error that existed at the time of VA's decision on the claim under review and cannot grant the maximum benefit for the claim, the higher-level adjudicator must return the claim to the adjudication activity for correction of the error

and readjudication. Upon receipt, the adjudication activity will take immediate action to expedite readjudication of the claim in accordance with 38 U.S.C. 5109B.

(1) For disability evaluations, the *maximum benefit* means the highest schedular evaluation allowed by law and regulation for the issue under review.

(2) For ancillary benefits, the *maximum benefit* means the granting of the benefit sought.

(3) For pension benefits or dependents indemnity compensation, the *maximum benefit* means granting the highest benefit payable.

(h) *Informal conferences.* A claimant or his or her representative may include a request for an informal conference with a request for higher-level review. For purposes of this section, *informal conference* means contact with a claimant's representative or, if not represented, with the claimant, telephonically, or as otherwise determined by VA, for the sole purpose of allowing the claimant or representative to identify any errors of law or fact in a prior decision based on the record at the time the decision was issued. If requested, VA will make reasonable efforts to contact the claimant and/or the authorized representative to conduct one informal conference during a higher-level review, but if such reasonable efforts are not successful, a decision may be issued in the absence of an informal conference. The higher-level adjudicator with determinative authority over the issue will conduct the informal conference, absent exceptional circumstances. VA will not receive any new evidence in support of the higher-level review during the informal conference in accordance with paragraph (d) of this section. Any expenses incurred by the claimant in connection with the informal conference are the responsibility of the claimant.

(i) *De novo review.* The higher-level adjudicator will consider only those decisions and claims for which the claimant has requested higher-level review, and will conduct a de novo review giving no deference to the prior decision, except as provided in § 3.104(c).

(j) *Difference of opinion.* The higher-level adjudicator may grant a benefit sought in the claim under review based on a difference of opinion (see § 3.105(b)). However, any finding favorable to the claimant is binding except as provided in § 3.104(c) of this part . In addition, the higher-level adjudicator will not revise the outcome in a manner that is less advantageous to the claimant based solely on a difference of opinion. The higher-level adjudicator may reverse or revise (even if disadvantageous to the claimant) prior decisions by VA (including the decision being reviewed or any prior decision) on the grounds of clear and unmistakable error under § 3.105(a)(1) or (a)(2), as applicable, depending on whether the prior decision is finally adjudicated.

(k) *Notice requirements.* Notice of a decision made under this section will include all of the elements described in § 3.103(f), a general statement indicating whether evidence submitted while the record was closed was not considered, and notice of the options available to have such evidence considered.

(Authority: 38 U.S.C. 5109A and 7105(d))

PART 8—NATIONAL SERVICE LIFE INSURANCE

26. The authority citation for part 8 continues to read as follows:

AUTHORITY: 38 U.S.C. 501, 1901-1929, 1981-1988, unless otherwise noted.

27. Amend § 8.30 by:

- a. Revising the section heading;
- b. Revising paragraphs (a), (b), and (c);
- c. Adding paragraphs (d) through (h).

The revisions read as follows:

8.30 Review of Decisions and Appeal to Board of Veterans' Appeals.

(a) *Decisions.* This section pertains to insurance decisions involving questions arising under Parts 6, 7, 8, and 8a of this chapter, to include the denial of applications for insurance, total disability income provision, or reinstatement; disallowance of claims for insurance benefits; and decisions holding fraud or imposing forfeiture. The applicant or claimant and his or her representative, if any, will be notified in writing of such a decision, which must include, in the notice letter or enclosures or a combination thereof, all of the following elements:

- (1) Identification of the issues adjudicated.
- (2) A summary of the evidence considered.
- (3) A summary of the applicable laws and regulations relevant to the decision.
- (4) Identification of findings that are favorable to the claimant.
- (5) For denials, identification of the element(s) not satisfied that led to the denial.
- (6) An explanation of how to obtain or access the evidence used in making the decision.

(7) A summary of the applicable review options available for the claimant to seek further review of the decision.

(b) *Favorable findings.* Any finding favorable to the claimant or applicant is binding on all subsequent VA and Board of Veterans' Appeals adjudicators, unless rebutted by clear and convincing evidence to the contrary.

(c) *Review of Decisions.* Within one year from the date on which the agency of original jurisdiction issues notice of an insurance decision as outlined in paragraph (a) of this section, applicants or claimants may elect one of the following administrative review options by timely filing the appropriate form prescribed by the Secretary:

(1) *Supplemental Claim Review.* The nature of this review will accord with § 3.2501 of this title to the extent the terms used therein apply to insurance matters.

(2) *Request for a Higher-level Review.* The nature of this review will accord with § 3.2601 of this title to the extent the terms used therein apply to insurance matters. Higher-level reviews will be conducted by an experienced decision-maker who did not participate in the prior decision. Selection of an employee to conduct a higher-level review is at VA's discretion.

(3) *Board of Veterans' Appeals Review.* See 38 CFR part 20.

(d) *Part 3 provisions.* See § 3.2500(b)-(d) of this title for principles that generally apply to a veteran's election of review of an insurance decision.

(e) *Applicability.* This section applies where notice of an insurance decision was provided to an applicant or claimant on or after the effective date of the modernized review system as provided in § 19.2(a) of this title, or where an applicant or claimant

has elected review of a legacy claim under the modernized review system as provided in § 3.2400(c) of this title.

(f) *Unpaid premiums.* When a claimant or applicant elects a review option under paragraph (c) of this section, any unpaid premiums, normally due under the policy from effective date of issue or reinstatement (as appropriate), will become an interest-bearing lien, enforceable as a legal debt due the United States and subject to all available collection procedures in the event of a favorable result for the claimant or applicant.

(g) *Premium payments.* Despite a claimant's or applicant's election of a review option under paragraph (c) of this section, where the agency of original jurisdiction's decision involved a change in or addition to insurance currently in force, premium payments must be continued on the existing contract.

(h) *Section 1984.* Nothing in this section shall limit an applicant's or claimant's right to pursue actions under 38 U.S.C. 1984.

(Authority: 38 U.S.C. 501, 1901-1929, 1981-1988)

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

28. 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.

29. Amend § 14.629 by:

a. Removing the introductory text.

- b. In paragraph (b)(5), removing the words “General Counsel or his or her designee” and adding, in their place, the words “Chief Counsel with subject-matter jurisdiction”.
- c. Adding new paragraph (d) to read as follows:

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

* * * * *

(d) *Decisions on applications for accreditation.* 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.

(1) 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.

(2)(i) 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.

(ii) The determination of the Chief Counsel regarding the qualifications of a prospective service organization representative, agent, or attorney is a final adjudicative determination of an agency of original jurisdiction that may only be appealed to the Board of Veterans' Appeals.

30. In § 14.631(c) revise the second sentence to read as followings:

§ 14.631 Powers of attorney; disclosure of claimant information.

* * * * *

(c) * * * This section is applicable unless 38 CFR 20.6 governs withdrawal from the representation.

* * * * *

§ 14.632 [Amended]

31. In § 14.632(c)(6) remove the words “representation provided before an agency of original jurisdiction has issued a decision on a claim or claims and a Notice of Disagreement has been filed with respect to that decision” and add, in their place, the words “services for which a fee could not lawfully be charged”.

32. Amend § 14.633 by:

a. In paragraph (e)(2)(i), adding the words “before the Office of the General Counsel” after the words “close the record”.

b. In paragraph (e)(2)(ii), adding the words “before the Office of the General Counsel” after the words “close the record”.

c. Revising paragraph (h).

d. In paragraph (i), adding the words “suspended or” before the word “cancelled”.

e. Adding new paragraph (j).

The revision and addition read as follows:

§ 14.633 Termination of accreditation or authority to provide representation under

§ 14.630.

* * * * *

(h) The decision of the General Counsel is a final adjudicative determination of an agency of original jurisdiction that may only be appealed to the Board of Veterans' Appeals.

(1) *Decisions issued before the effective date of the modernized review system.* Notwithstanding provisions in this section for closing the record before the Office of the General Counsel at the end of the 30-day period for filing an answer or 10 days after a hearing, appeals of decisions issued before the effective date of the modernized review system as provided in § 19.2(a) of this chapter shall be initiated and processed using the procedures in 38 CFR parts 19 and 20 applicable to legacy appeals. Nothing in this section shall be construed to limit the Board's authority to remand a matter to which this paragraph (h)(1) applies to the General Counsel under 38 CFR 20.904 for any action that is essential for a proper appellate decision or the General Counsel's ability to issue a Supplemental Statement of the Case under 38 CFR 19.31.

(2) *Decisions issued on or after the effective date of the modernized review system.* Notwithstanding provisions in this section for closing the record before the Office of the General Counsel at the end of the 30-day period for filing an answer or 10

days after a hearing, appeals of decisions issued on or after the effective date of the modernized review system as provided in § 19.2(a) of this chapter shall be initiated and processed using the procedures in 38 CFR part 20 applicable to appeals under the modernized system.

* * * * *

(j) The effective date for suspension or cancellation of accreditation or authority to provide representation on a particular claim shall be the date upon which the General Counsel's final decision is rendered.

* * * * *

33. Amend § 14.636 by:

a. Revising paragraph (c).

b. In paragraph (h)(3), removing all references to "reopened" and adding, in each place, the word "readjudicated".

c. Revising paragraph (i)(3).

d. Revising paragraph (k).

The revisions 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.

* * * * *

(c) *Circumstances under which fees may be charged.* Except as noted in paragraph (d) of this section, agents and attorneys may only charge fees as follows:

(1)(i) Agents and attorneys may charge claimants or appellants for representation provided after an agency of original jurisdiction has issued notice of an initial decision on the claim or claims, including any claim for an increase in rate of a benefit, if the notice of the initial decision was issued on or after the effective date of the modernized review system as provided in § 19.2(a) of this chapter, and the agent or attorney has complied with the power of attorney requirements in § 14.631 and the fee agreement requirements in paragraph (g) of this section. For purposes of this paragraph (c)(1)(i), a decision by an agency of original jurisdiction adjudicating a supplemental claim will be considered the initial decision on a claim unless that decision was made while the claimant continuously pursued the claim by filing any of the following, either alone or in succession: a request for higher-level review, on or before one year after the date on which the agency of original jurisdiction issued a decision; a supplemental claim, on or before one year after the date on which the agency of original jurisdiction issued a decision; a Notice of Disagreement, on or before one year after the date on which the agency of original jurisdiction issued a decision; a supplemental claim, on or before one year after the date on which the Board of Veterans' Appeals issued a decision; or a supplemental claim, on or before one year after the date on which the Court of Appeals for Veterans Claims issued a decision.

(ii) Agents and attorneys may charge fees for representation provided with respect to a request for revision of a decision of an agency of original jurisdiction under 38 U.S.C. 5109A or the Board of Veterans' Appeals under 38 U.S.C. 7111 based on clear and unmistakable error if notice of the decision on a claim or claims was issued on or after the effective date of the modernized review system as provided in § 19.2(a), and

the agent or attorney has complied with the power of attorney requirements in § 14.631 and the fee agreement requirements in paragraph (g) of this section.

(2)(i) Agents and attorneys may charge claimants or appellants for representation provided: after an agency of original jurisdiction has issued a decision on a claim or claims, including any claim to reopen under 38 CFR 3.156(a) or for an increase in rate of a benefit; the agency of original jurisdiction issued notice of that decision before the effective date of the modernized review system as provided in § 19.2(a) of this chapter; a Notice of Disagreement has been filed with respect to that decision on or after June 20, 2007; and the agent or attorney has complied with the power of attorney requirements in §14.631 and the fee agreement requirements in paragraph (g) of this section.

(ii) Agents and attorneys may charge fees for representation provided with respect to a request for revision of a decision of an agency of original jurisdiction under 38 U.S.C. 5109A or the Board of Veterans' Appeals under 38 U.S.C. 7111 based on clear and unmistakable error if the agency of original jurisdiction issued notice of its decision on such request before the effective date of the modernized review system as provided in § 19.2(a); a Notice of Disagreement was filed with respect to the challenged decision on or after June 20, 2007; and the agent or attorney has complied with the power of attorney requirements in §14.631 and the fee agreement requirements in paragraph (g) of this section.

(3) In cases in which a Notice of Disagreement was filed on or before June 19, 2007, agents and attorneys may charge fees only for services provided after both of the following conditions have been met:

(i) A final decision was promulgated by the Board with respect to the issue, or issues, involved in the appeal; and

(ii) The agent or attorney was retained not later than 1 year following the date that the decision by the Board was promulgated. (This condition will be considered to have been met with respect to all successor agents or attorneys acting in the continuous prosecution of the same matter if a predecessor was retained within the required time period.)

(4) Except as noted in paragraph (i) of this section and § 14.637(d), the agency of original jurisdiction that issued the decision referenced in paragraphs (c)(1) or (2) of this section shall determine whether an agent or attorney is eligible for fees under this section. The agency of original jurisdiction's eligibility determination is a final adjudicative action that may only be appealed to the Board.

* * * * *

(i) * * *

(3) The Office of the General Counsel shall close the record before the Office of the General Counsel 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, 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.

* * * * *

(k)(1) *Decisions issued before the effective date of the modernized review system.* Notwithstanding provisions in this section for closing the record before the Office of the General Counsel at the end of the 30-day period for serving a response or 15 days after the date on which the agent or attorney served a response, appeals of decisions issued before the effective date of the modernized review system as provided in § 19.2(a), shall be initiated and processed using the procedures in 38 CFR parts 19 and 20 applicable to legacy appeals. Nothing in this section shall be construed to limit the Board's authority to remand a matter to the General Counsel under 38 CFR 20.904 for any action that is essential for a proper appellate decision or the General Counsel's ability to issue a Supplemental Statement of the Case under 38 CFR 19.31.

(2) *Decisions issued on or after the effective date of the modernized review system.* Notwithstanding provisions in this section for closing the record before the Office of the General Counsel at the end of the 30-day period for serving a response or 15 days after the date on which the agent or attorney served a response, appeals of decisions issued on or after the effective date of the modernized review system as provided in § 19.2(a), shall be initiated and processed using the procedures in 38 CFR part 20 applicable to appeals under the modernized system.

* * * * *

34. Amend § 14.637 by:

a. Revising paragraph (d)(3).

b. Revising paragraph (f).

The revisions 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 before the Office of the General Counsel 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, 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.

