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38 CFR Part 5

General Evidence Requirements, Effective Dates, Revision of Decisions, and Protection of Existing Ratings; Proposed Rule

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 5

RIN 2900–AM01

General Evidence Requirements, Effective Dates, Revision of Decisions, and Protection of Existing Ratings

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to reorganize and rewrite in plain language general provisions applicable to its compensation and pension regulations, including general evidence requirements, general effective dates for new awards, revision of decisions, and protection of existing ratings. These revisions are proposed as part of VA's rewrite and reorganization of all of its compensation and pension rules in a logical, claimant-focused, and user-friendly format. The intended effect of the proposed revisions is to assist claimants and VA personnel in locating and understanding these general provisions.

DATES: Comments must be received by VA on or before July 23, 2007.

ADDRESSES: Written comments may be submitted through *www.Regulations.gov*; by mail or hand-delivery to the Director, Regulations Management (00REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Comments should indicate that they are submitted in response to ''RIN 2900–AM01—General Evidence Requirements, Effective Dates, Revision of Decisions, and Protection of Existing Ratings.'' 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 a.m. and 4:30 p.m. Monday through Friday (except holidays). Please call (202) 273–9515 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).

FOR FURTHER INFORMATION CONTACT: William F. Russo, Director, Regulations Management (00REG), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273–9515. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: The Secretary of Veterans Affairs has established an Office of Regulation Policy and Management (ORPM) to provide centralized management and coordination of VA's rulemaking process. One of the major functions of this office is to oversee a Regulation Rewrite Project (the Project) to improve the clarity and consistency of existing VA regulations. The Project responds to a recommendation made in the October 2001 ''VA Claims Processing Task Force: Report to the Secretary of Veterans Affairs.'' The Task Force recommended that the compensation and pension regulations be rewritten and reorganized in order to improve VA's claims adjudication process. Therefore, the Project began its efforts by reviewing, reorganizing, and redrafting the content of the regulations in 38 CFR part 3 governing the compensation and pension program of the Veterans Benefits Administration. These regulations are among the most difficult VA regulations for readers to understand and apply.

Once rewritten, the proposed regulations will be published in several portions for public review and comment. This is one such portion. It includes proposed rules regarding general evidence requirements, general effective dates for awards, revision of decisions, and protection of VA ratings. After review and consideration of public comments, final versions of these proposed regulations will ultimately be published in a new part 5 in 38 CFR.

Outline

Overview of New Part 5 Organization
Overview of This Notice of Proposed Rulemaking
Table Comparing Current Part 3 Rules with Proposed Part 5 Rules
Content of Proposed Regulations
General Evidence Requirements
5.130 Submission of statements, evidence, or information affecting entitlement to benefits.
5.13 Applications, claims, and exchange of evidence with Social Security Administration (SSA)—death benefits.
5.132 Claims, statements, evidence, or information filed abroad; authentication of documents from foreign countries.
5.133 Information VA may request from financial institutions.
5.134 Will VA accept a signature by mark or thumbprint?
5.135 Statements certified or under oath or affirmation.
Evidence Requirements for Former Prisoners of War (POWs)
5.140 Determining former prisoner of war status.
5.141 Medical evidence for former prisoners' of war compensation claims.
General Effective Dates for Awards
5.150 General effective dates for awards or increased benefits.
5.151 Date of receipt.
5.152 Effective dates based on change of law or VA issue.
5.153 Effective date of awards based on receipt of evidence prior to end of appeal period.
General Rules on Revision of Decisions
5.160 Binding effect of VA decisions.
5.161 Review of benefit claims decisions.
5.162 Revision of decisions based on clear and unmistakable error (CUE).
5.163 Revision of decisions based on difference of opinion.
5.164 Effective dates for revision of decisions based on difference of opinion.
5.165 Effective dates for reduction or discontinuance of awards based on error.
5.166 New and material evidence based on service department records.
General Rules on Protection or Reduction of Existing Ratings
5.170 Calculation of 5-year, 10-year, and 20-year protection periods.
5.171 Protection of 5-year stabilized ratings.
5.172 Protection of continuous 20-year ratings.
5.173 Protection against reduction of disability ratings when revisions are made to the Schedule for Rating Disabilities.
5.174 Protection of entitlement to benefits established before 1959.
5.175 Protection or severance of service connection.
5.176 Due process procedures for severing service connection or reducing or discontinuing compensation benefits.
5.177 Effective dates for severing service connection or discontinuing or reducing benefit payments.
Endnote Regarding Amendatory Language
Paperwork Reduction Act
Regulatory Flexibility Act
Executive Order 12866
Unfunded Mandates
Catalog of Federal Domestic Assistance Numbers and Titles
List of Subjects in 38 CFR Part 5

Overview of New Part 5 Organization

We plan to organize the part 5 regulations so that most of the provisions governing a specific benefit are located in the same subpart, with general provisions pertaining to all compensation and pension benefits also grouped together. We believe this organization will enable claimants, beneficiaries, and their representatives, as well as VA personnel, to find information relating to a specific benefit more quickly than the organization provided in current part 3.

The first major subdivision would be ''Subpart A—General Provisions.'' It would include information regarding the scope of the regulations in new part 5, general definitions, and general policy provisions for this part. This subpart was published as proposed on March 31, 2006. *See* 71 FR 16464.

''Subpart B—Service Requirements for Veterans'' would include information regarding a veteran's military service, including the minimum service requirement, types of service, periods of

war, and service evidence requirements. This subpart was published as proposed on January 30, 2004. *See* 69 FR 4820.

''Subpart C—Adjudicative Process, General'' would inform readers about types of claims and filing procedures, VA's duties, rights and responsibilities of claimants and beneficiaries, general evidence requirements, and effective dates for new awards, as well as revision of decisions and protection of VA ratings. This subpart will be published as three separate Notices of Proposed Rulemaking (NPRMs) due to its size. The first, concerning the duties of VA and the rights and responsibilities of claimants and beneficiaries, was published as proposed on May 10, 2005. *See* 70 FR 24680. The portion of this subpart covering general evidence requirements, effective dates for awards, revision of decisions, and protection of VA ratings is the subject of this document.

''Subpart D—Dependents and Survivors'' would inform readers how VA determines whether an individual is a dependent or a survivor of a veteran. It would also provide the evidence requirements for these determinations. This subpart was published as proposed on September 20, 2006. *See* 71 FR 55052.

''Subpart E—Claims for Service Connection and Disability Compensation'' would define service-connected compensation, including direct and secondary service connection. This subpart would inform readers how VA determines entitlement to service connection. The subpart would also contain those provisions governing presumptions related to service connection, rating principles, and effective dates, as well as several special ratings. This subpart will be published as three separate NPRMs due to its size. The first, concerning presumptions related to service connection, was published as proposed on July 27, 2004. *See* 69 FR 44614.

''Subpart F—Nonservice-Connected Disability Pensions and Death Pensions'' would include information regarding the three types of nonservice-connected pension: Improved pension, Old-Law pension, and Section 306 pension. This subpart would also include those provisions that state how to establish entitlement to Improved pension, and the effective dates governing each pension. This subpart would be published in two separate NPRMs due to its size. The portion concerning Old-Law pension, Section 306 pension, and elections of Improved pension was published as proposed on December 27, 2004. *See* 69 FR 77578.

''Subpart G—Dependency and Indemnity Compensation, Death Compensation, Accrued Benefits, and Special Rules Applicable Upon Death of a Beneficiary,'' would contain regulations governing claims for dependency and indemnity compensation (DIC); death compensation; accrued benefits; benefits awarded, but unpaid at death; and various special rules that apply to the disposition of VA benefits, or proceeds of VA benefits, when a beneficiary dies. This subpart would also include related definitions, effective-date rules, and rate-of-payment rules. This subpart was published as two separate NPRMs due to its size. The portion concerning accrued benefits, death compensation, special rules applicable upon the death of a beneficiary, and several effective-date rules, was published as proposed on October 1, 2004. *See* 69 FR 59072. The portion concerning DIC benefits and general provisions relating to proof of death and service-connected cause of death was published as proposed on October 21, 2005. *See* 70 FR 61326.

''Subpart H—Special and Ancillary Benefits for Veterans, Dependents, and Survivors'' would pertain to special and ancillary benefits available, including benefits for children with various birth defects. This subpart was published as proposed on March 9, 2007. *See* 72 FR 10860.

''Subpart I—Benefits for Certain Filipino Veterans and Survivors'' would pertain to the various benefits available to Filipino veterans and their survivors. This subpart was published as proposed on June 30, 2006. *See* 71 FR 37790.

''Subpart J—Burial Benefits'' would pertain to burial allowances.

''Subpart K—Matters Affecting the Receipt of Benefits'' would contain provisions regarding bars to benefits, forfeiture of benefits, and renouncement of benefits. This subpart was published as proposed on May 31, 2006. *See* 71 FR 31056.

''Subpart L—Payments and Adjustments to Payments'' would include general rate-setting rules, several adjustment and resumption regulations, and election-of-benefit rules. Because of its size, subpart L will be published in two separate NPRMs.

The final subpart, ''Subpart M—Apportionments to Dependents and Payments to Fiduciaries and Incarcerated Beneficiaries,'' would include regulations governing apportionments, benefits for incarcerated beneficiaries, and guardianship.

Some of the regulations in this NPRM cross-reference other compensation and pension regulations. If those regulations have been published in this or earlier NPRMs for the Project, we cite the proposed part 5 section. We also include, in the relevant portion of the Supplementary Information, the **Federal Register** page where a proposed part 5 section published in an earlier NPRM may be found. However, where a regulation proposed in this NPRM would cross-reference a proposed part 5 regulation that has not yet been published, we cite to the current part 3 regulation that deals with the same subject matter. The current part 3 section we cite may differ from its eventual part 5 counterpart in some respects, but we believe this method will assist readers in understanding these proposed regulations where no part 5 counterpart has yet been published. If there is no part 3 counterpart to a proposed part 5 regulation that has not yet been published, we have inserted ''[regulation that will be published in a future Notice of Proposed Rulemaking]'' where the part 5 regulation citation would be placed.

Because of its large size, proposed part 5 will be published in a number of NPRMs, such as this one. VA will not adopt any portion of part 5 as final until all of the NPRMs have been published for public comment.

In connection with this rulemaking, VA will accept comments relating to a prior rulemaking issued as a part of the Project, if the matter being commented on relates to both rulemakings.

Overview of This Notice of Proposed Rulemaking

This NPRM pertains to those regulations governing the following for purposes of compensation and pension benefits: (1) General evidence requirements; (2) general effective dates for awards; (3) revision of decisions; and (4) protection of existing ratings. These regulations would be contained in proposed Subpart C of new 38 CFR part 5. Although these regulations have been substantially restructured and rewritten for greater clarity and ease of use, most of the basic concepts contained in these proposed regulations are the same as in their existing counterparts in 38 CFR part 3. However, a few substantive differences are proposed, along with some rules that do not have counterparts in 38 CFR part 3.

Table Comparing Current Part 3 Rules With Proposed Part 5 Rules

The following table shows the relationship between the current regulations in part 3 and those proposed regulations contained in this NPRM:

Proposed part 5 section or paragraph	Based in whole or in part on 38 CFR part 3 section or paragraph (or "New")
5.130(a)	3.217(a) and Note to 3.217(a).
5.130(b)	3.217(b).
5.130(c)(1)(i)	3.217(b)(1)(i).
5.130(c)(1)(ii)	3.217(b)(1)(ii).
5.130(c)(1)(iii)	3.217(b)(1)(iii).
5.130(c)(2)	3.217(b)(2).
5.130(d)	New.
5.131(a)	3.153.
5.131(b)	3.201(a).
5.131(c)	3.201(b).
5.132(a)	3.108.
5.132(b)	3.202(a).
5.132(c)(1)	3.202(b)(1).
5.132(c)(2)	3.202(b)(2).
5.132(c)(3)	3.202(b)(3).
5.132(c)(4)	3.202(b)(6).
5.132(c)(5)	3.202(b)(4).
5.132(d)(1)	3.202(a) [first sentence] and 3.202(a)(2).
5.132(d)(2)	3.202(a)(1).
5.132(e)	3.202(c).
5.133(a)	3.115(a).
5.133(b)	New.
5.133(b)(1)	New.
5.133(b)(2)	New.
5.133(c)(1)	3.115(b).
5.133(c)(2)	3.115(b).
5.134	3.2130.
5.135	3.200.
5.140(a)	3.1(y)(1), (y)(3).
5.140(b)	3.1(y)(2)(i).
5.140(c)	3.1(y)(2)(ii).
5.140(d)	3.1(y)(4).
5.141(a)	3.304(c).
5.141(b)	New.
5.141(c)	3.304(e).
5.141(d)	3.304(e) [first sentence].
5.141(e)	3.304(e) [last two sentences].
5.141(f)	3.326(b).
5.150(a)	3.400 [intro] and (a), 3.400(h)(1), and 3.400(q)(1)(ii).
5.150(b)	New.
5.151	3.1(r).
5.152	3.114.
5.153	3.156(b) and 3.400(q)(1)(i).
5.160(a)	3.104(a).
5.160(b)	3.104(b).
5.161	3.2600.
5.162(a)	3.105(a) first two sentences].
5.162(b)	3.105 [intro—first sentence] and 3.105(a) [third and fourth sentences].
5.163	3.105(b).
5.164	3.400(h)(1).
5.165(a)	3.500(b).
5.165(b)	3.500(b)(1).
5.165(c)	3.500(b)(2).
5.166	3.156(c).
5.170(a)	3.344, 3.951, and 3.957.
5.170(b)	3.951(b) and 3.957.
5.170(c)	New.
5.170(d)	New.
5.170(e)	New.
5.171(a)	3.344(a).
5.171(b)	3.344(c).
5.171(c)(1)	3.344(c).
5.171(c)(2)	3.344(a).
5.171(d)	3.344(a).
5.171(e)	3.344(b).
5.172(a)	3.951(b) [first sentence].
5.172(b)	3.951(b) [second sentence].
5.172(c)	New
5.173(a)	3.951(a) and 3.952.
5.173(b)(1)	3.952.
5.173(b)(2)	3.952.
5.173(b)(3)	3.952.
5.174(a)	3.953(a).
5.174(b)	3.953(c).
5.175(a)(1)	3.957 [first sentence].
5.175(a)(2)	3.957 [last sentence].
5.175(b)(1)	3.105(d) [first two sentences].
5.175(b)(2)	3.105(d) [third and fourth sentences].
5.176(a) and (b)	3.105(d) [fifth and sixth sentences] and 3.105(e) [first two sentences].
5.176(c)	3.105(d) [last two sentences] and 3.105(e) [last two sentences].
5.177(a)	3.105 [intro—last sentence].
5.177(b)	3.105 [intro—second sentence].
5.177(c)	3.105 [intro—first sentence] and 3.500(b).
5.177(d)	3.105(d).
5.177(e)	3.105(c).
5.177(f)	3.105(e).
5.177(g)	3.105(f).
5.177(h)	3.105(g).
5.177(i)	3.105(h).