* * * * *

(f)(1) *Decisions issued before the effective date of the modernized review system.* Notwithstanding provisions in this section for closing the record before the Office of the General Counsel at the end of the 30-day period for serving a response or 15 days after the date on which the agent or attorney served a response, appeals of decisions issued before the effective date of the modernized review system as provided in § 19.2(a), shall be initiated and processed using the procedures in 38 CFR parts 19 and 20 applicable to legacy appeals. Nothing in this section shall be construed to limit the Board's authority to remand a matter to the General Counsel under 38 CFR 20.904 for any action that is essential for a proper appellate decision or the General Counsel's ability to issue a Supplemental Statement of the Case under 38 CFR 19.31.

(2) *Decisions issued on or after the effective date of the modernized review system.* Notwithstanding provisions in this section for closing the record before the Office of the General Counsel at the end of the 30-day period for serving a response or 15 days after the date on which the agent or attorney served a response, appeals of decisions issued on or after the effective date of the modernized review system as provided in § 19.2(a), shall be initiated and processed using the procedures in 38 CFR part 20 applicable to appeals under the modernized system.

PART 19—BOARD OF VETERANS' APPEALS: LEGACY APPEALS REGULATIONS

35. The authority citation for part 19, subpart A continues to read as follows:

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

36. The heading for part 19 is revised as set forth above.

Subpart A—Applicability

37. The heading for subpart A is revised as set forth above.

§19.1 [Redesignated as §20.100 and Amended]

38. Redesignate § 19.1 as § 20.100 and revise the heading to read “Rule 100. Establishment of the Board.” in the newly redesignated §20.100.

§19.2 [Redesignated as §20.101 and Amended]

39. Redesignate § 19.2 as § 20.101; revise the heading to read “Rule 101. Composition of the Board; Titles.”; in paragraph (b), remove the word “member” and add in its place the word “Member” in the newly redesignated §20.101.

§19.3 [Redesignated as §20.106 and Amended]

40. Redesignate § 19.3 as § 20.106 and revise the heading to read “Rule 106. Assignment of proceedings.” in the newly redesignated §20.106.

§19.4 [Redesignated as §20.103 and Amended]

41. Redesignate § 19.4 as § 20.103 and revise the heading to read “Rule 103. Principal functions of the Board.” in the newly redesignated §20.103.

§19.5 [Redesignated as §20.105 and Amended]

42. Redesignate § 19.5 as § 20.105; revise the heading to read “Rule 105. Criteria governing disposition of appeals.”; in the first sentence, add the text

“and in its decisions” before the first comma in the newly redesignated §20.105.

§19.7 [Redesignated as §20.903 and Amended]

43. Redesignate § 19.7 as § 20.903, and amend by:

- a. Revising the heading to read “Rule 903. The decision.”.
- b. In the second sentence of paragraph (b), removing the words “separately stated”.
- c. Removing the authority citation at the end of paragraph (b);
- d. Adding an authority citation at the end of the section to read as follows:

Authority: 38 U.S.C. 7104(d) (2016) in the newly redesignated §20.903.

§19.8 [Redesignated as §20.905 and Amended]

44. Redesignate § 19.8 as § 20.905 and revise the heading to read “Rule 905.

Content of Board decision, remand, or order in simultaneously contested claims.” in the newly redesignated §20.905.

§19.9 [Redesignated as §20.904 and Amended]

45. Redesignate § 19.9 as § 20.904 and amend by:

- a. Revising the heading to read “Rule 904. Remand or referral for further action.”;
- b. In paragraph (c), removing the text “subpart B of this part” and adding in its place the text “part 19, subpart B of this chapter”;
- c. In paragraph (c), removing the text “§ 20.204” and adding in its place the text “§ 19.55”;

- d. In paragraph (d)(3), removing the text “§ 20.1304(c) of this chapter” and adding in its place the text “Rule 1305 (§ 20.1305(c) of this part)”;
- e. In paragraph (d)(4), removing the text “§ 20.901 of this chapter” and adding in its place the text “Rule 906 (§ 20.906 of this part)”;
- f. Revising the authority citation to read as follows:

§20.904 Remand or referral for further action.

* * * * *

Authority: 38 U.S.C. 7102, 7103(c); 38 U.S.C. 7104(a), 7105 (2016) in the newly redesignated §20.904.

§19.11 [Redesignated as §20.1004 and Amended]

46. Redesignate § 19.11 as § 20.1004 and amend by:

- a. Revising the heading to read “Rule 1004. Reconsideration panel.”.
- b. Removing the word “heard” in paragraph (b) and adding in its place the word “decided” both places it appears in the newly redesignated §20.1004.

§19.12 [Redesignated as §20.107 and Amended]

47. Redesignate § 19.12 as § 20.107 and amend by:

- a. Revising the heading to read “Rule 107. Disqualification of Members.”.
- b. Removing paragraph (b) and the authority citation following paragraph (b);
- c. Redesignating paragraph (c) as paragraph (b); and
- d. In new paragraph (b), removing the text “paragraphs (a) and (b)” and adding in its place the text “paragraph (a)” in the newly redesignated §20.107.

§19.13 [Redesignated as §20.108 and Amended]

48. Redesignate § 19.13 as § 20.108 and revise the heading to read “Rule 108. Delegation of authority to Chairman and Vice Chairman, Board of Veterans' Appeals.” in the newly redesignated §20.108.

§19.14 [Redesignated as §20.109 and Amended]

48a. Redesignate § 19.14 as § 20.109 and revise the newly redesignated §20.109 to read as follows:

§ 20.109 Rule 109. Delegation of authority to Vice Chairman, Deputy Vice Chairmen, or Members of the Board.

(a) The authority exercised by the Chairman of the Board of Veterans' Appeals described in Rules 106(b) and 107(b) (§§ 20.106(b) and 20.107(b)) may also be exercised by the Vice Chairman of the Board.

(b) The authority exercised by the Chairman of the Board of Veterans' Appeals described in Rules 1004 and 1002(c) (§§ 20.1004 and 20.1002(c)) may also be exercised by the Vice Chairman of the Board and by Deputy Vice Chairmen of the Board.

(c) The authority exercised by the Chairman of the Board of Veterans' Appeals described in Rule 2 (§20.2), may also be exercised by the Vice Chairman of the Board; by Deputy Vice Chairmen of the Board; and, in connection with a proceeding or motion assigned to them by the Chairman, by a Member or Members of the Board.

(Authority: 38 U.S.C. 512(a), 7102, 7104)

49. Add §19.1 to subpart A to read as follows:

§ 19.1. Provisions applicable to legacy appeals.

Part 19 and subparts F, G, and J of part 20 apply only to the processing and adjudication of legacy appeals, as defined in § 19.2. Except as otherwise provided in specific sections, subparts A, B, H, K, L, M, N, and O of part 20 apply to the processing and adjudication of both appeals and legacy appeals. For applicability provisions concerning appeals in the modernized review system, see § 20.4 of this chapter.

50. Add §19.2 to subpart A to read as follows:

§ 19.2. Appellant's election for review of a legacy appeal in the modernized system.

(a) *Effective date.* As used in this section, *the effective date* means February 14, 2019, or the date that is published in the Federal Register pursuant to Pub. L. 115-55, section 2, paragraph (x)(6), whichever is later.

(b) *Modernized review system.* The modernized review system refers to the current statutory framework for claims and appeals processing, set forth in Pub. L. 115-55, and any amendments thereto, applicable on the effective date. The modernized review system applies to all claims, requests for reopening of finally adjudicated claims, and requests for revision based on clear and unmistakable error for which VA issues notice of an initial decision on or after the effective date, or as otherwise provided in paragraph (d) of this section.

(c) *Legacy appeals.* A legacy appeal is an appeal of a legacy claim, as defined in 38 CFR 3.2400(b), where a claimant has not elected to participate in the modernized review system as provided in paragraph (d) of this section. A legacy appeal is initiated

by the filing of a Notice of Disagreement and is perfected to the Board with the filing of a Substantive Appeal pursuant to applicable regulations in accordance with 38 CFR parts 19 and 20.

(d) *Election into the modernized review system.* The modernized review system applies to legacy claims and appeals where:

(1) A claimant with a legacy claim or appeal elects the modernized review system pursuant to 38 CFR 3.2400(c)(1);

(2) A claimant with a legacy claim or appeal elects the modernized review system, following issuance, on or after the effective date, of a VA Statement of the Case or Supplemental Statement of the Case. The election is made by filing an appeal in accordance with 38 CFR 20.202, or a review option in accordance with 38 U.S.C. 5108 or 5104B, as implemented by 38 CFR 3.2500 and other applicable regulations. The election must be filed within the time allowed for filing a substantive appeal under §19.52(b); or

(3) VA issued notice of a decision prior to the effective date, and, pursuant to the Secretary's authorization to participate in a test program, the claimant elects the modernized review system by filing an appeal in accordance with 38 U.S.C. 7105, or a review option in accordance with 38 U.S.C. 5108 or 5104B.

(Authority: Pub. L. 115-55; 131 Stat. 1105; 38 U.S.C. 5104B, 5104C(a); 5108; 38 U.S.C. 7105)

§§ 19.3 – 19.19 [Reserved]

51. Reserve §§ 19.3 through 19.19 to subpart A.

Subpart B—Legacy Appeals and Legacy Appeals Processing by Agency of Original Jurisdiction

52. Revise the subpart B heading as set forth above.

§ 19.23 [Amended]

53. Amend § 19.23 by:

- a. In paragraph (a), by removing the words “§ 20.201(a) of this chapter” and adding in their place the text “§ 19.21(a)” both places they appear.
- b. In paragraph (a), by removing the text “, § 19.27”.
- c. In paragraph (b), by removing the text “, § 19.27”.
- d. In paragraph (b), by removing the words “§ 20.201(b) of this chapter” and adding in their place the text “§ 19.21(b)”.

§ 19.24 [Amended]

54. Amend § 19.24 by:

- a. In paragraph (a), by removing the text “§ 20.201(a) of this chapter” and adding in its place the text “§ 19.21(a)”;
- b. In paragraph (b)(1), by removing the text “paragraph (a) of § 20.201 of this chapter” and adding in its place the text “§ 19.21(a)”;
- c. In paragraph (b)(3), by removing the text “§ 20.302(a) of this chapter” and adding in its place the text “§ 19.52(a)”.

55. Amend § 19.25 by revising the authority citation to read as follows:

§ 19.25 Notification by agency of original jurisdiction of right to appeal.

* * * * *

Authority: 38 U.S.C. 7105(a) (2016).

56. Amend § 19.26 by revising the authority citation to read as follows:

§ 19.26 Action by agency of original jurisdiction on Notice of Disagreement.

* * * * *

Authority: 38 U.S.C. 501; 38 U.S.C. 7105, 7105A (2016).

§ 19.27 [Removed and Reserved]

57. Remove and reserve § 19.27.

58. Amend § 19.28 by revising the authority citation to read as follows:

§19.28 Determination that a Notice of Disagreement is inadequate protested by claimant or representative.

* * * * *

Authority: 38 U.S.C. 7105 (2016).

59. Amend § 19.29 by revising the authority citation to read as follows:

§19.29 Statement of the Case.

* * * * *

Authority: 38 U.S.C. 7105(d)(1) (2016).

60. Amend § 19.30 by revising paragraph (b) and the authority citation to read as follows:

§19.30 Furnishing the Statement of the Case and instructions for filing a Substantive Appeal.

* * * * *

(b) *Information furnished with the Statement of the Case.* With the Statement of the Case, the appellant and the representative will be furnished information on the right to

file, and time limit for filing, a substantive appeal; information on hearing and representation rights; and a VA Form 9, “Appeal to Board of Veterans' Appeals”, and a statement describing the available review options if the appellant elects review of the issue or issues on appeal in the modernized review system.

Authority: Sec. 2, Pub. L. 115-55; 131 Stat. 1105; 38 U.S.C. 7105 (2016).

61. Amend § 19.31 by:

a. Adding after the first sentence the text “The information furnished with the Supplemental Statement of the Case shall include a statement describing the available review options if the appellant elects review of the issue or issues on appeal in the modernized system.”.

b. Revising the authority citation to read as follows:

Authority: 38 U.S.C. 5902, 5903, 5904; 38 U.S.C. 7105(d) (2016).

62. Amend § 19.32 by revising the authority citation to read as follows:

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

* * * * *

Authority: 38 U.S.C. 7105(d)(3) (2016).

§ 19.33 [Removed and Reserved]

63. Remove and reserve § 19.33.

64. Amend § 19.34 by revising the authority citation to read as follows:

§ 19.34 Determination that Notice of Disagreement or Substantive Appeal was not timely filed protested by claimant or representative.

* * * * *

Authority: 38 U.S.C. 7105 (2016).

§ 19.35 [Amended]

65. Amend § 19.35 by:

- a. Removing the second sentence;
- b. Revising the authority citation to read as follows:

§ 19.35 Certification of appeals.

* * * * *

Authority: 38 U.S.C. 7105 (2016).

§ 19.36 [Amended]

66. Amend § 19.36 by:

- a. Removing the text “Rule of Practice 1304 (§ 20.1304 of this chapter)” from the first sentence and adding in its place the text “Rule 1305 (§ 20.1305 of this chapter)”; and by removing the text “§ 20.1304” from the second sentence and adding in its place the text “§ 20.1305”;
- b. Revising the authority citation to read as follows:

§ 19.36 Notification of certification of appeal and transfer of appellate record.

* * * * *

Authority: 38 U.S.C. 5902, 5903; 38 U.S.C. 5904, 7105 (2016).

67. Amend § 19.37 by revising the authority citation to read as follows:

§ 19.37 Consideration of additional evidence received by the agency of original jurisdiction after an appeal has been initiated.

* * * * *

Authority: 38 U.S.C. 5902, 5903, 5904; 38 U.S.C. 7105(d)(1) (2016).

68. Amend § 19.38 by:

- a. Removing the text “Rule of Practice 302, paragraph (c) (§ 20.302(c) of this chapter)” and adding in its place the text “§ 19.52(c)”
- b. Revising the authority citation to read as follows:

§ 19.38 Action by agency of original jurisdiction when remand received.

* * * * *

Authority: 38 U.S.C. 7105(d)(1) (2016).

Subpart C—Claimant Action in a Legacy Appeal

69. Revise the subpart C heading as set forth above.

§§ 19.50-19.53 [Removed]

70. Remove §§ 19.50 through 19.53.

Subpart D [Removed and Reserved]

71. Remove and reserve Subpart D, consisting of §§ 19.75 through 19.99.

Subpart E—Simultaneously Contested Claims

72. Amend § 19.100 by revising the authority citation to read as follows:

§ 19.100 Notification of right to appeal in simultaneously contested claims.