Readers who use this table to compare existing regulatory provisions with the proposed provisions, and who observe a substantive difference between them, should consult the text that appears later in this document for an explanation of significant changes in each regulation. Not every paragraph of every current part 3 section regarding the subject matter of this rulemaking is accounted for in the table. In some instances, other portions of the part 3 sections that are contained in these proposed regulations will appear in subparts of part 5 that are being published separately for public comment. For example, a reader might find a reference to paragraph (a) of a part 3 section in the table, but no reference to paragraph (b) of that section because paragraph (b) will be addressed in a separate NPRM. The table also does not include provisions from part 3 regulations that will not be carried forward to part 5. Such provisions are discussed specifically under the appropriate part 5 heading in this preamble. Readers are invited to comment on the proposed part 5 provisions and also on our proposals to omit those part 3 provisions from part 5.

Content of Proposed Regulations

General Evidence Requirements

Section 5.130 Submission of Statements, Evidence, or Information Affecting Entitlement to Benefits

Proposed § 5.130 is derived from current § 3.217, VA's regulation governing the submission of statements or information affecting entitlement to benefits. We propose explicitly to make this regulation applicable to ''evidence'' as well as statements and information. The current regulation does not explicitly apply to the submission of written evidence; however, in practice the principles therein do apply to the submission of written evidence, and there is no reason not to make the part 5 regulation explicit in this regard.

Proposed paragraph (a) addresses the methods by which beneficiaries may submit statements, evidence, or information affecting their entitlement to benefits. Acknowledging that certain VA regulations require that particular types of evidence or information be submitted in writing—e.g., Marriage (§ 5.192), Divorce (§ 5.194), and Birth (§ 5.229)—we propose to state that it is VA's policy to accept electronic submissions unless another regulation, form, or directive expressly requires a different method of submission. Proposed paragraph (a) would state that this policy does not apply to the filing of a claim, Notice of Disagreement, Substantive Appeal, or any other submissions or filing requirements covered in parts 19 and 20 of this title.

We propose not to include the introductory phrase, ''For purposes of this part, unless specifically provided otherwise,'' which is used in paragraph (b) of current § 3.217. Because proposed § 5.0 specifically states that ''[e]xcept as otherwise provided, this part applies only to benefits governed by this part,'' it is no longer necessary to state that any rule in part 5 applies only for purposes of this part. 71 FR 16464, 16473. Therefore, in paragraph (b) of § 5.130, we propose to state, ''Except as otherwise provided.'' By so doing, we achieve our goal of greater readability without loss of clarity or substance.

In § 5.130(c)(1), we propose to include a reference to the beneficiary's authorized representative that is not

contained in current § 3.217(b)(1). Including the representative merely clarifies the established legal principle that the actions of an authorized representative are considered to be actions by the client beneficiary.

Current § 3.217(b)(1)(iii) states that, when a beneficiary or fiduciary orally provides information or a statement that VA may use to adjust benefits, VA must inform him or her that ''the information or statement will be used for the purpose of calculating benefit amounts.'' In proposed § 5.130(c)(1)(iii), we use the word ''may'' instead of ''will.'' This wording is more accurate because VA may determine that the information or statement needs to be verified through other means. It also makes this paragraph consistent with the first sentence in proposed paragraph (b), which states that, ''VA may take action* * *'' Similarly, we also propose to use the phrase ''may be used'' in § 5.130(c)(2)(v) instead of ''would be used'' as stated in current § 3.217(b)(2).

Finally, in proposed paragraph (d) we articulate the exceptions to the rule that VA cannot act on an oral statement unless VA has complied with paragraphs (c)(1) and (2). These exceptions, which apply to statements made at a hearing or to a physician, reflect current practice. Persons who appear at a hearing or who provide information to a physician, especially in connection with a VA medical examination, should expect that such information will be considered as part of their claim. Neither current § 3.217 nor the proposed part 5 version of that rule preclude VA from relying on medical statements or statements made at a hearing. Moreover, there is no doubt as to the identity of the person making the statement in these two discrete situations. Finally, §§ 5.81, 5.82, and 20.700 adequately regulate statements made at a hearing. 70 FR 24680, 24686–87.

Section 5.131 Applications, Claims, and Exchange of Evidence With Social Security Administration (SSA)—Death Benefits

Proposed § 5.131(a) is derived from the first sentence of current § 3.153, which states that an application for death benefits filed with SSA on or after January 1, 1957, on a form jointly prescribed by VA and SSA, will be considered a claim for VA death benefits, and will be considered as received by VA as of the date SSA received it.

Note that although current § 3.1(p) uses the terms ''claim'' and ''application'' interchangeably, we propose to only use the term ''claim'' in part 5, for the sake of consistency, when referring to a formal or informal communication in writing requesting a determination of entitlement or evidencing a believe in entitlement to a benefit, as the term ''claim'' is defined in part 3. (A future NPRM will fully address the definition of ''claim'' for the purposes of part 5.) Thus, the term ''claim'' would have the same meaning in Part 5 as it currently does in Part 3; no substantive change is intended. We propose to use the term ''application'' when referring to a certain form that a claimant must file to apply for benefits. This definition will be contained in § 5.1 General Definitions.

Current § 3.153 implements the statutory provision 38 U.S.C. 5105 that governs joint applications for SSA and dependency and indemnity compensation (DIC). The statute is applicable only to claims for chapter 13 benefits, which means that it applies to claims for DIC. Current § 3.153 states that a claim on a joint form is to be treated as a claim for ''death benefits.'' However, under 38 U.S.C. 5101(b)(1), a claim for DIC must also be considered a claim for death pension and accrued benefits. Consequently, proposed § 5.131(a) would parenthetically describe ''VA death benefits'' as ''[DIC], death pension and accrued benefits.'' We also propose to update the statutory authority citation by including a reference to 38 U.S.C. 5101(b)(1), as the authority for considering a joint application to be a claim for ''death benefits'' is not derived from 38 U.S.C. 5105 alone. For the reasons set forth above, the inclusion of death pension and accrued benefits in the proposed regulation would not create a new basis of entitlement or result in a substantive right that does not exist within the current framework of the pertinent law or regulations.

The second sentence of current § 3.153 states that VA is not precluded by reason of having received a joint application from requesting necessary evidence. This language is unnecessary because nothing in any statute or regulation, including proposed § 5.131, precludes VA from requesting necessary evidence after we have received a claim for benefits. In addition, the sentence merely reiterates the last sentence of 38 U.S.C. 5105(b), and there is no need to maintain a regulatory provision that merely recites a statutory provision.

Proposed § 5.131(b) is derived in part from the second sentence of current § 3.201(a), which pertains to the exchange of evidence between VA and SSA. The cited authority for this regulation includes 38 U.S.C. 5105, discussed above. Proposed § 5.131(b) does not incorporate the first sentence of current § 3.201(a), as it is unnecessary and redundant of proposed § 5.81, which explicitly states that ''VA will include in the record of proceedings any information, evidence (whether documentary, testimonial, or in other form), and any argument that a claimant offers in support of a claim.'' 70 FR 24680, 24686. In addition, VA's ''duty to assist'' regulation, 38 CFR 3.159(c)(2), requires VA to obtain relevant records from a federal department or agency, including records in custody of SSA. Moreover, SSA is required, pursuant to 38 U.S.C. 5105(b), to forward to VA all information and supporting documents that it receives in conjunction with a joint application for DIC/SSA benefits. In light of the foregoing, it is not necessary to specify in § 5.131(b) that a claimant may submit evidence submitted to SSA, or to permit the claimant to request VA to obtain such evidence. We have also clarified that the rule, embodied in proposed § 5.131(b) and current § 3.201(a), regarding the deemed date of receipt for evidence filed at SSA applies only when the evidence was filed in conjunction with a claim for both SSA death benefits and VA death benefits. The clarification is to avoid a situation in which a final VA decision is subject to collateral attack based upon evidence filed with SSA in support of a claim for only SSA death benefits that predates a subsequent separate claim for VA death benefits.