* * * * *

Authority: 38 U.S.C. 7105A(a) (2016).

73. Amend § 19.101 by revising the authority citation to read as follows:

§ 19.101 Notice to contesting parties on receipt of Notice of Disagreement in simultaneously contested claims.

* * * * *

Authority: 38 U.S.C. 7105A(b) (2016).

74. Amend § 19.102 by revising the authority citation to read as follows:

§ 19.102 Notice of appeal to other contesting parties in simultaneously
contested claims.

* * * * *

Authority: 38 U.S.C. 7105A(b) (2016).

§§ 19.103-19.199 [Added and Reserved]

75. Add and reserve §§ 19.103 through 19.199.

76. Remove Appendix A to Part 19—Cross-References.

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

77. 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 A—General

§ 20.1 [Amended]

78. Amend § 20.1 by adding the text “(Board)” after the text “Board of Veterans’
Appeals”.

79. Amend § 20.3 by:

- a. Revising paragraphs (b), (c) and (f);

- b. Removing paragraph (h);

- c. Redesignating paragraph (i) as paragraph (h) and revising the introductory text to read: “*Hearing on appeal or Board hearing*”, and removing the text “argument and/or”;
- d. Removing paragraphs (j) and (k);
- e. Redesignating paragraph (l) as paragraph (i) and revising the second sentence to read: “For example, a request to correct a hearing transcript (see Rule 714 (§ 20.714)) is raised by motion.”;
- f. Removing paragraph (m);
- g. Redesignating paragraph (n) as paragraph (j) and removing the word “reopened” and adding in its place the word “readjudicated”.
- h. Redesignating paragraph (o) as paragraph (k);
- i. Redesignating paragraph (p) as paragraph (l);
- j. Redesignating paragraph (q) as paragraph (m);

The revisions read as follows:

§ 20.3 Rule 3. Definitions.

* * * * *

(b) *Agent* means a person who has met the standards and qualifications for accreditation outlined in § 14.629(b) of this chapter and who has been properly designated under the provisions of § 14.631 of this chapter. It does not include representatives accredited under § 14.629(a) of this chapter, attorneys accredited under § 14.629(b) of this chapter, or a person authorized to represent a claimant for a particular claim under § 14.630 of this chapter.

(c) *Appellant* means a claimant who has filed an appeal to the Board of Veterans' Appeals either as a legacy appeal or in the modernized review system, as those terms are defined in § 19.2 of this chapter, and Rule 4 (§ 20.4 of this part), respectively.

* * * * *

(f) *Claim* means a written communication requesting a determination of entitlement or evidencing a belief in entitlement, to a specific benefit under the laws administered by the Department of Veterans Affairs submitted on an application form prescribed by the Secretary.

* * * * *

80. Add new § 20.4 to read as follows:

§ 20.4 Rule 4. Appeal systems definitions and applicability provisions.

(a) *Appeal.* (1) *In general.* An appeal consists of a Notice of Disagreement timely filed to the Board on any issue or issues for which VA provided notice of a decision under 38 U.S.C. 5104 on or after the effective date, as defined in § 19.2(a) of this chapter.

(2) *Appellant's election for review of a legacy claim or appeal in the modernized review system.* The regulations applicable to appeals are also applicable to legacy claims and appeals, as those terms are defined in §§ 3.2400(b) and 19.2(c) of this chapter, where the claimant elects the modernized review system pursuant to § 19.2(d) of this chapter, and upon the timely filing to the Board of a Notice of Disagreement.

(b) *Applicability of parts 19 and 20.* (1) *Appeals.* Subparts C, D, E, and I of part 20 apply only to the processing and adjudication of appeals in the modernized review system.

(2) *Legacy claims and appeals.* Part 19 and subparts F, G, and J of part 20 apply only to the processing and adjudication of legacy claims and appeals.

(3) *Both appeals systems.* Except as otherwise provided in specific sections, subparts A, B, H, K, L, M, N, and O of part 20 apply to the processing and adjudication of both appeals and legacy claims and appeals.

(Authority: Sec. 2, Pub. L. 115-55; 131 Stat. 1105)

Subpart B—The Board

§20.102 [Removed]

81. Remove § 20.102.

82. Redesignate § 20.100 as § 20.102, and revise paragraph (c) in the newly redesignated § 20.102 to read as follows:

§ 20.102 Rule 102. Name, business hours, and mailing address of the Board.

* * * * *

(c) *Mailing address.* The mailing address of the Board is: Board of Veterans' Appeals, P.O. Box 27063, Washington, DC 20038. Mail to the Board that is not related to an appeal must be addressed to: Board of Veterans' Appeals, 810 Vermont Avenue NW., Washington, DC 20420.

83. Redesignate § 20.101 as § 20.104, and amend by:

- a. Removing the third sentence of paragraph (a);
- b. Redesignating paragraph (c) as paragraph (d)(1), revising the paragraph heading and the first sentence, and add an authority citation in the newly designated paragraph (d)(1);

- c. Redesignating paragraph (d) as paragraph (c) and revising the first sentence of the newly redesignated paragraph (c);
- d. Redesignating paragraph (e) as paragraph (d)(2) and revising the newly redesignated paragraph (d)(2).

The revisions read as follows:

§ 20.104 Rule 104. Jurisdiction of the Board.

* * * * *

(c) * * *

The Board shall decide all questions pertaining to its jurisdictional authority to review a particular case.

* * *

(d)(1) *Appeals as to jurisdiction in legacy claims and appeals.* All claimants in legacy appeals, as defined in § 19.2 of this chapter, have the right to appeal a determination made by the agency of original jurisdiction that the Board does not have jurisdictional authority to review a particular case.

* * *

(Authority: Sec. 2, Pub. L. 115-55; 131 Stat. 1105)

(2) *Application of 20.904 and 20.1305.* Section 20.904 of this part shall not apply to proceedings to determine the Board's own jurisdiction. However, the Board may remand a case to an agency of original jurisdiction in order to obtain assistance in securing evidence of jurisdictional facts. The time restrictions on requesting a hearing and submitting additional evidence in § 20.1305 of this part do not apply to a hearing requested, or evidence submitted, under paragraph (c) of this section.

(Authority: 38 U.S.C. 511(a), 7104, 7105, 7108)

Subpart C—Commencement and Filing of Appeals

84. Revise the subpart heading as set forth above.

85. Redesignate § 20.200 as § 19.20 and amend by:

- a. Revising the section heading.
- b. In the introductory text removing the text “§ 20.201” and adding in its place the text “§ 19.21”, removing the text “§ 20.302(a)” and adding in its place the text “§ 19. 52(a)” and adding the text “of this chapter” after the text “of § 20.501(a)”.
- c. Revising the authority citation;

The revisions read as follows:

§ 19.20 What constitutes an appeal.

* * * * *

Authority: 38 U.S.C. 7105 (2016).

86. Redesignate § 20.201 as § 19.21 and amend by:

- a. Revising the section heading;
- b. In paragraph (a)(5), removing the text “§ 20.302(a)” and adding in its place the text “§ 19.52(a)”;
- c. In paragraph (c), removing the text “§§ 20.500 and 20.501” and adding in its place the text “Rules 500 and 501 (§§20.500 and 20.501 of this chapter)”;

d. Revising the authority citation;

The revisions to read as follows:

§ 19.21 Notice of Disagreement.

* * * * *

Authority: 38 U.S.C. 7105 (2016).

87. Redesignate § 20.202 as § 19.22 and amend by revising the section heading and authority citation to read as follows:

§ 19.22 Substantive Appeal.

* * * * *

Authority: 38 U.S.C. 7105(d)(3)-(5) (2016).

88. Redesignate § 20.204 as § 19.55 and amend by:

- a. Revising the section heading;
- b. In paragraph (b)(1), revising the introductory text to read “*Content*”, removing the first sentence, removing the word “They” from the second sentence and adding in its place the words “Appeal withdrawals”;
- c. In paragraph (b)(2), revising the last sentence;
- d. In paragraph (b)(3) removing the word “part” and adding in its place the word “chapter”; and
- e. Revising the authority citation to read as follows:
- f. Removing “[68 FR 13236, Mar. 19, 2003, as amended at 81 FR 32649, May 24, 2016]” from the end of the paragraph.

The revisions read as follows:

§19.55 Withdrawal of Appeal.

* * * * *

(b)* * *

(1) *Content.*

* * * * *

(2) * * *

* * *

Thereafter, file the withdrawal at the Board.

* * * * *

Authority 38 U.S.C. 7105(b), (d) (2016)

89. Revise subpart C to read as follows:

§ 20.200 Rule 200. Notification by agency of original jurisdiction of right to appeal.

The claimant and his or her representative, if any, will be informed of appellate rights provided by 38 U.S.C. chapters 71 and 72, including the right to a personal hearing and the right to representation. The agency of original jurisdiction will provide this information in each notification of a determination of entitlement or nonentitlement to Department of Veterans Affairs benefits, pursuant to 38 U.S.C. 5104, 5104B, and 5108. (Authority: 38 U.S.C. 7105(a))

§ 20.201 Rule 201. What constitutes an appeal.

An appeal of a decision by the agency of original jurisdiction consists of a Notice of Disagreement submitted to the Board in accordance with the provisions of §§ 20.202-20.204.

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

§ 20.202 Rule 202. Notice of Disagreement.

(a) *In General.* A Notice of Disagreement must be properly completed on a form prescribed by the Secretary. If the agency of original jurisdiction decision addressed several issues, the Notice of Disagreement must identify the specific determination or determinations with which the claimant disagrees. The Board will construe such arguments in a liberal manner for purposes of determining whether they raise issues on appeal, but the Board may dismiss any appeal which fails to identify the specific determination with which the claimant disagrees.

(b) Upon filing the Notice of Disagreement, a claimant must indicate whether the claimant requests:

(1) Direct review by the Board of the record before the agency of original jurisdiction at the time of its decision, without submission of additional evidence or a Board hearing;

(2) A Board hearing, to include an opportunity to submit additional evidence at the hearing and within 90 days following the hearing; or

(3) An opportunity to submit additional evidence without a Board hearing with the Notice of Disagreement and within 90 days following receipt of the Notice of Disagreement.

(c)(1) The information indicated by the claimant in paragraph (b) of this section determines the evidentiary record before the Board as described in subpart D of this

part, and the docket on which the appeal will be placed, as described in Rule 800 (§ 20.800). Except as otherwise provided in paragraph (2) of this section, the Board will not consider evidence as described in Rules 302 or 303 (§§ 20.302 and 20.303) unless the claimant requests a Board hearing or an opportunity to submit additional evidence on the Notice of Disagreement.

(2) A claimant may modify the information identified in the Notice of Disagreement for the purpose of selecting a different evidentiary record option as described in paragraph (b) of this section. Requests to modify a Notice of Disagreement must be in writing, must clearly identify the option listed in paragraph (b) of this section that the appellant requests, and must be received at the Board within one year from the date that the agency of original jurisdiction mails notice of the decision on appeal, or within 30 days of the date that the Board receives the Notice of Disagreement, whichever is later.

Requests to modify a Notice of Disagreement will not be granted if the appellant has submitted evidence or testimony as described in §§ 20.302 and 20.303.

(d) The Board will not accept as a Notice of Disagreement an expression of dissatisfaction or disagreement with an adjudicative determination by the agency of original jurisdiction and a desire to contest the result that is submitted in any format other than the form prescribed by the Secretary, including on a different VA form.

(e) *Alternate form or other communication.* The filing of an alternate form or other communication will not extend, toll, or otherwise delay the time limit for filing a Notice of Disagreement, as provided in § 20.203(b). In particular, returning the incorrect VA form does not extend, toll, or otherwise delay the time limit for filing the correct form.

(f) *Unclear Notice of Disagreement.* If within one year after mailing an adverse decision (or 60 days for simultaneously contested claims), the Board receives a Notice of Disagreement completed on the form prescribed by the Secretary, but the Board cannot identify which denied issue or issues the claimant wants to appeal or which option the claimant intends to select under paragraph (b) of this section, then the Board will contact the claimant to request clarification of the claimant's intent.

(g) *Response required from claimant—(1) Time to respond.* The claimant must respond to the Board's request for clarification on or before the later of the following dates:

(i) 60 days after the date of the Board's clarification request; or

(ii) One year after the date of mailing of notice of the adverse decision being appealed (60 days for simultaneously contested claims).

(2) *Failure to respond.* If the claimant fails to provide a timely response, the previous communication from the claimant will not be considered a Notice of Disagreement as to any claim for which clarification was requested. The Board will not consider the claimant to have appealed the decision(s) on any claim(s) as to which clarification was requested and not received.

(h) *Action following clarification.* The unclear Notice of Disagreement is properly completed, and thereby filed, under paragraph (a) of this section when the Board receives the clarification.

(i) *Representatives and fiduciaries.* For the purpose of the requirements in paragraphs (f) through (h) of this section, references to the "claimant" include reference to the claimant or his or her representative, if any, or to his or her fiduciary, if any, as appropriate.

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

[Approved by the Office of Management and Budget under control number 2900-0085]

§ 20.203 Rule 203. Place and time of filing Notice of Disagreement.

(a) *Place of filing.* The Notice of Disagreement must be filed with the Board of Veterans' Appeals, P.O. Box 27063, Washington, DC 20038.

(b) *Time of filing.* Except as provided in § 20.402 for simultaneously contested claims, a claimant, or his or her representative, must file a properly completed Notice of Disagreement with a determination by the agency of original jurisdiction within one year from the date that the agency mails the notice of the determination. The date of mailing the letter of notification of the determination will be presumed to be the same as the date of that letter for purposes of determining whether an appeal has been timely filed.

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

§ 20.204 Rule 204. Who can file a Notice of Disagreement.

(a) *Persons authorized.* A Notice of Disagreement may be filed by a claimant personally, or by his or her representative if a proper Power of Attorney is on record or accompanies such Notice of Disagreement.

(b) *Claimant rated incompetent by Department of Veterans Affairs or under disability and unable to file.* If an appeal is not filed by a person listed in paragraph (a) of this section, and the claimant is rated incompetent by the Department of Veterans Affairs or has a physical, mental, or legal disability which prevents the filing of an appeal on his or her own behalf, a Notice of Disagreement may be filed by a fiduciary appointed to

manage the claimant's affairs by the Department of Veterans Affairs or a court, or by a person acting as next friend if the appointed fiduciary fails to take needed action or no fiduciary has been appointed.

(c) *Claimant under disability and able to file.* Notwithstanding the fact that a fiduciary may have been appointed for a claimant, an appeal filed by a claimant will be accepted.

(Authority: 38 U.S.C. 7105(b)(2)(A))

§ 20.205 Rule 205. Withdrawal of Appeal.

(a) *When and by whom filed.* Only an appellant, or an appellant's authorized representative, may withdraw an appeal. An appeal may be withdrawn as to any or all issues involved in the appeal.

(b) *Filing—(1) Content.* Appeal withdrawals 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), the applicable Department of Veterans Affairs file number, and a statement that the appeal is withdrawn. If the appeal involves multiple issues, the withdrawal must specify that the appeal is withdrawn in its entirety, or list the issue(s) withdrawn from the appeal.

(2) *Where to file.* Appeal withdrawals should be filed with the Board.

(3) *When effective.* An appeal withdrawal is effective when received by the Board. A withdrawal received after the Board issues a final decision under Rule 1100(a) (§20.1100(a)) will not be effective.

(c) *Effect of filing.* Withdrawal of an appeal will be deemed a withdrawal of the Notice of Disagreement as to all issues to which the withdrawal applies. Withdrawal does not

preclude filing a new Notice of Disagreement pursuant to this subpart, a request for higher-level review under 38 U.S.C. 5104B, or a supplemental claim under 38 U.S.C. 5108, as to any issue withdrawn, provided such filing would be timely under these rules if the withdrawn appeal had never been filed.

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

§§ 20.206 – 20.299 [Reserved]

Subpart D—Evidentiary Record

90. Revise the subpart D heading to read as set forth above.

91. Redesignate § 20.300 as § 19.51, and amend by:

- a. Revising the section heading.
- b. Revising the authority citation of the newly redesignated § 19.51 to read as follows:

§ 19.51 Place of filing Notice of Disagreement and Substantive Appeal.

* * * * *

Authority: 38 U.S.C. 7105(b)(1), (d)(3) (2016).

92. Redesignate § 20.301 as § 19.50, and amend by:

- a. Revising the section heading.
- b. Revising the authority citation of the newly redesignated § 19.50 to read as follows:

§19.50 Who can file an appeal.

* * * * *

Authority: 38 U.S.C. 7105(b)(2) (2016).

93. Redesignate § 20.302 as § 19.52, and amend by:

- a. Revising the section heading.
- b. Revising the authority citations of paragraphs (a) – (c) in the newly redesignated §19.52 to read as follows:

§ 19.52 Time limit for filing Notice of Disagreement, Substantive Appeal, and response to Supplemental Statement of the Case.

(a) * * *

Authority: 38 U.S.C. 7105(b)(1) (2016)

(b) * * *

Authority: 38 U.S.C. 7105(b)(1), (d)(3) (2016)

(c) * * *

Authority: 38 U.S.C. 7105(d)(3) (2016)

94. Redesignate § 20.303 as § 19.53, and amend by:

- a. Revising the section heading.
- b. Revising the authority citation of the newly redesignated §19.53 to read as follows:

§ 19.53 Extension of time for filing Substantive Appeal and response to Supplemental Statement of the Case.

* * * * *

Authority: 38 U.S.C. 7105(d)(3) (2016).

95. Redesignate § 20.304 as § 19.54 and amend by:

- a. Revising the section heading.

- b. In the introductory text removing the text “Rule 302(b) (§ 20.302(b) of this part)” and adding in its place the text “§ 19.52(b)”.
- c. Revising the authority citation of the newly redesignated § 19.54 to read as follows:

§19.54 Filing additional evidence does not extend time limit for appeal.

* * * * *

Authority: 38 U.S.C. 7105 (2016).

96. Redesignate § 20.305 as § 20.110, and revise the section heading by removing the words “Rule 305” and adding in their place the words “Rule 110” in the newly redesignated § 20.110.

97. Redesignate § 20.306 as § 20.111 and amend by:

- a. In the section heading removing the words “Rule 306” and adding in their place the words “Rule 111”.
- b. In the introductory text removing the words “Rule 305 (§ 20.305)” and adding in their place the words “Rule 110 (§ 20.110)” in the newly redesignated § 20.111.

98. Add §§ 20.300 – 20.303 to read as follows:

§ 20.300 Rule 300. General.

Decisions of the Board will be based on a de novo review of the evidence of record at the time of the agency of original jurisdiction decision on the issue or issues on appeal, and any additional evidence or testimony submitted pursuant to this subpart, as provided in § 20.801.

(Authority: 38 U.S.C. 7104)

§ 20.301 Rule 301. Appeals with no request for a Board hearing and no additional evidence.

For appeals in which the appellant requested, on the Notice of Disagreement, direct review by the Board without submission of additional evidence and without a Board hearing, the Board's decision will be based on a review of the evidence of record at the time of the agency of original jurisdiction decision on the issue or issues on appeal.

(Authority: 38 U.S.C. 7105, 7107, 7113(a))

§ 20.302 Rule 302. Appeals with a request for a Board hearing.

(a) Except as described in paragraphs (b) and (c) of this section, for appeals in which the appellant requested, on the Notice of Disagreement, a Board hearing, the Board's decision will be based on a review of the following:

- (1) Evidence of record at the time of the agency of original jurisdiction's decision on the issue or issues on appeal;
- (2) Evidence submitted by the appellant or his or her representative at the hearing, to include testimony provided at the hearing; and
- (3) Evidence submitted by the appellant or his or her representative within 90 days following the hearing.

(b) In the event that the hearing request is withdrawn pursuant to § 20.704(e), the Board's decision will be based on a review of evidence described in paragraph (a)(1) of this section, and evidence submitted by the appellant or his or her representative within 90 days following receipt of the withdrawal.

(c) In the event that the appellant does not appear for a scheduled hearing, and the hearing is not rescheduled subject to § 20.704(d), the Board's decision will be based on a review of evidence described in paragraph (a)(1) of this section, and evidence submitted by the appellant or his or her representative within 90 days following the date of the scheduled hearing.

(Authority: 38 U.S.C. 7105, 7107, 7113(b))

§ 20.303 Rule 303. Appeals with no request for a Board hearing, but with a request for submission of additional evidence.

For appeals in which the appellant requested, on the Notice of Disagreement, an opportunity to submit additional evidence without a Board hearing, the Board's decision will be based on a review of the following:

(a) Evidence of record at the time of the agency of original jurisdiction's decision on the issue or issues on appeal; and

(b) Evidence submitted by the appellant or his or her representative:

(1) With the Notice of Disagreement or within 90 days following receipt of the Notice of Disagreement; or,

(2) If the appellant did not request an opportunity to submit additional evidence on the Notice of Disagreement, but subsequently requested to submit additional evidence pursuant to Rule 202, (§ 20.202 (c)(2)(ii)), within 90 days following VA's notice that the appeal has been moved to the docket described in § 20.800(a)(ii).

(Authority: 38 U.S.C. 7105, 7107, 7113(c))

§§ 20.304 – 20.306 [Added and Reserved]

99. Add and reserve §§ 20.304 through 20.306.

Subpart E— Appeal in Simultaneously Contested Claims

100. Revise the subpart E heading to read as set forth above.

§§ 20.400 and 20.401 [Removed]

101. Remove §§ 20.400 and 20.401.

102. Add §§ 20.400 through 20.407 to read as follows:

§ 20.400 Rule 400. Notification of the right to appeal in a simultaneously contested claim.

All interested parties will be specifically notified of the action taken by the agency of original jurisdiction in a simultaneously contested claim and of the right and time limit for submitting a Notice of Disagreement to the Board, as well as hearing and representation rights.

§ 20.401 Rule 401. Who can file an appeal in simultaneously contested claims.

In simultaneously contested claims, any claimant or representative of a claimant may file a Notice of Disagreement within the time limits set out in Rule 402 (§ 20.402).

(Authority: 38 U.S.C. 7105(b)(2), 7105A)

§ 20.402 Rule 402. Time limits for filing Notice of Disagreement in simultaneously contested claims.

In simultaneously contested claims, the Notice of Disagreement from the person adversely affected must be filed within 60 days from the date of mailing of the

notification of the determination to him or her; otherwise, that determination will become final. The date of mailing of the letter of notification will be presumed to be the same as the date of that letter for purposes of determining whether a Notice of Disagreement has been timely filed.

(Authority: 38 U.S.C. 7105A)

§ 20.403 Rule 403. Notice to contesting parties on receipt of Notice of Disagreement in simultaneously contested claims.

Upon the filing of a Notice of Disagreement in a simultaneously contested claim, all interested parties and their representatives will be furnished a copy of the substance of the Notice of Disagreement. The notice will inform the contesting party or parties of what type of review the appellant who initially filed a Notice of Disagreement selected under § 20.202(b), including whether a hearing was requested.

(Authority: 38 U.S.C. 7105A)

§ 20.404 Rule 404. Time limit for response to appeal by another contesting party in a simultaneously contested claim.

A party to a simultaneously contested claim may file a brief, argument, or request for a different type of review under § 20.202(b) in answer to a Notice of Disagreement filed by another contesting party. Any such brief, argument, or request must be filed with the Board within 30 days from the date the content of the Notice of Disagreement is furnished as provided in § 20.403. Such content will be presumed to have been furnished on the date of the letter that accompanies the content.

(Authority: 38 U.S.C. 7105A(b)(1))

§ 20.405 Rule 405. Docketing of simultaneously contested claims at the Board.

After expiration of the 30 day period for response in § 20.404, the Board will place all parties of the simultaneously contested claim on the docket for the type of review requested under § 20.202(b). In the event the parties request different types of review, if any party requests a hearing the appeal will be placed on the docket described in § 20.800(a)(iii), and VA will notify the parties that a hearing will be scheduled. If no party requested a hearing, but any party requested the opportunity to submit additional evidence, the appeal will be placed on the docket described in § 20.800(a)(ii), and the parties will be notified of their opportunity to submit additional evidence within 90 days of the date of such notice.

(Authority: 38 U.S.C. 7105A(b)(1))

§ 20.406 Rule 406. Notices sent to last addresses of record in simultaneously contested claims.

Notices in simultaneously contested claims will be forwarded to the last address of record of the parties concerned and such action will constitute sufficient evidence of notice.

§ 20.407 Rule 407. Favorable Findings are not binding in Contested Claims.

Where a claim is contested, findings favorable to either party, as described in Rule 801 (§ 20.801), are no longer binding on all VA and Board of Veterans' Appeals adjudicators during the pendency of the contested appeal.

(Authority: 38 U.S.C. 7105A(b)(2))

Subpart F— Legacy Appeal in Simultaneously Contested Claims

103. Revise the subpart F heading to read as set forth above.

104. Redesignate § 20.500 as § 20.501 and amend by:

- a. In the section heading removing the words “Rule 500” and adding in their place the words “Rule 501”.
- b. In the introductory text removing the words “Rule 501 (§ 20.501 of this part)” and adding in their place the words “Rule 502 (§ 20.502)”;
- c. Revising the authority citation of the newly redesignated § 20.501 to read as follows:

§ 20.501 Who can file an appeal in simultaneously contested claims.

* * * * *

Authority: 38 U.S.C. 7105(b)(2), 7105A (2016)

105. Add new §20.500 to read as follows:

§ 20.500 Rule 500. Applicability.

The provisions of this subpart apply to legacy appeals, as defined in § 19.2 of this chapter.

106. Redesignate § 20.501 as § 20.502 and amend by:

- a. In the section heading removing the words “Rule 501” and adding in their place the words “Rule 502”.
- b. In paragraphs (a) through (c), revise the authority citations of the newly redesignated § 20.502 to read as follows:

(a) * * *

Authority: 38 U.S.C. 7105A(a) (2016).

(b) * * *

Authority: 38 U.S.C. 7105A(b) (2016).

(c) * * *

Authority: 38 U.S.C. 38 U.S.C. 7105(d)(3), 7105A(b) (2016).

107. Redesignate § 20.502 as § 20.503, and amend by:

- a. In the section heading removing the words “Rule 502” and adding in their place the words “Rule 503”.
- b. Revising the authority citation of the newly redesignated §20.503 to read as follows:

§ 20.503 Rule 503. Time limit for response to appeal by another contesting party in a simultaneously contested claim.

* * * * *

Authority: 38 U.S.C. 7105A(b) (2016).

108. Redesignate § 20.503 as § 20.504, and amend by:

- a. In the section heading removing the words “Rule 503” and adding in their place the words “Rule 504”.
- b. Revising the authority citation of the newly redesignated § 20.504 to read as follows:

§ 20.504 Rule 504. Extension of time for filing a Substantive Appeal in simultaneously contested claims.

* * * * *

Authority: 38 U.S.C. 7105A(b) (2016).

- 109. Redesignate § 20.504 as § 20.505, and
 - a. In the section heading removing the words “Rule 504” and adding in their place the words “Rule 505”.
 - b. Revising the authority citation of the newly redesignated § 20.505 to read as follows:

§ 20.505 rule 505. Notices sent to last addresses of record in simultaneously contested claims.

* * * * *

Authority: 38 U.S.C. 7105A(b) (2016).

Subpart G— Legacy Hearings on Appeal

- 110. Revise the subpart G heading to read as set forth above.
- 111. Redesignate § 20.600 as § 20.5, and revise the section heading by removing the words “Rule 600” and adding in their place the words “Rule 5”.
- 112. Redesignate § 20.608 as § 20.6 and amend by:

- a. Revising the section heading by removing the words “Rule 608” and adding in their place the words “Rule 6”.
- b. Redesignating paragraph (a) as paragraph (b), and removing the words “an appeal” both places it appears and adding in its place the words “a legacy appeal”;
- c. Redesignating paragraph (b) as paragraph (a);
- d. In new paragraph (a), remove the heading;
- e. In new paragraph (a)(1), removing the words “§ 20.602 through 20.605 of this part” and adding in its place the words “§ 14.630 or § 14.631 of this chapter”;
- f. In new paragraph (a)(2), removing the words “After the agency of original jurisdiction has certified an appeal to the Board of Veterans’ Appeals” and adding in its place the words “Except as otherwise provided in paragraph (b) of this section, after an appeal to the Board of Veterans’ Appeals has been filed”; and
- g. In new paragraph (a)(2), removing the words “Office of the Principal Deputy Vice Chairman (01C),”.

113. Remove the Note to subpart G.

114. Add new § 20.600 to read as follows:

§ 20.600 Rule 600. Applicability.

(a) The provisions in this subpart apply to Board hearings conducted in legacy appeals, as defined in § 19.2 of this chapter.

(b) Except as otherwise provided, Rules 700, 701, 704, 705, and 707-715 (§§ 20.700, 20.701, 20.704, 20.705, and 20.707-20.715) are also applicable to Board hearings conducted in legacy appeals.