Proposed § 5.131(c) is derived from current § 3.201(b), which provides that when SSA requests evidence from VA that was submitted in support of a DIC application, VA will furnish it. However, current § 3.201(b) does not acknowledge the existence of laws, including the Health Insurance Portability and Accountability Act (HIPAA), that protect the confidentiality of various kinds of information or evidence that claimants or beneficiaries file with VA. For example, 38 U.S.C. 7332 protects the confidentiality of all records containing the identity, diagnosis, prognosis, or treatment of any patient or subject maintained in connection with any program or activity carried out by or for VA and connected with drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus, or sickle cell anemia. VA can only release such records when certain prerequisites are satisfied, and we do not interpret section 7332 as providing for an exemption for mandatory disclosures to SSA under this regulation or under its authorizing statute, 38 U.S.C. 5105(b). Also, 5 U.S.C. 552a contains general

procedures that all agencies must follow when determining whether to release records that they maintain on individuals. Therefore, we propose to add a sentence in proposed § 5.131(c) to clarify that any disclosure of evidence to the SSA under this paragraph must comply with all requirements of any applicable privacy or confidentiality laws, which would include HIPAA.

Section 5.132 Claims, Statements, Evidence, or Information Filed Abroad; Authentication of Documents From Foreign Countries

Proposed § 5.132 is derived from current § 3.202, VA's regulation pertaining to the criteria for the acceptance of foreign evidence, and § 3.108, which relates to occasions when the State Department functions as an agent of VA. We believe it is logical to consolidate into a single regulation the rule pertaining to filing claims or evidence in foreign countries with the rule pertaining to filing evidence from foreign sources.

In paragraph (a) of § 5.132, we propose to include the provisions of current § 3.108, which recognize U.S. diplomatic and consular officers abroad as agents for the acceptance of VA applications or claims, or evidence in support of a claim pending with VA. We clarify that the rule applies to submissions of claims or of statements, evidence, or information in support of a claim.

Current § 3.108 provides that diplomatic and consular officers may act as agents of VA, ''and, therefore, a formal or informal claim or evidence submitted in support of a claim filed in a foreign country will be considered as filed in [VA] as of the date of receipt by the State Department representative.'' We intend no substantive changes to this regulation by eliminating the term ''informal claim.'' The term ''claim'' necessarily embraces all of the types of claims listed in the regulations, including informal and formal claims.

Current § 3.108 uses the terms ''diplomatic and consular officers of the Department of State'' and ''the State Department representative,'' to describe the officials who are authorized to receive claims and evidence. For purposes of § 5.132, we propose to simplify the description by substituting the inclusive term ''Department of State representative.''

Paragraph (b) of proposed § 5.132 explains that the term ''authentication'' means that ''an official listed in paragraph (d) of this section verifies that the foreign document, including each signature, stamp, and seal appearing on it, is genuine and has not been altered.''

Paragraph (b) of proposed § 5.132 explains that for the purposes of § 5.132(b) the term ''foreign documents'' means documents that are signed under oath or affirmation in the presence of an official in a foreign country. This definition is derived from current § 3.202(a). Examples of foreign documents are described in the proposed regulation in order to aid the reader.

Paragraph (b) also directs the reader to a list (in paragraph (c)) of foreign documents that do not require authentication.

Paragraph (c) of proposed § 5.132 restates current § 3.202(b). In addition, proposed § 5.132(c)(3) contains a direct reference to § 2.3, which pertains to delegation of authority to employees to take affidavits, to administer oaths, etc. This reference is appropriate, as it bears directly on the subject matter contained in proposed § 5.132. Current § 3.202(b)(4) states that authentication will not be required, ''[w]hen a copy of a public or church record from any foreign country purports to establish birth, adoption, marriage, annulment, divorce, or death, provided it bears the signature and seal of the custodian of such record and there is no conflicting evidence in the file which would serve to create doubt as to the correctness of the record.'' Paragraph (b)(5) states that authentication will not be required, ''[w]hen a copy of the public or church record from one of the countries comprising the United Kingdom, namely: England, Scotland, Wales, or Northern Ireland, purports to establish birth, marriage, or death, provided it bears the signature or seal or stamp of the custodian of such record and there is no evidence which would serve to create doubt as to the correctness of the records.'' VA believes that maintaining a different rule for the United Kingdom is unnecessary because records maintenance in the United Kingdom is not necessarily superior to that of all other countries. Moreover, we believe that a single rule will be easier for VA personnel to correctly apply and for the public to understand. We therefore propose not to include an equivalent to § 3.202(b)(5) in § 5.132.

Paragraph (d) of proposed § 5.132 is derived from current § 3.202(a). Current § 3.202(a) uses, among others, the terms ''United States Consular Officer,'' ''the State Department,'' and ''the nearest American consul,'' to describe the various Department of State officials who may authenticate the signatures of officials of foreign countries in cases where affidavits or other documents are required to be executed under oath before foreign officials. For purposes of § 5.132, we propose to simplify the description by substituting the inclusive term ''officer of the Department of State authorized to authenticate documents.'' We note that the Department of State has promulgated 22 CFR 131.1, which authorizes specially designated ''authentication officers'' to issue certificates of authentication under the seal of the Department of State on behalf of the Secretary of State. That regulation also prescribes the proper form of authentication. A certificate of authentication therefore constitutes the State Department's official acknowledgment that a document of foreign origin is genuine.

Section 5.133 Information VA May Request From Financial Institutions

Proposed § 5.133, derived from current § 3.115, will provide readers with clarification of the different types of information VA may request from a financial institution, the conditions under which a request may be made, the steps for making a request, and VA's responsibilities with regard to the handling of this information once it is obtained.

The first sentence of current § 3.115(a) reads: ''The Secretary of Veterans Affairs may request from a financial institution the names and addresses of its customers.'' As in several other proposed part 5 rules, this rule will refer to ''VA'' rather than ''[t]he Secretary of Veterans Affairs'' to shorten the reference without changing its meaning.

Some readers may not have a clear understanding of what constitutes a ''financial institution,'' a term that is used in the first sentence of current § 3.115(a). Accordingly, we propose to add examples of various types of financial institutions. Examples include banks, savings and loan associations, trust companies, and credit unions.

The current language of § 3.115 and the statutory provisions of 12 U.S.C. 3413 explicitly authorize VA to obtain only names and addresses from a financial institution. However, VA also possesses statutory authority to subpoena financial information. According to the Right to Financial Privacy Act, ''A government authority may obtain financial records * * * pursuant to an administrative subpoena or summons otherwise authorized by law if there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry.'' 12 U.S.C. 3405. ''Government authority'' is defined in this Act as ''any agency or department of the United States, or any officer, employee, or agent thereof.'' 12 U.S.C. 3401(3). The Act also defines ''law enforcement inquiry'' as ''a lawful

investigation or official proceeding inquiring into a violation of, or failure to comply with, any * * * regulation, rule, or order issued pursuant thereto.'' 12 U.S.C. 3401(8). These provisions give VA the authority, under certain circumstances, to obtain financial information through a subpoena, provided it is necessary in order to determine whether an individual has violated any of the regulations on veterans' benefits. Additionally, 38 U.S.C. 5711(a)(2), authorizes the Secretary and employees to whom the Secretary has delegated such authority to ''require the production of books, papers, documents, and other evidence.''

For example, current §§ 3.660(a), 3.256(a), and 3.277(b) require individuals claiming entitlement to or receiving income-based benefits from VA to promptly report changes in their income. If VA discovers that a current or former beneficiary may have reported a lower amount of income to VA than the financial institution reported to the Internal Revenue Service as having been paid to the beneficiary, VA will ask the individual to verify the amount received. If the individual refuses or fails to respond to VA's request, VA has authority under 12 U.S.C. 3405 to subpoena from the financial institution a statement showing amounts it paid to the individual.