115. Reserve §§ 20.606 – 20.699.

Subpart H—Hearings on Appeal.

116. Amend § 20.700 by:

- a. Removing paragraphs (d) and (e); and
- b. Revising paragraphs (a) and (b) to read as follows:

§ 20.700 Rule 700. General.

(a) *Right to a hearing.* A hearing on appeal will be granted if an appellant, or an appellant's representative acting on his or her behalf, expresses a desire to testify before the Board.

(b) *Purpose of hearing.* The purpose of a hearing is to receive argument and testimony relevant and material to the appellate issue or issues. It is contemplated that the appellant and witnesses, if any, will be present. A hearing will not normally be scheduled solely for the purpose of receiving argument by a representative. Such argument may be submitted in the form of a written brief. Requests for appearances by representatives alone to personally present argument to Members of the Board may be granted if good cause is shown. Whether good cause has been shown will be determined by the presiding Member assigned to conduct the hearing.

* * * * *

(Authority: 38 U.S.C. 7102, 7105(a), 7107)

117. Redesignate § 20.702 as § 20.704 and amend by:

- a. Revising the section heading;
- b. Revising paragraph (a);
- c. Revising paragraphs (c) through (e); and
- d. Adding new paragraph (f).

The revisions and additions read as follows:

§ 20.704 Rule 704. Scheduling and notice of hearings conducted by the Board of Veterans' Appeals.

(a)(1) *General.* To the extent that officials scheduling hearings for the Board determine that necessary physical resources and qualified personnel are available, hearings will be scheduled at the convenience of appellants and their representatives, with consideration of the travel distance involved. Subject to paragraph (f) of this section, electronic hearings will be scheduled for each area served by a regional office in accordance with the place of each case on the Board's docket, established under Rule 801 (§ 20.801) for appeals and under Rule 902 (§ 20.902) for legacy appeals, relative to other cases for which hearings are scheduled to be held within that area.

(2) *Special provisions for legacy appeals.* The procedures for scheduling and providing notice of Board hearings in legacy appeals conducted at a Department of Veterans Affairs facility having adequate physical resources and personnel for the support of such

hearings under paragraph (a)(3) of Rule 601 (§ 20.601(a)(3)) are contained in Rule 603 (§ 20.603).

(b) * * *

(c) *Requests for changes in hearing dates.* Requests for a change in a hearing date may be made at any time up to two weeks prior to the scheduled date of the hearing if good cause is shown. Such requests must be in writing, must explain why a new hearing date is necessary, and must be filed with the Board. Examples of good cause include, but are not limited to, illness of the appellant and/or representative, difficulty in obtaining necessary records, and unavailability of a necessary witness. If good cause is shown, the hearing will be rescheduled for the next available hearing date after the appellant or his or her representative gives notice that the contingency which gave rise to the request for postponement has been removed. If good cause is not shown, the appellant and his or her representative will be promptly notified and given an opportunity to appear at the hearing as previously scheduled. If the appellant elects not to appear at the prescheduled date, the request for a hearing will be considered to have been withdrawn. In such cases, however, the record will be submitted for review by the Member who would have presided over the hearing. If the presiding Member determines that good cause has been shown, the hearing will be rescheduled for the next available hearing date after the contingency which gave rise to the request for postponement has been removed.

(d) *Failure to appear for a scheduled hearing.* If an appellant (or when a hearing only for oral argument by a representative has been authorized, the representative) fails to appear for a scheduled hearing and a request for postponement has not been received

and granted, the case will be processed as though the request for a hearing had been withdrawn. No further request for a hearing will be granted in the same appeal unless such failure to appear was with good cause and the cause for the failure to appear arose under such circumstances that a timely request for postponement could not have been submitted prior to the scheduled hearing date. A motion for a new hearing date following a failure to appear for a scheduled hearing must be in writing, must be filed within 15 days of the originally scheduled hearing date, and must explain why the appellant failed to appear for the hearing and why a timely request for a new hearing date could not have been submitted. Such motions must be filed with: Board of Veterans' Appeals, P.O. Box 27063, Washington, DC 20038. Whether good cause for such failure to appear and the impossibility of timely requesting postponement have been established will be determined by the Member who would have presided over the hearing. If good cause and the impossibility of timely requesting postponement are shown, the hearing will be rescheduled for the next available hearing date at the same facility after the appellant or his or her representative gives notice that the contingency which gave rise to the failure to appear has been removed.

(e) *Withdrawal of hearing requests.* A request for a hearing may be withdrawn by an appellant at any time before the date of the hearing. A request for a hearing may not be withdrawn by an appellant's representative without the consent of the appellant. Notices of withdrawal must be submitted to the Board.

(f) *Advancement of the case on the hearing docket.* A hearing may be scheduled at a time earlier than would be provided for under paragraph (a) of this section upon written motion of the appellant or the representative. The same grounds for granting relief,

motion filing procedures, and designation of authority to rule on the motion specified in Rule 902(c) (§ 20.902(c)) for advancing a case on the Board's docket shall apply.

(Authority: 38 U.S.C. 7107)

[Approved by the Office of Management and Budget under control number 2900-0085]

118. Add new § 20.702 to read as follows:

§ 20.702 Rule 702. Methods by which hearings are conducted.

A hearing on appeal before the Board may be held by one of the following methods:

- (a) In person at the Board's principal location in Washington, DC, or
- (b) By electronic hearing, through picture and voice transmission, with the appellant appearing at a Department of Veterans Affairs facility.

(Authority: 38 U.S.C. 7102, 7105(a), 7107)

119. Redesignate § 20.703 as § 20.602 and revise the newly redesignated § 20.602 to read as follows:

§ 20.602 Rule 602. When a hearing before the Board of Veterans' Appeals may be requested in a legacy appeal; procedure for requesting a change in method of hearing.

(a) *How to request a hearing.* An appellant, or an appellant's representative, may request a hearing before the Board when submitting the substantive appeal (VA Form 9) or anytime thereafter, subject to the restrictions in Rule 1305 (§ 20.1305). Requests for such hearings before a substantive appeal has been filed will be rejected.

(b) *Board's determination of method of hearing.* Following the receipt of a request for a hearing, the Board shall determine, for purposes of scheduling the hearing for the earliest practical date, whether a hearing before the Board will be held at its principal location or at a facility of the Department or other appropriate Federal facility located within the area served by a regional office of the Department. The Board shall also determine whether the hearing will occur by means of an electronic hearing or by the appellant personally appearing before a Board member or panel. An electronic hearing will be in lieu of a hearing held by personally appearing before a Member or panel of Members of the Board and shall be conducted in the same manner as, and considered the equivalent of, such a hearing.

(c) *Notification of method of hearing.* The Board will notify the appellant and his or her representative of the method of a hearing before the Board.

(d) *How to request a change in method of hearing.* Upon notification of the method of the hearing requested pursuant to paragraph (c) of this section, an appellant may make one request for a different method of the requested hearing. If the appellant makes such a request, the Board shall grant the request and notify the appellant of the change in method of the hearing.

(e) *Notification of scheduling of hearing.* The Board will notify the appellant and his or her representative of the scheduled time and location for the requested hearing not less than 30 days prior to the hearing date. This time limitation does not apply to hearings which have been rescheduled due to a postponement requested by an appellant, or on his or her behalf, or due to the prior failure of an appellant to appear at a scheduled hearing before the Board with good cause. The right to notice at least 30 days in

advance will be deemed to have been waived if an appellant accepts an earlier hearing date due to the cancellation of another previously scheduled hearing.

(Authority: Sec. 102, Pub. L. 114-315; 130 Stat. 1536)

120. Add new § 20.703 to read as follows:

§ 20.703 Rule 703. When a hearing before the Board of Veterans' Appeals may be requested; procedure for requesting a change in method of hearing.

(a) *How to request a hearing.* An appellant, or an appellant's representative, may request a hearing before the Board when submitting the Notice of Disagreement, or when requesting to modify the Notice of Disagreement, as provided in Rule 202 (§ 20.202). Requests for such hearings at any other time will be rejected.

(b) *Board's determination of method of hearing.* Following the receipt of a request for a hearing, the Board shall determine, for purposes of scheduling the hearing for the earliest practical date, whether a hearing before the Board will be held at its principal location or by picture and voice transmission at a facility of the Department located within the area served by a regional office of the Department.

(c) *Notification of method of hearing.* The Board will notify the appellant and his or her representative of the method of a hearing before the Board.

(d) *How to request a change in method of hearing.* If an appellant declines to participate in the method of hearing selected by the Board, the appellant's opportunity to participate in a hearing before the Board shall not be affected. Upon notification of the method of the hearing requested pursuant to paragraph (c) of this section, an appellant may make

one request for a different method of the requested hearing. If the appellant makes such a request, the Board shall grant the request and notify the appellant of the change in method of the hearing.

(e) *Notification of scheduling of hearing.* The Board will notify the appellant and his or her representative of the scheduled time and location for the requested hearing not less than 30 days prior to the hearing date. This time limitation does not apply to hearings which have been rescheduled due to a postponement requested by an appellant, or on his or her behalf, or due to the prior failure of an appellant to appear at a scheduled hearing before the Board of Veterans' Appeals with good cause. The right to notice at least 30 days in advance will be deemed to have been waived if an appellant accepts an earlier hearing date due to the cancellation of another previously scheduled hearing.

(Authority: 38 U.S.C. 7105(a), 7107)

121. Redesignate § 20.704 as § 20.603 and revise the newly redesignated § 20.603 to read as follows:

§ 20.603 Rule 603. Scheduling and notice of hearings conducted by the Board of Veterans' Appeals at Department of Veterans Affairs field facilities in a legacy appeal.

(a) *General.* Hearings may be conducted by a Member or Members of the Board during prescheduled visits to Department of Veterans Affairs facilities having adequate physical resources and personnel for the support of such hearings. Subject to paragraph (f) of this section, the hearings will be scheduled for each area served by a regional office in accordance with the place of each case on the Board's docket,

established under § 20.902, relative to other cases for which hearings are scheduled to be held within that area.

(b) *Notification of hearing.* When a hearing at a Department of Veterans Affairs field facility is scheduled, the person requesting it will be notified of its time and place, and of the fact that the Government may not assume any expense incurred by the appellant, the representative, or witnesses attending the hearing.

(c) *Requests for changes in hearing dates.* Requests for a change in a hearing date may be made at any time up to two weeks prior to the scheduled date of the hearing if good cause is shown. Such requests must be in writing, must explain why a new hearing date is necessary, and must be filed with the Board. Examples of good cause include, but are not limited to, illness of the appellant and/or representative, difficulty in obtaining necessary records, and unavailability of a necessary witness. If good cause is shown, the hearing will be rescheduled for the next available hearing date after the appellant or his or her representative gives notice that the contingency which gave rise to the request for postponement has been removed. If good cause is not shown, the appellant and his or her representative will be promptly notified and given an opportunity to appear at the hearing as previously scheduled. If the appellant elects not to appear at the prescheduled date, the request for a hearing will be considered to have been withdrawn. In such cases, however, the record will be submitted for review by the Member who would have presided over the hearing. If the presiding Member determines that good cause has been shown, the hearing will be rescheduled for the next available hearing date after the contingency which gave rise to the request for postponement has been removed.

(d) *Failure to appear for a scheduled hearing.* If an appellant (or when a hearing only for oral argument by a representative has been authorized, the representative) fails to appear for a scheduled hearing and a request for postponement has not been received and granted, the case will be processed as though the request for a hearing had been withdrawn. No further request for a hearing will be granted in the same appeal unless such failure to appear was with good cause and the cause for the failure to appear arose under such circumstances that a timely request for postponement could not have been submitted prior to the scheduled hearing date. A motion for a new hearing date following a failure to appear for a scheduled hearing must be in writing, must be filed within 15 days of the originally scheduled hearing date, and must explain why the appellant failed to appear for the hearing and why a timely request for a new hearing date could not have been submitted. Such motions must be filed with: Board of Veterans' Appeals, P.O. Box 27063, Washington, DC 20038. Whether good cause for such failure to appear and the impossibility of timely requesting postponement have been established will be determined by the Member who would have presided over the hearing. If good cause and the impossibility of timely requesting postponement are shown, the hearing will be rescheduled for the next available hearing date at the same facility after the appellant or his or her representative gives notice that the contingency which gave rise to the failure to appear has been removed.

(e) *Withdrawal of hearing requests.* A request for a hearing may be withdrawn by an appellant at any time before the date of the hearing. A request for a hearing may not be withdrawn by an appellant's representative without the consent of the appellant. Notices of withdrawal must be submitted to the Board.

(f) *Advancement of the case on the hearing docket.* A hearing may be scheduled at a time earlier than would be provided for under paragraph (a) of this section upon written motion of the appellant or the representative. The same grounds for granting relief, motion filing procedures, and designation of authority to rule on the motion specified in Rule 902(c) (§ 20.902(c)) for advancing a case on the Board's docket shall apply.

(Authority: 38 U.S.C. 7107; Sec. 102, Pub. L. 114-315; 130 Stat. 1536)

[Approved by the Office of Management and Budget under control number 2900-0085]

122. Redesignate § 20.705 as § 20.601 and revise the newly redesignated § 20.601 to read as follows:

§ 20.601 Rule 601. Methods by which hearings in legacy appeals are conducted; scheduling and notice provisions for such hearings.

(a) *Methods by which hearings in legacy appeals are conducted.* A hearing on appeal before the Board may be held by one of the following methods:

(1) In person at the Board's principal location in Washington, DC;

(2) By electronic hearing, through voice transmission or through picture and voice transmission, with the appellant appearing at a Department of Veterans Affairs facility or appropriate Federal facility; or

(3) At a Department of Veterans Affairs facility having adequate physical resources and personnel for the support of such hearings.

(b) *Electronic hearings.* An appropriate Federal facility consists of a Federal facility having adequate physical resources and personnel for the support of such hearings.

(c) *Provisions for scheduling and providing notice of hearings in legacy appeals.*

(1) The procedures for scheduling and providing notice of Board hearings in legacy appeals conducted by the methods described in paragraphs (a)(1) and (a)(2) of this section are contained in Rule 704 (§ 20.704).

(2) The procedures for scheduling and providing notice of Board hearings in legacy appeals conducted at a Department of Veterans Affairs facility having adequate physical resources and personnel for the support of such hearings under (a)(3) are contained in Rule 603 (§ 20.603).