Before issuing a subpoena to a financial institution, 12 U.S.C. 3405(2) requires VA to: (1) Send a copy of the subpoena to the current or former beneficiary; (2) inform the current or former beneficiary of the reason VA is requesting financial information from the financial institution; and (3) explain to the current or former beneficiary the procedures for challenging VA's proposal to issue a subpoena.

VA's authority to issue subpoenas to financial institutions in order to verify the amount of income paid by a financial institution to a current or former VA beneficiary, as well as the circumstances under which they may be issued, are not addressed in part 3 of current 38 CFR. However, we believe this is an issue about which the public should be informed. For example, if VA discovers that a current or former beneficiary, while receiving either pension or parents' dependency and indemnity compensation, may have underreported or failed to report to VA the receipt of income from a financial institution, VA may ask the financial institution that paid the income to provide a statement showing the amount it paid to the individual. We propose to clarify in § 5.133(b) that requests of this type must be made through a subpoena. To ensure readers understand the meaning of the word ''subpoena,'' we propose to define it in paragraph (b). Our definition, which is ''a legal document commanding an individual or organization to provide specified evidence to the issuer of the subpoena,'' is derived from the 2001 edition of *Merriam-Webster's Dictionary of Law*.

The content of paragraph (c)(1) of proposed § 5.133 is derived from current § 3.115(b), while the content of paragraph (c)(2) is derived from 12 U.S.C. 3412(a), which was part of the Right to Financial Privacy Act of 1978. Although we have changed the language taken from these two sources in order to make the proposed rule easier to understand, we intend no change in the substance they convey.

Section 5.134 Will VA accept a signature by mark or thumbprint?

Proposed § 5.134 is derived from current § 3.2130. We are not proposing any changes to the current regulation. Rather, we will incorporate the language of current § 3.2130 at proposed § 5.134.

Section 5.135 Statements Certified or Under Oath or Affirmation

Proposed § 5.135 is based on current § 3.200, which states, in pertinent part, ''All written testimony submitted by the claimant or in his or her behalf for the purpose of establishing a claim for service connection will be certified or under oath or affirmation.'' Instead of referring to ''written testimony'' we propose to use the phrase, ''[a]ny documentary evidence or written assertion of fact'' which we believe is easier for readers to understand. We propose to give VA discretion to consider such a submission that is not certified or under oath or affirmation or to require certification, oath, or affirmation if considered necessary to establish the reliability of a material document. This would give VA discretion to consider documents which are considered reliable under the circumstances of a particular case. It would also give VA discretion to require certification, oath, or affirmation when a submission appears unreliable, which will help ensure program integrity.

Whereas current § 3.200(b) is limited to claims for service connection, we propose to have § 5.135(b) apply to all claims within the scope of part 5. We believe that there is nothing unique about claims for service connection with respect to the reliability of evidence. We believe that the principles stated above should apply equally to all claims for compensation or pension benefits.

Evidence Requirements for Former Prisoners of War (POWs)

Section 5.140 Determining Former Prisoner of War Status

Proposed § 5.140 contains rules relating to the evidentiary and adjudicative considerations in determining prisoner of war (POW) status. Proposed § 5.140 is derived from current § 3.1(y), which sets forth general principles applicable to establishing status as a POW, including definitions and certain evidentiary and adjudicative considerations. We have addressed the various definitions contained in current 3.1(y) in a separate NPRM that restated such definitions in § 5.1 of proposed part 5. *See* 71 FR 16464, 16473. Additional principles establishing former POW status are found in § 3.41, which sets forth special rules applicable to former prisoners of war with Philippine service. These principles are also covered in a separate NPRM. *See* 71 FR 37790, 37794.

Paragraph (a) of proposed § 5.140 restates the current rule that service department determinations of POW status are generally binding on VA, and states the criteria VA will use to decide POW status in all other cases. It also restates the requirement in current § 3.1(y)(3) that the Director of the Compensation and Pension Service must approve all 152 office decisions based on criteria for determining former POW status other than service department findings. In order to recognize the modern dangers presented by non-government forces, we propose to expand the instances in which service department findings will be accepted. Whereas current § 3.1(y)(1) only accepts service department findings that a person was a POW during a period of war when detention or internment was by an enemy government or its agents, under paragraph (a) of proposed § 5.140, VA will also accept a finding by the service department that a person was a POW during a period of war when detention or internment was by a hostile force.

Paragraphs (b), (c), and (d) of proposed § 5.140 restate the content of current § 3.1(y)(2)(i), (y)(2)(ii), and (y)(4), respectively. In paragraph (d), we propose to cross-reference § 5.660, pertaining to ''line of duty'' and derived from current §§ 3.1(m) and 3.301(a), and § 5.661, pertaining to ''willful misconduct'' and derived from current §§ 3.1(n), 3.301(a) through (d), and 3.302. *See* 71 FR 31056, 31062–63.

At the end of the proposed rule, we propose to cross-reference proposed § 5.611, which restates current § 3.41,

relating to POW status and Philippine service. *See* 71 FR 37790, 37795.

Section 5.141 Medical Evidence for Former Prisoners' of War Compensation Claims

Proposed § 5.141 is based in part on those portions of current § 3.304, ''Direct service connection; wartime and peacetime,'' that pertain to former POWs. Except as provided below, no substantive changes are intended to these provisions. Portions of current § 3.304 have already been addressed in a prior NPRM, published as proposed on May 10, 2005. *See* 70 FR 24680. Other provisions of current § 3.304 will be addressed in a separate NPRM.

Proposed paragraph (a) provides information regarding injuries and conditions claimed by a former POW that are obviously due to service. The paragraph states that VA will rate such injuries and conditions without awaiting receipt of service records. This paragraph is derived from the last sentence of current § 3.304(c) and is included to clarify how the general rule in proposed § 5.91, the part 5 version of current § 3.304(c), applies to conditions resulting from POW confinement.

Proposed paragraph (b) provides that where disability compensation is claimed by a former POW, the claimant's statements as to the incurrence or aggravation of an injury or disease during or immediately prior to detention or internment will be viewed as truthful unless there is clear and convincing evidence to the contrary. This is a substantive change based upon expanding current § 3.304(d). VA's practice has been to treat statements by former POWs in the same manner as combat veterans for purposes of 38 U.S.C. 1154(b) in order to recognize the deficiencies or complete absence of many former POWs' service medical records showing evidence of diseases or injuries suffered during or immediately before detention or internment. This substantive change is consistent with current § 3.304(f)(2), pertaining to post-traumatic stress disorder claimed by a former prisoner of war. At the end of paragraph (b), we propose to add a reference to § 3.304(f)(2) to let the reader know the location of a similar provision regarding POWs. We cite to the current part 3 regulation because the proposed part 5 regulation that deals with the same subject matter has not yet been published. Current § 3.304(f)(2) may differ from its eventual part 5 counterpart in some respects.

Proposed paragraph (c) notes that supporting evidence from fellow service members that an injury or disease was incurred during confinement will be considered. This is not a substantive change from part 3 and does not provide a new benefit to former POWs. VA accepts ''buddy statements'' in all cases. We explicitly provide for such evidence here, and discuss how to evaluate that evidence, because such evidence is more frequently encountered in cases relating to POWs.

Proposed paragraph (c) would require VA to consider statements from fellow service members submitted in connection with a former POW's claim for benefits, regarding the former POW's physical condition before capture, the circumstances surrounding the former POW's internment, changes in the former POW's physical condition following release from internment, or the existence of signs or symptoms of disability following the former POW's release from internment.