(Authority: 38 U.S.C. 7107; Sec. 102, Pub. L. 114-315; 130 Stat. 1536)

123. Redesignate § 20.706 as § 20.705 and revise the newly redesignated § 20.705 to read as follows:

§ 20.705 Rule 705. Functions of the presiding Member.

(a) *General.* The presiding Member is responsible for the conduct of a Board hearing in accordance with the provisions of subparts G and H of this part.

(b) *Duties.* The duties of the presiding Member include, but are not limited to, any of the following:

(1) Conducting a prehearing conference, pursuant to § 20.707;

(2) Ruling on questions of procedure;

(3) Administering the oath or affirmation;

(4) Ensuring that the course of the Board hearing remains relevant to the issue or issues on appeal;

- (5) Setting reasonable time limits for the presentation of argument;
- (6) Prohibiting cross-examination of the appellant and any witnesses;
- (7) Excluding documentary evidence, testimony, and/or argument which is not relevant or material to the issue or issues being considered or which is unduly repetitious;
- (8) Terminating a Board hearing or directing that an offending party, representative, witness, or observer leave the hearing if that party persists or engages in disruptive or threatening behavior;
- (9) Disallowing or halting the use of personal recording equipment being used by an appellant or representative if it becomes disruptive to the hearing; and
- (10) Taking any other steps necessary to maintain good order and decorum.

(c) *Ruling on motions.* The presiding Member has the authority to rule on any Board hearing-related motion.

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

124. Add new § 20.706 to read as follows:

§ 20.706 Rule 706. Designation of Member or Members to conduct the hearing.

Hearings will be conducted by a Member or panel of Members of the Board. Where a proceeding has been assigned to a panel, the Chairman, or the Chairman's designee, shall designate one of the Members as the presiding Member.

(Authority: 38 U.S.C. 7102, 7107)

125. Redesignate § 20.707 as § 20.604 and amend by:

- a. In the section heading, remove the words “Rule 707” and add in their place the words “Rule 604”;
- b. In the section heading, add the words “in a legacy appeal” after the word “hearing”;
- c. Remove the words “§ 19.3 of this part” and add in their place the words “Rule 106 (§ 20.106)”;
- d. Remove the words “§ 19.11(c) of this part” and add in their place the words “Rule 1004 (§ 20.1004)”;
- e. Adding an authority citation to the newly redesignated §20.604 to read as follows:

Authority: 38 U.S.C. 7102; 38 U.S.C. 7101 (2016)

126. Redesignate § 20.708 as § 20.707 and amend by:

- a. In the section heading, remove the words “Rule 708” and add in their place the words “Rule 707”;
- b. Removing all text in the introductory text after the first sentence; and
- c. Adding an authority citation to the newly redesignated §20.707 to read as follows:

Authority: 38 U.S.C. 7102, 7107

127. Redesignate § 20.709 as § 20.605, revise the section heading, and add an authority citation to the newly redesignated § 20.605 to read as follows:

§ 20.605 Rule 605. Procurement of additional evidence following a hearing in a legacy appeal.

* * * * *

Authority: 38 U.S.C. 7102; 38 U.S.C. 7105, 7101 (2016)

128. Redesignate § 20.710 as § 20.708, and revise the section heading by removing the words “Rule 710” and add in their place the words “Rule 708” in the newly redesignated § 20.708.

§ 20.711 [Redesignated and Amended]

129. Redesignate § 20.711 as § 20.709 and amend by:

- a. In the section heading remove the words “Rule 711” and add in their place the words “Rule 709”; and
- b. In paragraph (c), removing the words “Director, Office of Management, Planning and Analysis (014),” in the newly redesignated § 20.709.

130. Redesignate § 20.712 as § 20.710 and revise the section heading by removing the words “Rule 712” and add in their place the words “Rule 710” in the newly redesignated § 20.710.

131. Redesignate § 20.713 as § 20.711 and revise paragraph (b) in the newly redesignated § 20.711 to read as follows:

§ 20.711 Rule 711. Hearings in simultaneously contested claims.

(a) * * *

(b) *Requests for changes in hearing dates.* (1) General. Except as described in paragraphs (b)(2) and (3) of this section, any party to a simultaneously contested claim may request a change in a hearing date in accordance with the provisions of Rule 704, paragraph (c) (§ 20.704(c)).

(2)(i) A request under Rule 704, paragraph (c) must be made within 60 days from the date of the letter of notification of the time and place of the hearing, or not later than two weeks prior to the scheduled hearing date, whichever is earlier.

(ii) In order to obtain a new hearing date under the provisions of Rule 704, paragraph (c), the consent of all other interested parties must be obtained and submitted with the request for a new hearing date. If such consent is not obtained, the date of the hearing will become fixed. After a hearing date has become fixed, an extension of time for appearance at a hearing will be granted only for good cause, with due consideration of the interests of other parties. Examples of good cause include, but are not limited to, illness of the appellant and/or representative, difficulty in obtaining necessary records, and unavailability of a necessary witness. The motion for a new hearing date must be in writing and must explain why a new hearing date is necessary. If good cause is shown, the hearing will be rescheduled for the next available hearing date after the appellant or his or her representative gives notice that the contingency which gave rise to the request for postponement has been removed. Ordinarily, however, hearings will not be postponed more than 30 days. Whether good cause for establishing a new hearing date has been shown will be determined by the presiding Member assigned to conduct the hearing.

(3) A copy of any motion for a new hearing date required by these rules must be mailed to all other interested parties by certified mail, return receipt requested. The receipts, which must bear the signatures of the other interested parties, and a letter explaining that they relate to the motion for a new hearing date and containing the applicable Department of Veterans Affairs file number must be filed at the same address where the

motion was filed as proof of service of the motion. Each interested party will be allowed a period of 10 days from the date that the copy of the motion was received by that party to file written argument in response to the motion.

(Authority: 38 U.S.C. 7105A)

132. Redesignate § 20.714 as § 20.712 and revise the newly redesignated § 20.712 to read as follows:

§ 20.712 Rule 712. Record of hearing.

(a) *General.* All Board hearings will be recorded. The Board will prepare a written transcript for each Board hearing conducted. The transcript will be the official record of the hearing and will be incorporated as a part of the record on appeal. The Board will not accept alternate transcript versions prepared by the appellant or representative.

(b) *Hearing recording.* The recording of the Board hearing will be retained for a period of 12 months following the date of the Board hearing as a duplicate record of the proceeding.

(c) *Copy of written transcript.* If the appellant or representative requests a copy of the written transcript in accordance with § 1.577 of this chapter, the Board will furnish one copy to the appellant or representative.

133. Redesignate § 20.715 as § 20.713 and amend by:

- a. Revising the section heading by removing the words “Rule 715” and adding in their place the words “Rule 713”;

- b. Revising the fourth sentence of the introductory text to read: “In all such situations, advance arrangements must be made with the Board of Veterans' Appeals, P.O. Box 27063, Washington, DC 20038.”;
- c. Removing the fifth and sixth sentences; and
- d. Revising the authority citation of the newly redesignated § 20.713 to read: § 20.713 Rule 713. Recording of hearing by appellant or representative.

* * * * *

Authority: 38 U.S.C. 7102, 7107

- 134. Redesignate § 20.716 as § 20.714 and revise the newly redesignated § 20.714 to read as follows:

§ 20.714 Rule 714. Correction of hearing transcripts.

If an appellant wishes to seek correction of perceived errors in a hearing transcript, the appellant or his or her representative should move for correction of the hearing transcript within 30 days after the date that the transcript is mailed to the appellant. The motion must be in writing and must specify the error, or errors, in the transcript and the correct wording to be substituted. The motion must be filed with the Board of Veterans' Appeals, P.O. Box 27063, Washington, DC 20038. The ruling on the motion will be made by the presiding Member of the hearing.

Authority: 38 U.S.C. 7102, 7107

- 135. Redesignate § 20.717 as § 20.715 and revise the newly redesignated § 20.715 to read as follows:

§ 20.715 Rule 715. Loss of hearing recordings or transcripts—motion for new hearing.

(a) *Notification.* (1) The Board must notify the appellant and his or her representative in writing in the event the Board discovers that a Board hearing has not been recorded in whole or in part due to equipment failure or other cause, or the official transcript of the hearing is lost or destroyed and the recording upon which it was based is no longer available. The notice must provide the appellant with a choice of either of the following options:

(i) Appear at a new Board hearing, pursuant to Rules 703 and 704 (§§ 20.703 and 20.704) for appeals or Rules 602 and 603 (§§ 20.602 and 20.603) for legacy appeals, as defined in § 19.2 of this chapter; or

(ii) Have the Board proceed to appellate review of the appeal based on the evidence of record.

(2) The notice will inform the appellant that he or she has a period of 30 days to respond to the notice. If the appellant does not respond by requesting a new hearing within 30 days from the date of the mailing of the notice, then the Board will decide the appeal on the basis of the evidence of record. A request for a new Board hearing will not be accepted once the Board has issued a decision on the appeal.

(b) *Board decision issued prior to a loss of the recording or transcript.* The Board will not accept a request for a new Board hearing under this section if a Board decision was issued on an appeal prior to the loss of the recording or transcript of a Board hearing, and the Board decision considered testimony provided at that Board hearing.

(Authority: 38 U.S.C. 7102, 7105(a), 7107)

§§ 20.716 and 20.717 [Reserved]

136. Reserve §§ 20.716 and 20.717.

Subpart I— Appeals Processing

137. Revise the subpart I heading to read as set forth above.

138. Redesignate § 20.800 as § 20.901, and amend by:

- a. Revising the section heading by removing the words “Rule 800” and adding in their place the words “Rule 901”.
- b. Revising the authority citation of the newly redesignated § 20.901 to read as follows:

§ 20.901 Rule 901. Submission of additional evidence after initiation of appeal.

* * * * *

Authority: 38 U.S.C. 5902, 5903, 5904; 38 U.S.C. 5904, 7105(d)(1) (2016).

139. Add §§ 20.800 through 20.804 to read as follows:

§ 20.800 Rule 800. Order of consideration of appeals.

(a) *Docketing of appeals.* (1) Applications for review on appeal are docketed in the order in which they are received on the following dockets:

(i) A docket for appeals in which an appellant does not request a hearing or an opportunity to submit additional evidence on the Notice of Disagreement;

(ii) A docket for appeals in which the appellant does not request a hearing but does request an opportunity to submit additional evidence on the Notice of Disagreement; and

(iii) A docket for appeals in which the appellant requests a hearing on the Notice of Disagreement.

(2) An appeal may be moved from one docket to another only when the Notice of Disagreement has been modified pursuant to Rule 202, paragraph (c)(3) (§ 20.202(c)(3)). The request to modify the Notice of Disagreement must reflect that the appellant requests the option listed in § 20.202(b) that corresponds to the docket to which the appeal will be moved. An appeal that is moved from one docket to another will retain its original docket date.

(b) Except as otherwise provided, each appeal will be decided in the order in which it is entered on the docket to which it is assigned.

(c) *Advancement on the docket*—(1) *Grounds for advancement*. A case may be advanced on the docket to which it is assigned on the motion of the Chairman, the Vice Chairman, a party to the case before the Board, or such party's representative. Such a motion may be granted only if the case involves interpretation of law of general application affecting other claims, if the appellant is seriously ill or is under severe financial hardship, or if other sufficient cause is shown. "Other sufficient cause" shall include, but is not limited to, administrative error resulting in a significant delay in docketing the case, administrative necessity, or the advanced age of the appellant. For purposes of this Rule, "advanced age" is defined as 75 or more years of age. This

paragraph does not require the Board to advance a case on the docket in the absence of a motion of a party to the case or the party's representative.

(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 the Board of Veterans' Appeals, P.O. Box 27063, Washington, DC 20038.

(3) *Disposition of motions.* If a motion is received prior to the assignment of the case to an individual member or panel of members, the ruling on the motion will be by the Vice Chairman, who may delegate such authority to a Deputy Vice Chairman. If a motion to advance a case on the docket is denied, the appellant and his or her representative will be immediately notified. If the motion to advance a case on the docket is granted, that fact will be noted in the Board's decision when rendered.

(d) *Consideration of appeals remanded by the United States Court of Appeals for Veterans Claims.* A case remanded by the United States Court of Appeals for Veterans Claims for appropriate action will be treated expeditiously by the Board without regard to its place on the Board's docket.

(Authority: 38 U.S.C. 7112; Sec. 302, Pub. L. 103-446; 108 Stat. 4645)

(e) *Case remanded to correct duty to assist error and new Notice of Disagreement filed after readjudication.* A case will not be returned to the Board following the agency of original jurisdiction's readjudication of an appeal previously remanded by the Board

pursuant to Rule 803, paragraph (c) (§ 20.802(c)), unless the claimant files a new Notice of Disagreement. Such cases will be docketed in the order in which the most recent Notice of Disagreement was received.

(f) *Cases involving substitution.* 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. If the deceased appellant's case was advanced on the docket prior to his or her death pursuant to paragraph (c) of this section, the substitute will receive the benefit of the advanced placement.

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

(g) *Postponement to provide hearing.* Any other provision of this Rule notwithstanding, a case may be postponed for later consideration and determination if such postponement is necessary to afford the appellant a hearing.

(Authority: 38 U.S.C. 7105, 7107)

§ 20.801 Rule 801. The decision.

(a) *General.* Decisions of the Board will be based on a de novo review of the evidence of record at the time of the agency of original jurisdiction decision on the issue or issues on appeal, and any additional evidence submitted pursuant to Rules 302 and 303 (§§ 20.302 and 20.303). Any findings favorable to the claimant as identified by the agency of original jurisdiction in notification of a decision or in a prior Board decision on an issue on appeal are binding on all VA and Board of Veterans' Appeals adjudicators, unless rebutted by clear and convincing evidence to the contrary. For purposes of this

section, findings means conclusions on questions of fact and application of law to facts made by an adjudicator concerning the issue under review.

(b) *Content.* The decision of the Board will be in writing and will set forth specifically the issue or issues under appellate consideration. Except with respect to appeals which are dismissed because an appellant seeking nonmonetary benefits has died while the appeal was pending, the decision will also include:

- (1) Findings of fact and conclusions of law on all material issues of fact and law presented on the record;
- (2) The reasons or bases for those findings and conclusions;
- (3) A general statement reflecting whether any evidence was received at a time when not permitted under subpart D, and informing the appellant that any such evidence was not considered by the Board and of the options available to have that evidence reviewed by the Department of Veterans Affairs; and
- (4) An order granting or denying the benefit or benefits sought on appeal, dismissing the appeal, or remanding the issue or issues as described in Rule 802 (§ 20.802).

(c) A decision by a panel of Members will be by a majority vote of the panel Members.

(Authority: 38 U.S.C. 7104(d))

§ 20.802 Rule 802. Remand for correction of error.

(a) *Remand.* Unless the issue or issues can be granted in full, the Board shall remand the appeal to the agency of original jurisdiction for correction of an error on the part of the agency of original jurisdiction to satisfy its duties under 38 U.S.C. 5103A, if the error occurred prior to the date of the agency of original jurisdiction decision on appeal. The

Board may remand for correction of any other error by the agency of original jurisdiction in satisfying a regulatory or statutory duty, if correction of the error would have a reasonable possibility of aiding in substantiating the appellant's claim. The remand must specify the action to be taken by the agency of original jurisdiction.

(b) *Advisory Medical Opinion.* If the Board determines that an error as described in paragraph (a) of this section may only be corrected by obtaining an advisory medical opinion from a medical expert who is not an employee of the Department of Veterans Affairs, the Board shall remand the case to the agency of original jurisdiction to obtain such an opinion, specifying the questions to be posed to the independent medical expert providing the advisory medical opinion.

(c) *Action by agency of original jurisdiction after receipt of remand.* After correction of any error identified in the Board's remand, the agency of original jurisdiction must readjudicate the claim and provide notice of the decision under 38 U.S.C. 5104, to include notice under 38 U.S.C. 5104C of a claimant's options for further review of the agency of original jurisdiction's decision. The agency of original jurisdiction must provide for the expeditious treatment of any claim that is remanded by the Board.

(Authority: 38 U.S.C. 5103A, 5109, 5109B, 7102, 7104(a), 7105).

§ 20.803 Rule 803. Content of Board decision, remand, or order in simultaneously contested claims.

The content of the Board's decision, remand, or order in appeals involving a simultaneously contested claim will be limited to information that directly affects the issues involved in the contested claim. Appellate issues that do not involve all of the

contesting parties will be addressed in one or more separate written decisions, remands, or orders that will be furnished only to the appellants concerned and their representatives, if any.

(Authority: 5 U.S.C. 552a(b), 38 U.S.C. 5701(a))

§ 20.804 Rule 804. Opinions of the General Counsel.

(a) The Board may obtain an opinion from the General Counsel of the Department of Veterans Affairs on legal questions involved in the consideration of an appeal.

(b) *Filing of requests for the procurement of opinions.* The appellant or representative may request that the Board obtain an opinion under this section. Such request must be in writing and will be granted upon a showing of good cause, such as the identification of a complex or controversial legal issue involved in the appeal which warrants such an opinion.

(c) *Notification of evidence to be considered by the Board and opportunity for response.*

If the Board requests an opinion pursuant to this section, it will notify the appellant and his or her representative, if any. When the Board receives the opinion, it will furnish a copy of the opinion to the appellant, subject to the limitations provided in 38 U.S.C. 5701(b)(1), and to the appellant's representative, if any. A period of 60 days from the date the Board furnishes a copy of the opinion will be allowed for response, which may include the submission of relevant evidence or argument. The date the Board furnishes a copy will be presumed to be the same as the date of the letter or memorandum that accompanies the copy of the opinion for purposes of determining whether a response was timely filed.

(d) For purposes of this section, the term “the Board” includes the Chairman, the Vice Chairman, any Deputy Vice Chairman, and any Member of the Board before whom a case is pending.

(Authority: 38 U.S.C. 5107(a), 7102(c), 7104(a), 7104(c))

Subpart J— Action by the Board in Legacy Appeals

140. Revise the subpart J heading as set forth above.

141. Redesignate § 20.900 as § 20.902 and amend by:

- a. Revising the section heading by removing the words “Rule 900” and adding in their place the words “Rule 902”;
- b. In paragraph (c)(1), revising the third sentence;
- c. In paragraph (c)(2), removing the words “Director, Office of Management, Planning and Analysis (014),”;
- d. Revise the authority citation at the end of paragraph (d); and
- e. Revise the authority citation of the newly redesignated § 20.902 to read as follows:

§ 20.902 Rule 902. Order of consideration of appeals.

* * * * *

(c) * * *

(1) * * *

“Other sufficient cause” shall include, but is not limited to, administrative error resulting in a significant delay in docketing the case, administrative necessity, or the advanced age of the appellant.

* * * * *

(d) * * *

Authority: Sec. 302, Pub. L. 103-446; 108 Stat. 4645

* * * * *

Authority: 38 U.S.C. 5121A, 7107; 38 U.S.C. 7107 (2016)

142. Add § 20.900 to read as follows:

§ 20.900 Rule 900. Applicability.

The provisions in this subpart apply to Board decisions and remands rendered in legacy appeals, as defined in § 19.2 of this chapter.

(Authority: Sec. 2, Pub. L. 115-55; 131 Stat. 1105)

§ 20.901 [Redesignated and Amended]

143. Redesignate § 20.901 as § 20.906 and amend by:

- a. Revising the section heading by replacing the words “Rule 901” and adding in their place the words “Rule 906”.
- b. In paragraph (b), removing the words “Armed Forces Institute of Pathology” and adding in its place the words “Joint Pathology Center” both places it appears in the newly redesignated § 20.906.

144. Redesignate § 20.902 as § 20.907 and amend by:

- a. Revising the section heading by removing the words “Rule 902” and adding in their place the words “Rule 907”.
- b. In the introductory text removing the words “Rule 901 (§ 20.901 of this part)” and adding in its place the words “Rule 906 (§ 20.906)” in the newly redesignated § 20.907.

145. Redesignate § 20.903 as § 20.908 and amend by:

- a. Revising the section heading by removing the words “Rule 903” and adding in their place the words “Rule 908”;
- b. In paragraph (a), removing the words “Rule 901 (§ 20.901 of this part)” and adding in its place the words “Rule 906 (§ 20.906)”;
- c. In paragraph (b), removing the words “§ 19.9(d)(5) of this chapter” and adding in its place the words “Rule 904(d)(5) (§ 20.904(d)(5))” in the newly redesignated § 20.908.

146. Redesignate § 20.904 as § 20.1000 and amend by revising the section heading and paragraphs (a)(2) and (3) of the newly redesignated § 20.1000 to read as follows:

§ 20.1000 Rule 1000. Vacating a decision.

* * * * *

(a) * * *

(1) * * *

(2) When there was a prejudicial failure to afford the appellant a personal hearing.

(Where there was a failure to honor a request for a hearing and a hearing is

subsequently scheduled, but the appellant fails to appear, the decision will not be vacated.), and

(3) For a legacy appeal, as defined in § 19.2 of this chapter, when a Statement of the Case or required Supplemental Statement of the Case was not provided.

* * * * *

Subpart K— Vacatur and Reconsideration

147. Revise the subpart K heading as set forth above.

§ 20.1000 [Redesignated and Amended]

148. Redesignate § 20.1000 as § 20.1001 and amend by:

- a. Revising the section heading by removing the words “Rule 1000” and adding in their place the words “Rule 1001”;
- b. Removing the words “and material” from paragraph (b).

§ 20.1001 [Redesignated and Amended]

149. Redesignate § 20.1001 as § 20.1002 and amend by:

- a. Revising the section heading by removing the words “Rule 1001” and adding in their place the words “Rule 1002”;
- b. In paragraph (b), removing the words “Director, Office of Management, Planning and Analysis (014),”; and
- c. In paragraph (c)(2), removing the words “§ 19.11 of this chapter” and adding in its place the words “Rule 1004 (§ 20.1004)” in the newly redesignated § 20.1002.

150. Amend § 20.1003 by revising the first sentence and removing the fifth sentence of the introductory text to read as follows:

§ 20.1003 Rule 1003. Hearing on reconsideration.

After a motion for reconsideration has been allowed, a hearing will be granted if the issue under reconsideration was considered on a docket for cases that may include a hearing, and an appellant requests a hearing before the Board.

* * * * *

Subpart L—Finality

151. Amend § 20.1103 by revising to read as follows:

§ 20.1103 Rule 1103. Finality of determinations of the agency of original jurisdiction where issue is not appealed.

A determination on a claim by the agency of original jurisdiction of which the claimant is properly notified is final if an appeal is not perfected as prescribed in § 19.52 of this chapter. If no Notice of Disagreement is filed as prescribed in subpart C of this part, the claim shall not thereafter be readjudicated or allowed, except as provided by 38 U.S.C. 5104B or 5108, or by regulation.

152. Amend § 20.1105 by revising to read as follows:

§ 20.1105 Rule 1105. Supplemental claim after promulgation of appellate decision.

(a) After an appellate decision has been promulgated on a claim, a claimant may file a supplemental claim with the agency of original jurisdiction by submitting the prescribed

form with new and relevant evidence related to the previously adjudicated claim as set forth in § 3.2601 of this chapter, except in cases involving simultaneously contested claims under Subpart E of this part.

(Authority: 38 U.S.C. 5108, 7104)

(b) *Legacy appeals pending on the effective date.* For legacy appeals as defined in § 19.2 of this chapter, where prior to the effective date described in Rule 4 (§ 20.4), an appellant requested that a claim be reopened after an appellate decision has been promulgated and submitted evidence in support thereof, a determination as to whether such evidence is new and material must be made and, if it is, as to whether it provides a basis for allowing the claim. An adverse determination as to either question is appealable.

(Authority: 38 U.S.C. 5108, 7104 (2016))

Subpart M—Privacy Act

153. Amend § 20.1201 by removing the words “Rules 1000 through 1003 (§§ 20.1000-20.1003 of this part)” and adding in its place the words “Rules 1001 through 1004 (§§ 20.1001-20.1004)” both places it appears.

Subpart N—Miscellaneous

154. Amend § 20.1301 by:

- a. Redesignating paragraph (b) as paragraph (c) and revising the newly redesignated paragraph (c)(1) by removing the text “the internet at

<http://www.index.va.gov/search/va/bva.html>” and replacing it with the text “the Board’s website”;

- b. Adding new paragraph (b) and revising paragraph (a);
- c. In paragraph (c)(2):
 - i. Removing the words “at the Research Center” from the second sentence;
 - ii. Removing the words “Board’s Research Center” and adding in its place the words “Board” from the third sentence;
 - iii. Removing the word “paper” from the ninth sentence; and
 - iv. Removing the words “Research Center (01C1),” from the last sentence.

The additions and revisions read as follows:

§ 20.1301 Rule 1301. Disclosure of information.

(a) *Policy.* It is the policy of the Board for the full text of appellate decisions to be disclosed to appellants. In those situations where disclosing certain information directly to the appellant would not be in conformance with 38 U.S.C. 5701, that information will be removed from the decision and the remaining text will be furnished to the appellant. A full-text appellate decision will be disclosed to the designated representative, however, unless the relationship between the appellant and representative is such (for example, a parent or spouse) that disclosure to the representative would be as harmful as if made to the appellant.

(b) *Legacy appeals*. For legacy appeals as defined in § 19.2 of this chapter, the policy described in paragraph (a) is also applicable to Statements of the Case and supplemental Statements of the Case.

(Authority: 38 U.S.C. 7105(d)(2))

* * * * *

155. Amend § 20.1302 by removing the words “Rule 900 (§ 20.900(a)(2))” and adding in its place the words “Rule 800, paragraph (f) (§ 20.800(f)) or, for legacy appeals, Rule 902, paragraph (a)(2) (§ 20.902(a)(2))” both places it appears.

156. Redesignate § 20.1304 as § 20.1305 and amend by:

- a. Revising the section heading and paragraph (a);
- b. In paragraph (b)(1), removing the words “Director, Office of Management, Planning and Analysis (014),”;
- c. In paragraph (b)(2), removing the words “§ 20.903 of this chapter” and adding in their place “§ 20.908”; and
- d. In paragraph (c), removing the words “§ 20.903” and adding in their place the words “§ 20.908”;
- e. Revising the authority citation in the newly redesignated § 20.1305 to read as follows:

§ 20.1305 Rule 1305. Procedures for legacy appellants to request a change in representation, personal hearing, or submission of additional evidence following certification of an appeal to the Board of Veterans' Appeals.

(a) Request for a change in representation, request for a personal hearing, or submission of additional evidence within 90 days following notification of certification

and transfer of records. An appellant in a legacy appeal, as defined in § 19.2 of this chapter, and his or her representative, if any, will be granted a period of 90 days following the mailing of notice to them that an appeal has been certified to the Board for appellate review and that the appellate record has been transferred to the Board, or up to and including the date the appellate decision is promulgated by the Board, whichever comes first, during which they may submit a request for a personal hearing, additional evidence, or a request for a change in representation. Any such request or additional evidence should be submitted directly to the Board and not to the agency of original jurisdiction. If any such request or additional evidence is submitted to the agency of original jurisdiction instead of to the Board, the agency of original jurisdiction must forward it to the Board in accordance with § 19.37(b) of this chapter. The date of mailing of the letter of notification will be presumed to be the same as the date of that letter for purposes of determining whether the request was timely made or the evidence was timely submitted. Any evidence which is submitted at a hearing on appeal which was requested during such period will be considered to have been received during such period, even though the hearing may be held following the expiration of the period. Any pertinent evidence submitted by the appellant or representative is subject to the requirements of paragraph (d) of this section if a simultaneously contested claim is involved.

* * * * *

Authority: 38 U.S.C. 5121A, 5902, 5903; 38 U.S.C. 5904, 7104, 7105, 7105A (2016).

157. Add new §20.1304 to read as follows:

§ 20.1304 Rule 1304. Request for a change in representation.

(a) *Request for a change in representation within 90 days following Notice of Disagreement.* An appellant and his or her representative, if any, will be granted a period of 90 days following receipt of a Notice of Disagreement, or up to and including the date the appellate decision is promulgated by the Board, whichever comes first, during which they may submit a request for a change in representation.

(b) *Subsequent request for a change in representation*—Following the expiration of the period described in paragraph (a) of this section, the Board will not accept a request for a change in representation 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; and withdrawal of an individual representative. 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 could not be accomplished in a timely manner. Such motions must be filed at the following address: Board of Veterans' Appeals, P.O. Box 27063, Washington, DC 20038. Depending upon the ruling on the motion, action will be taken as follows:

(1) *Good cause not shown.* If good cause is not shown, the request for a change in representation will be referred to the agency of original jurisdiction for association with the appellant's file for any pending or subsequently received claims upon completion of the Board's action on the pending appeal without action by the Board concerning the request.

(2) *Good cause shown.* If good cause is shown, the request for a change in representation will be honored.