Paragraph (d) of proposed § 5.141 provides that the lack of medical findings from clinical records made upon a former POW's return to U.S. control will not be determinative of whether service connection is awarded for a particular disability. It is derived from the first sentence of current § 3.304(e).

Proposed paragraph (e) restates the second and third sentences of current § 3.304(e).

Finally, proposed paragraph (f) includes information from the second sentence of current § 3.326(b), which provides that VA will not deny monetary benefits unless the claimant has been offered a complete physical examination at a VA facility. Unlike current § 3.326(b), which states that the examination will be ''conducted at a [VA] hospital or outpatient clinic,'' proposed paragraph (f) does not specify the location of the examination to be provided because an examination may be provided by VA at one of a variety of VA medical facilities, or, in some instances, VA may provide an examination with a private contractor at a non-VA facility. ''[M]edical examination'' used in proposed paragraph (f), as opposed to ''physical examination'' used in current § 3.326(b), clarifies that the examination is not limited to examination for physical disorders but includes examination for mental disorders as well.

General Effective Dates for Awards

Section 5.150 General Effective Dates for Awards or Increased Benefits

Proposed § 5.150 would restate without substantive change the introductory text and paragraph (a) of current § 3.400, which state:

> Except as otherwise provided, the effective date of an evaluation and award of pension, compensation or dependency and indemnity compensation based on an original claim, a claim reopened after final disallowance, or a claim for increase will be the date of receipt of the claim or the date entitlement arose, whichever is later.
>
> (a) *Unless specifically provided.* On basis of facts found.

The exceptions to the general effective-date rule, which are currently contained in other provisions of §§ 3.400 through 3.405, would be contained in regulations located proximate to their respective benefit regulations.

In paragraph (a) of § 5.150, we propose not to include the phrase ''facts found'' in current § 3.400(a). Instead, we will only use the phrase ''date entitlement arose,'' which appears in the introductory text of § 3.400. Section 5110(a) of title 38, United States Code, on which the general effective date rule stated in § 3.400 is based, uses ''facts found'' and does not use the phrase ''date entitlement arose.'' Nevertheless, the legislative history of 38 U.S.C. 5110(a) and the regulatory history of 38 CFR 3.400 both suggest that ''facts found'' and ''date entitlement arose'' mean the same thing. Both phrases are derived from Veterans Regulation No. 2(a), promulgated by Exec. Order 6230 (1933), which states that the effective date of an award of pension ''shall be fixed in accordance with the facts found'' except that no awards would be effective before the date of separation from service, date of death, date of the happening of the contingency upon which disability or death pension is allowed, or the date of receipt of the claim therefor, whichever is the later date. The various dates listed in the immediately preceding sentence, except for the date of receipt of the claim, are exceptions to the rule to assign the effective date in accordance with the facts found, and are themselves dates upon which entitlement to various kinds of benefits is predicated. For all practical purposes, these are the relevant ''facts'' upon which entitlement would be based.

VA has consistently so construed Veterans Regulation No. 2(a), a fact made clear by an examination of the effective-date regulations VA issued after Veterans' Regulation No. 2(a). These are as follows: VA Regulation (VAR) 1148 (concerning the assignment of effective dates for ratings made under VA's 1945 Schedule for Rating Disabilities); VAR 1212 (effective date for awards of disability compensation); VAR 2574 (effective date of awards of death compensation or pension), and

VAR 2945 (effective date of payment of dependency and indemnity compensation). VA used the term ''facts found'' in only two of these regulations. VAR 2574 (Jan. 25, 1936) (which cites Veterans Regulation No. 2(a)), VAR 2945 (Jan. 1, 1958) (which was changed from different language to mirror the language of what is now 38 U.S.C. 5110(a)). Instead of using ''facts found,'' VA used phrases such as ''date the evidence shows a compensable or pensionable degree of disability to have existed'' and ''date the evidence shows entitlement.'' VAR 1148 (Jan. 25, 1936). In 1950, VAR 2574 was amended to state that the effective date for an award of death compensation or pension would be the date ''of the veteran's death, date of the happening of the contingency upon which death compensation or pension is allowed, or the date of receipt of [the] application therefor,'' whichever is later. This general effective-date provision is very similar to that of Veterans Regulation No. 2(a) except that it is devoid of the phrase ''fixed in accordance with the facts found.'' Nevertheless, it conveys the same information.

When Congress first consolidated the laws and regulations related to compensation and pension, the present version of what is now 38 U.S.C. 5110(a) first appeared in the statute. Public Law 85–56, section 910(a), 71 Stat. 83, 119 (1957). The purpose of this law was to incorporate existing law into a single act. According to the committee reports, Congress did not intend to make any substantive changes to the effective date provisions. See H.R. Rep. No. 85–279, at 2, *reprinted* in 1957 U.S.C.C.A.N. 1214, 1215 (1957); S. Rep. No. 85–332, at 2, *reprinted in* 1957 U.S.C.C.A.N. 1214, 1241 (1957). This statute also repealed Veterans Regulation No. 2(a). Pub. L. No. 85–56, § 2202(129), 71 Stat. at 167. The committee reports stated that the law ''would repeal those provisions of law * * * which are obsolete, executed, or restated in substance.'' H.R. Rep. No. 85–279, at 2, S. Rep. No. 85–322, at 2. Therefore, Public Law 85–56 was intended to restate the substance of the rule in Veterans Regulation No. 2(a), despite changing the language.

Current § 3.400 uses ''date entitlement arose'' in the introductory text and uses ''facts found'' in paragraph (a). These two phrases have been used interchangeably in the past, though neither has been defined. This also suggests that ''facts found'' and ''date entitlement arose'' mean the same thing. We believe that we should only use one phrase consistently throughout the part 5 to eliminate any confusion over whether ''facts found'' means the same thing as ''date entitlement arose'' and to make the regulations more user-friendly. Therefore, we will use ''date entitlement arose'' in § 5.150. The proposed rule clarifies that the term ''date entitlement arose'' has the same meaning when used in other effective-date regulations throughout part 5.

We also propose to define the phrase ''date entitlement arose'' in paragraph (a)(2) of § 5.150 to make the rule easier to understand. As noted above, the phrase has never been defined in the statute or in the regulations. Proposed paragraph (a)(2) defines ''date entitlement arose'' as the date shown by the evidence to be the date that the claimant first met the requirements for the benefit awarded. This definition accurately expresses the intent of the relevant statutes cited above.

We also propose to add a sentence to emphasize that VA will assume the ''date entitlement arose'' was before the date VA received the claim for benefits unless the evidence indicates otherwise. We believe it is important to provide this guidance because in the majority of cases, claimants meet the requirements for a benefit before they apply for it. In such cases, the general rule mandates that the effective date be the date of receipt of the claim for that benefit, and not some later date.

Proposed § 5.150(b) sets forth a chart that provides readers with the location of other effective-date provisions in part 5, which are exceptions to the general effective date rule of proposed paragraph (a). The chart is intended solely for informational purposes. As proposed, the chart shows both already published and as yet unpublished Part 5 sections. The unpublished sections are included as placeholders; many may change before publication. The Subpart B provisions were published as proposed on January 30, 2004. *See* 69 FR 4820.

Section 5.101(d) of Subpart C was published as proposed on May 10, 2005. *See* 70 FR 24680. Proposed §§ 5.152, 5.153, 5.162(b), 5.164, 5.165, 5.166(c), (d), and 5.177 of Subpart C are contained in this document.

The Subpart D provisions were published as proposed on September 20, 2006. *See* 71 FR 55052.

Sections 5.463 and 5.477 of Subpart F were published as proposed on December 27, 2004. *See* 69 FR 77578.