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

§§ 20.1306 – 20.1399 [Reserved]

158. Add and reserve §§ 20.1306 through 20.1399.

Subpart O—Revision of Decisions on Grounds of Clear and Unmistakable Error

§ 20.1401 [Amended]

159. Amend § 20.1401 by removing the words “, but does not include officials authorized to file administrative appeals pursuant to § 19.51 of this title” in the last sentence of paragraph (b).

160. Amend § 20.1403 by revising paragraph (b)(2) to read as follows:

§ 20.1403 Rule 1403. What constitutes clear and unmistakable error; what does not.

* * * * *

(b) * * *

(1) * * *

(2) *Special rule for Board decisions on legacy appeals issued on or after July 21, 1992.*

For a Board decision on a legacy appeal as defined in § 19.2 of this chapter issued on or after July 21, 1992, the record that existed when that decision was made includes relevant documents possessed by the Department of Veterans Affairs not later than 90 days before such record was transferred to the Board for review in reaching that decision, provided that the documents could reasonably be expected to be part of the record.

* * * * *

§ 20.1404 [Amended]

161. Amend § 20.1404(c) by removing “Director, Office of Management, Planning and Analysis (014),”.

162. Amend § 20.1405 by:

- a. In paragraph (a)(1), removing the words “§ 19.3 of this title” and adding in its place the words “§ 20.106”;
- b. In paragraph (a)(2), removing the words “Rule 900(c) (§ 20.900(c) of this part)” and adding in its place the words “Rule 800, paragraph (c) (§ 20.800(c)) or, for legacy appeals, Rule 902, paragraph (c) (§ 20.902(c))”;
- c. In paragraph (c)(2), removing the words “Director, Office of Management, Planning and Analysis (014),”;
- d. Removing paragraph (d);
- e. Redesignating paragraph (e) as paragraph (d);
- f. Redesignating paragraph (f) as paragraph (e);

- g. Redesignating paragraph (g) as paragraph (f) and revising the first sentence of the newly redesignated paragraph (f) to read as follows:

§ 20.1405 Rule 1405. Disposition.

* * * * *

(f) *Decision.* The decision of the Board on a motion under this subpart will be in writing.

* * * * *

163. Amend § 20.1408 by removing the words “Rule 3(o) (§ 20.3(o) of this part)” and adding in its place the words “Rule 3(l) (§ 20.3(l) of this part)” from the introductory text.

164. Amend § 20.1409(b), by removing the words “Rule 1405(e)” and adding in its place the words “Rule 1405, paragraph (d) (§ 20.1405(d) of this part)”.

165. Amend § 20.1411 by revising paragraphs (b) and (d) to read as follows:

§20.1411 Rule 1411. Relationship to other statutes.

(a) * * *

(b) For legacy appeals as defined in § 19.2 of this chapter, a motion under this subpart is not a claim subject to reopening under 38 U.S.C. 5108 (prior to the effective date described in Rule 4, paragraph (a) (§ 20.4(a) of this part) (relating to reopening claims on the grounds of new and material evidence).

(c) * * *

(d) A motion under this subpart is not a claim for benefits subject to the requirements and duties associated with 38 U.S.C. 5103A (imposing a duty to assist).

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

§§ 20.1412 – 20.1499 [Added and Reserved]

166. Add and reserve §§ 20.1412 through 20.1499.

Subpart P—Expedited Claims Adjudication Initiative—Pilot Program

167. Remove and reserve subpart P, consisting of §§ 20.1500-20.1510.

168. Remove Appendix A to Part 20—Cross-References.

PART 21 – VOCATIONAL REHABILITATION AND EMPLOYMENT

Subpart A—Vocational Rehabilitation and Employment Under 38 U.S.C. Chapter 31

169. The authority citation for part 21, subpart A, continues to read as follows:

Authority: 38 U.S.C. 501(a), chs. 18, 31, and as noted in specific sections.

170. Remove §§ 21.59 and 21.98.

171. Remove the CROSS REFERENCE from the end of § 21.184.

172. Amend § 21.188(b) by removing the words “§ 21.96, or § 21.98” and adding in its place the words “or § 21.96”.

173. Amend § 21.190(b) by removing the words “§ 21.96, or § 21.98” and adding in its place the words “or § 21.96”.

174. Amend § 21.192(b) by removing the words “§ 21.96, or § 21.98” and adding in its place the words “or § 21.96”.

175. Amend § 21.194(b) by removing the words “§ 21.94 and 21.98” and adding in its place the words “and § 21.94”.

176. Amend § 21.282(c)(4) by removing the words “21.98” and adding in its place the words “21.96”.

177. Amend § 21.412(a)(2) by removing the words “(See §§ 19.153, 19.154, and 19.155”.

178. Amend § 21.414 by:

a. In paragraph (e), removing the period following “§ 3.105(e)” and adding in its place a semicolon.

b. Adding a new paragraph (f).

c. Revising the authority citation.

The revisions and additions read as follows:

§ 21.414 Revision of decision.

* * * * *

(f) Review of decisions, § 21.416.

(Authority: 38 U.S.C. 5104B, 5108, and 5112)

179. Add § 21.416 to read as follows:

§ 21.416 Review of decisions.

(a) *Applicability.* This section applies where notice of a decision under this subpart or subpart M of this part was provided to a veteran on or after the effective date of the modernized review system as provided in § 19.2(a) of this chapter, or where an applicant or claimant has elected review of a legacy claim under the modernized review system as provided in § 3.2400(c) of this chapter.

(b) *Reviews available.* Within one year from the date on which VA issues notice of a decision on an issue contained within a claim, a veteran may elect one of the following administrative review options:

(1) *Supplemental Claim Review.* The nature of this review will accord with § 3.2501 of this chapter, except that a complete application in writing on a form prescribed by the Secretary will not be required and a hearing will not be provided. The Vocational Rehabilitation and Employment (VR&E) staff member will inform the veteran or his or her decision within 125 days of receipt of the supplemental claim.

(2) *Board of Veterans' Appeals Review.* See 38 CFR part 20.

(3) *Higher-level Review.* Reviews will be conducted by a VR&E employee who did not participate in the prior decision and is more senior than the employee that made the prior decision currently under review. Selection of an employee to conduct a review of the decision is at VR&E's discretion. The VR&E staff member will inform the veteran of his or her decision within 90 days of receipt of the request for higher-level review.

(i) *Evidentiary record.* The evidentiary record in a higher-level review is limited to the evidence of record at the time VA issued the prior decision under review. Except as provided in paragraph (ii) of this section, the higher-level adjudicator may not consider, or order development of, additional evidence that may be relevant to the issue under review.

(ii) *Duty to assist errors.* The higher-level adjudicator will ensure that VR&E has complied with its statutory duty to assist in gathering evidence applicable prior to issuance of the decision being reviewed. If the higher-level adjudicator both identifies a duty to assist error that existed at the time of VR&E's decision on the claim under review, and cannot resolve the issue in the veteran's favor with the information at hand, the higher-level adjudicator must return the claim to the assigned VR&E case manager (unless that manager is unavailable) for correction of the error and readjudication. Upon receipt, the VR&E case manager will readjudicate the claim within 30 days.

(iii) *Informal conferences.* A veteran or his or her representative may request an informal conference during the higher-level review process. For purposes of this section, *informal conference* means contact with a veteran and/or his or her representative telephonically or in person, as determined by VR&E, for the sole purpose

of allowing the veteran or representative to identify any errors of law or fact in a prior decision. When requested, VA will make reasonable efforts to conduct one informal conference during a review. The higher-level adjudicator or designated representative will conduct the informal conference and document any arguments of fact or law presented by the veteran or his or her representative for inclusion in the record. Any expenses incurred by the veteran in connection with the informal conference are the responsibility of the veteran.

(iv) *De novo review.* The higher-level adjudicator will consider only those issues for which the veteran has requested a review, and will conduct a de novo review giving no deference to the prior decision, except as provided in § 3.104(c) of this chapter.

(v) *Difference of opinion.* The higher-level adjudicator may grant a benefit sought in the claim based on a difference of opinion (see § 3.105(b) of this chapter). However, findings favorable to the veteran will not be reversed in the absence of clear and convincing evidence to the contrary. In addition, the higher-level adjudicator will not revise the outcome in a manner that is less advantageous to the veteran based solely on a difference of opinion. The higher-level adjudicator may reverse or revise (even if disadvantageous to the veteran) prior decisions by VR&E (including the decision being reviewed or any prior decision) on the grounds of clear and unmistakable error under §3.105(a)(1) or (2) of this chapter, as applicable, depending on whether the prior decision is finally adjudicated.

(c) *Notice requirements.* Notice of a decision made under paragraph (b)(1) or (3) of this section will include all of the elements described in §21.420(b).

(Authority: 38 U.S.C. 5104B, 5108, 5109A, and 7105)

180. Amend § 21.420 by:

a. Revising paragraphs (b) and (d).

c. Adding new paragraph (e).

d. Revising the authority citation to read as follows:

§ 21.420 Informing the veteran.

(a) * * *

(b) *Notification:* Each notification should include the following:

(1) Identification of the issues adjudicated.

(2) A summary of the evidence considered by the Secretary.

(3) A summary of the applicable laws and regulations relevant to the decision.

(4) Identification of findings favorable to the veteran.

(5) In the case of a denial of a claim, identification of elements not satisfied leading to the denial.

(6) An explanation of how to obtain or access evidence used in making the decision.

(7) A summary of the applicable review options available for the veteran to seek further review of the decision.

* * * * *

(d) *Prior notification of adverse action.* VA shall give the veteran a period of at least 30 days to review, prior to its promulgation, an adverse action other than one which arises as a consequence of a change in training time or other such alteration in circumstances. During that period, the veteran shall be given the opportunity to:

(1) Meet informally with a representative of VA;

(2) Review the basis for VA decision, including any relevant written documents or material; and

(3) Submit to VA any material which he or she may have relevant to the decision.

(e) *Favorable findings.* Any finding favorable to the veteran is binding on all subsequent VA and Board of Veterans' Appeals adjudicators, unless rebutted by clear and convincing evidence to the contrary.

(Authority: 38 U.S.C. 3102, 5104, 5104A, and 7105)

181. Amend § 21.430(b) by removing the text “21.98” and adding in its place the text “21.96”.

Subpart B—Claims and Applications for Educational Assistance

182. The authority citation for part 21, subpart B is revised to read as follows:

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

§ 21.1033 [Amended]

183. Amend § 21.1033(f)(2) by removing the text “§§ 20.302 and 20.305” and adding in its place the text “§§ 20.203 and 20.110”.

184. Revise § 21.1034 to read as follows:

§ 21.1034 Review of decisions.

(a) *Decisions.* A claimant may request a review of a decision on eligibility or entitlement to educational assistance under title 38, United States Code. A claimant may request review of a decision on entitlement to educational assistance under 10 U.S.C. 510, and 10 U.S.C. chapters 106a, 1606, and 1607. A claimant may not request review of a decision on eligibility under 10 U.S.C. 510, and 10 U.S.C. chapters 106a, 1606, and 1607 or for supplemental or increased educational assistance under 10 U.S.C. 16131(i) or 38 U.S.C. 3015(d), 3021, or 3316 to VA as the Department of Defense solely determines eligibility to supplemental and increased educational assistance under these sections.

(b) *Reviews available.* Except as provided in paragraph (d) of this section, within one year from the date on which the agency of original jurisdiction issues notice of a

decision described in paragraph (a) of this section as subject to a request for review, a claimant may elect one of the following administrative review options:

(1) *Supplemental Claim Review*. See § 3.2501 of this chapter.

(2) *Higher-level Review*. See § 3.2601 of this chapter.

(3) *Board of Veterans' Appeals Review*. See 38 CFR part 20.

(c) *Part 3 provisions*. See § 3.2500(b)-(d) of this chapter for principles that generally apply to a veteran's election of review of a decision described in paragraph (a) of this section as subject to a request for review.

(d) *Contested claims*. See subpart E of part 20 of this title for the timeline pertaining to contested claims.

(e) *Applicability*. This section applies where notice of a decision described in paragraph (a) of this section was provided to a veteran on or after the effective date of the modernized review system as provided in § 19.2(a) of this chapter, or where a veteran has elected review of a legacy claim under the modernized review system as provided in § 3.2400(c) of this chapter.

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

185. Add § 21.1035 to read as follows:

§ 21.1035 Legacy review of benefit claims decisions.

(a) A claimant who has filed a Notice of Disagreement with a decision described in § 21.1034(a) that does not meet the criteria of § 21.1034(e) of this chapter has a right

to a review under this section. The review will be conducted by the Educational Officer of the Regional Processing Officer, at VA's discretion. An individual who did not participate in the decision being reviewed will conduct this review. Only a decision that has not yet become final (by appellate decision or failure to timely appeal) may be reviewed. Review under this section will encompass only decisions with which the claimant has expressed disagreement in the Notice of Disagreement. The reviewer will consider all evidence of record and applicable law, and will give no deference to the decision being reviewed.

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

(c) The reviewer may conduct whatever development he or she considers necessary to resolve any disagreements in the Notice of Disagreement, consistent with applicable law. This may include an attempt to obtain additional evidence or the holding of an informal conference with the claimant. Upon the request of the claimant, the reviewer will conduct a hearing under the version of § 3.103(c) of this chapter predating Pub. L. 115-55.

(d) A review decision made under this section will include a summary of the evidence, a citation to pertinent laws, a discussion of how those laws affect the decision, and a summary of the reasons for the decision.

(e) The reviewer may grant a benefit sought in the claim, notwithstanding § 3.105(b) of this chapter. The reviewer may not revise the decision in a manner that is less advantageous to the claimant than the decision under review, except that the reviewer may reverse or revise (even if disadvantageous to the claimant) prior decisions of an agency of original jurisdiction (including the decision being reviewed or any prior decision that has become final due to failure to timely appeal) on the grounds of clear and unmistakable error (see §3.105(a) of this chapter).

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

(Authority: 38 U.S.C. 5109A and 7105(d))

Subpart I— Temporary Program of Vocational Training for Certain New Pension Recipients

§ 21.6058 [Amended]

186. Amend § 21.6058(b) by removing the text “21.59” and adding in its place the text “21.416”.

§21.6080 [Amended]

187. Amend § 21.6080 by:

a. In paragraph (a), removing the text “21.96 and 21.98” and adding its place the text “and 21.96”.

b. In paragraph (d)(3), removing the text “21.98” and adding in its place the text “21.416”.

[FR Doc. 2018-15754 Filed: 8/9/2018 8:45 am; Publication Date: 8/10/2018]