Sections 5.567 to 5.572 of Subpart G were published as proposed on October 1, 2004. *See* 69 FR 59072. A correction to proposed § 5.570 was published on October 21, 2004. *See* 69 FR 61914. Sections 5.524(c), 5.573, and 5.574 of Subpart G were published as proposed on October 21, 2005. *See* 70 FR 61326.

The Subpart H provisions were published as proposed on March 9, 2007. *See* 72 FR 10860.

The Subpart I provisions were published as proposed on June 30, 2006. *See* 71 FR 37790.

The Subpart K provisions were published as proposed on May 31, 2006. *See* 71 FR 31056.

Section 5.151 Date of Receipt

Current § 3.1(r) sets forth a definition of the phrase ''date of receipt.'' We propose to address that topic in a provision designated as § 5.151. Proposed paragraph (a) would broaden the concept in current § 3.1(r) to include ''documents'' in addition to claims, information, and evidence. Although the language in the proposed Part 5 counterparts of current §§ 3.108, 3.153, and 3.201 does not contain the phrase ''date of receipt,'' proposed paragraph (a) would nevertheless retain the exceptions for these provisions that are contained in current § 3.1(r) because proposed paragraph (a) will refer to a concept rather than merely define the specific term ''date of receipt.''

Proposed paragraph (b) would incorporate provisions from current § 3.1(r) authorizing VA to establish exceptions to the general rule when a natural or man-made disaster or similar event has caused disruption in the process through which VA ordinarily receives correspondence. The intended effect is to ensure that claimants and beneficiaries are not deprived of potential entitlement to benefits because of unexpected delays or impediments through no fault of their own. Section 512(a) of 38 U.S.C., listed as statutory authority for proposed § 5.151, pertains to the Secretary's ability to delegate authority to officials and employees to administer the laws and make decisions. The citation to 38 U.S.C. § 512(a) is used to justify empowering employees and officials to establish procedures in emergency circumstances. Although current § 3.1(r) makes a delegation to the Under Secretary for Benefits, the cited statute does not limit delegation to the Under Secretary for Benefits. Accordingly, proposed paragraph (b) does not contain that limitation.

Section 5.152 Effective Dates Based on Change of Law or VA Issue

We propose to re-state current § 3.114 in § 5.152. The heading for paragraph (b) of proposed § 5.152, ''Reduction or discontinuance of benefits'' differs from the heading of current § 3.114(b), ''Discontinuance of benefits,'' in order to describe more accurately the content of the paragraph, which addresses both reductions of benefits and

discontinuances of benefits. Current § 3.114(b) states that a claimant has 60 days from the date of the notice of a proposed reduction or discontinuance of benefits in which to submit evidence showing the proposed action should not be taken. The last sentence of current § 3.114(b) states that

> [i]f additional evidence is not received within that period, the award will be reduced or discontinued effective the last day of the month in which the 60-day period expired.

We propose to clarify in § 5.152(b) that if no evidence is received within 60 days, or if evidence is received that does not demonstrate that the proposed action should not be taken, the award will be reduced or discontinued effective the last day of the month in which the 60-day period expired.

Another change has to do with the use of the term ''facts found'' used in current § 3.114 and in 38 U.S.C. 5110(g). As noted in the discussion of proposed § 5.150, VA interprets ''facts found'' and another phrase used in effective date rules, ''date entitlement arose,'' to have the same basic meaning. We are proposing to use only one of these terms in § 5.152, ''date entitlement arose,'' to be consistent.

Section 5.153 Effective Date of Awards Based on Receipt of Evidence Prior to End of Appeal Period

We propose to revise current §§ 3.156(b) and 3.400(q)(1)(i) in order to establish clearer rules regarding the effective dates for awards based on the types of evidence described in current § 3.156(b).

Section 3.156(b) reads as follows:

> New and material evidence received prior to the expiration of the appeal period, or prior to the appellate decision if a timely appeal has been filed (including evidence received prior to an appellate decision and referred to the agency of original jurisdiction by the Board of Veterans Appeals without consideration in that decision in accordance with the provisions of § 20.1304(b)(1) of this chapter), will be considered as having been filed in connection with the claim which was pending at the beginning of the appeal period.

Although the words ''effective date'' do not appear in current § 3.156(b), the substantive effect of the paragraph is to establish an appropriate effective date, in tandem with § 3.400(q)(1)(i).

Section 3.400(q)(1)(i) provides that the effective date for a claim reopened based on new and material evidence ''[o]ther than service department records'' that are ''[r]eceived within [the] appeal period or prior to appellate decision * * * will be as though the former decision had not been rendered.'' Under 38 U.S.C. 5110(a), the effective date for an award based on an original claim or a claim reopened after final adjudication (except as otherwise provided) ''shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefore.'' Therefore, if the claim is not ''finally'' decided when VA receives additional evidence, that is, if the evidence is submitted within the appeal period or before an appellate decision is rendered, then the effective date of the award can be as early as the date VA received the ''open'' claim. However, if VA were to treat all evidence submitted after the appeal period has begun as ''new and material evidence,'' then the effective date could not be earlier than the date VA received that evidence (which would be construed as a claim to reopen). Hence, 38 CFR 3.156(b) and 3.400(q)(1)(i) provide a claimant-friendly effective-date rule for awards based on evidence received while a claim is on appeal or before the appeal period expires. This interpretation is consistent with 38 U.S.C. 7105(c), which provides that a regional office denial is ''final'' when the time limit for initiating an appeal to the Board of Veterans' Appeals has expired and no appeal has been filed. The proposed text is also consistent with the Federal Circuit's decision in *Jackson* v. *Nicholson*, 449 F.3d 1204 (Fed. Cir. 2006), which held that current § 3.156(b) does not refer to evidence received by VA after a Board decision has been issued.

Proposed § 5.153 retains this favorable interpretation, but does rephrase the rule. The current regulation can be read to suggest that new and material evidence is needed while the claim is still ''open.'' However, in such cases there is no claim to ''reopen'' because the claim has not been ''closed'' (that is, the claimant could still prevail on that claim).

General Rules on Revision of Decisions

Section 5.160 Binding Effect of VA Decisions

Proposed § 5.160 is derived from current § 3.104, and is intended to clarify when a decision rendered by a decision maker in a VA agency of original jurisdiction is binding on other VA agencies of original jurisdiction. The current version provides that decisions of a VA agency of original jurisdiction,

> shall be *final and binding* on all field offices of [VA] as to conclusions based on the evidence on file at the time VA issues written notification in accordance with 38 U.S.C. 5104. A *final and binding* agency decision shall not be subject to revision on the same factual basis except by duly constituted appellate authorities or except as provided in § 3.105 and § 3.2600 of this part.

38 CFR 3.104(a) (emphasis added).

We propose to repeat the language of § 3.104(a) in proposed § 5.160(a) without any substantive change. However, we will not repeat the word ''final'' in § 3.104(a) in proposed § 5.160(a). We believe that use of the word ''final'' in this context may cause confusion because the word ''final'' is used elsewhere in VA's regulations to refer only to agency of original jurisdiction decisions that have not been appealed within the time limits prescribed by statute and regulation for their appeal. *See*, e.g., 38 CFR 20.302(a) (if Notice of Disagreement not filed within 1 year of notice of agency of original jurisdiction decision, that decision shall become ''final''). Further, in 38 CFR 3.160(d), VA defines a ''finally adjudicated claim'' as one that ''has been allowed or disallowed by the agency of original jurisdiction, the action having become final by the expiration of 1 year after the date of notice of an award or disallowance, or by denial on appellate review, whichever is the earlier.'' This suggests that an agency of original jurisdiction decision might be simultaneously ''final,'' in the sense implied by § 3.104(a), on the date notice of the decision is given, and ''non-final,'' in the sense implied by § 3.160(d), because the time within which to appeal the decision has not yet expired.

In *Majeed* v. *Principi*, 16 Vet. App. 421, 427–28 (2002), the United States Court of Appeals for Veterans Claims (CAVC) rejected the argument that the phrase ''final and binding'' in § 3.104(a) means that a decision is final and binding as of the date issued because it could be seen to be at odds with the availability of an administrative appeal. VA does not intend that the term ''final and binding'' preclude an administrative appeal. In fact, other VA regulations specifically provide for review of an agency of original jurisdiction decision that has not become final for purposes of appeal. For example, pursuant to 38 CFR 3.2600, a claimant may seek review of an agency of original jurisdiction decision by a Veterans Service Center Manager or Decision Review Officer after filing a Notice of Disagreement. Also, pursuant to 38 CFR 3.105(b), if revision of an agency of original jurisdiction decision is warranted as a result of a difference of opinion, an agency of original jurisdiction may recommend to VA Central Office that the decision be reversed or revised.

VA therefore intends to clarify in this rulemaking that an agency of original

jurisdiction decision is ''binding'' on the same or another agency of original jurisdiction on the same factual basis, barring a change in law, except under the circumstances enumerated in current § 3.104(a). Further, we have changed the cross-references in current § 3.104(a) to §§ 3.105 and 3.2600 to match their part 5 counterparts.

Paragraph (b) of § 3.104 currently provides that decisions made by an agency of original jurisdiction and VA Insurance Service adjudicators, which are ''made in accordance with existing instructions,'' concerning character of service, character of discharge, relationship issues, and other matters, are reciprocally binding when they are based on the same criteria. VA proposes not to include the phrase ''made in accordance with existing instructions'' from this paragraph because the instructions to which it refers are contained in VA procedural manuals rather than regulations in title 38, Code of Federal Regulations. The deletion of this phrase does not imply that VA is not required to follow the laws and regulations pertaining to the making of determinations of the type described in paragraph (b). It merely reflects a judgment that references to internal procedural manuals and other VA-generated documents that lack the force and effect of law are not appropriate for inclusion in the regulations.

Finally, we propose to replace the terms ''adjudication activity'' and ''insurance activity'' contained in § 3.104(b) with ''Veterans Service Center'' and ''VA Insurance Center,'' respectively; again, because these are the more precise modern designations of the relevant entities. These proposed changes would simply modify the terminology to make it easier for the public to understand.

Section 5.161 Review of Benefit Claims Decisions

We propose to repeat the language of § 3.2600 in proposed § 5.161 without any substantive change. We have only changed the cross-references in current § 3.2600 to §§ 3.103 and 3.105 to match their part 5 counterparts.

Section 5.162 Revision of Decisions Based on Clear and Unmistakable Error (CUE)

In § 5.162, we propose to state clearly that VA adjudicative agency decisions that are final will be presumed correct unless there is a showing of clear and unmistakable error (CUE). In addition, this section will state the effective date for awards resulting from the revision or reversal, based on a finding of clear and unmistakable error, of prior final decisions.

Proposed § 5.162 will not deviate in scope from the body of law that precedes it. Consequently, § 5.162 provides that, absent CUE, prior final decisions are accepted as correct. The requirement of a showing of CUE applies only to a ''final decision,'' as defined by proposed § 5.2 to mean ''a decision on a claim for VA benefits with respect to which VA provided the claimant with written notice'' and the claimant either did not file a timely Notice of Disagreement or Substantive Appeal or the Board has issued a final decision on the claim. *See* 71 FR 16464, 16473–74 (March 31, 2006). We also proposed to incorporate 38 U.S.C. 5109A(c) and (d), which state that a CUE claim may be instituted by VA or upon request of the claimant and that a CUE claim may be made at any time after a final decision is made.

We propose not to include the examples of determinations contained in the first sentence of current § 3.105(a) (''decisions of service connection, degree of disability, age, marriage, relationship, service, dependency, line of duty, and other issues''). Because the examples conclude with ''* * * and other issues,'' they would include any determination. Likewise, the proposed rule applies to any determination. By eliminating the examples, we intend to emphasize that the rule applies to any determination and avoid a misperception that the examples are a limitation on the rule.

Section 5.163 Revision of Decisions Based on Difference of Opinion

Current § 3.105(b) provides that where an agency of original jurisdiction believes that revising or amending a previous decision is warranted, based on a difference of opinion, a recommendation will be made to VA Central Office to authorize a change in the decision. We have used the term ''Director of the Compensation and Pension Service'' instead of ''[VA] Central Office'' and used the term ''Veterans Service Center Manager (VSCM)'' instead of ''adjudicative agency'' to accurately reflect long-standing VA practices. Additionally, we propose to state that this section authorizes revisions only when they would lead to a more favorable decision on the claim that was the subject of a prior decision, and that this section does not apply to a prior decision that is final or has been the subject of a Substantive Appeal.

Section 5.164 Effective Dates for Revision of Decisions Based on Difference of Opinion

We propose in § 5.164 to state VA's effective-date provision applicable to revisions of decisions based on difference of opinion. Proposed § 5.164 provides that the effective date of the revision would be the date benefits would have been paid if the previous decision had been favorable.

Section 5.165 Effective Dates for Reduction or Discontinuance of Awards Based on Error

Paragraphs (a), (b), and (c)(1) of proposed § 5.165 are derived from current § 3.500(b)(1) and (2), which govern the effective dates of reductions or discontinuances of awards of compensation, DIC, or pension based on error. In paragraph (a), we propose to exclude from § 5.165 payment amounts that are not authorized by a VA rating decision, such as a payment of an incorrect amount or a duplicative payment. Proposed § 5.165 applies only to reductions or discontinuances of erroneous awards. If a payment has not been authorized by a rating decision, then VA has not made an award of such an erroneous payment and therefore recovery of that payment is not a reduction or discontinuance of an ''erroneous award'' under 38 U.S.C. 5112(b)(9) or (10). We would add in paragraph (a) that ''[s]uch amounts are overpayments, subject to recoupment.''

We propose to rewrite the current language of § 3.500(b) to enhance its readability. We also propose not to include the word ''payee'' and insert in its place the term ''beneficiary.'' The term ''beneficiary'' is consistent with the phrasing of the authorizing statute, 38 U.S.C. 5112(b)(9).

In paragraph (c)(2), we propose to add a new definitional section that will clearly define ''administrative error'' and ''error in judgment.'' This definition will clearly show when these terms are applicable and will be consistent with precedential opinions prepared by VA's General Counsel. VAOPGCPRECs 2–90 (March 20, 1990) and 6–97 (January 18, 1997) held that an administrative error includes an error of fact (for example, VA mistakes or overlooks the facts or commits a purely clerical error) and that an error in judgment includes those instances when VA fails to properly interpret, understand, or follow Department instructions, regulations, or statutes. The proposed definitional section will assist the users of the regulation in determining under what circumstances VA may have committed

administrative error or an error in judgment.

Section 5.166 New and Material Evidence Based on Service Department Records

Current § 3.156(c) addresses those situations when a prior final decision is being reconsidered based on the official service department records. We repeat that language in proposed § 5.166.

General Rules on Protection or Reduction of Existing Ratings

Currently, the rules that protect existing VA disability ratings from either reduction or severance are located in several different subparts within part 3 of title 38, CFR. For example, most of the substantive rules on the subject (38 CFR 3.951 *et seq.*) are located under the undesignated part 3 subheading, ''Protections;'' however, substantive rules relevant to severance of service connection, as well as unique procedural provisions, are also located in current 38 CFR 3.105. Meanwhile, lesser protections afforded to stable ratings are located in § 3.344.

We therefore propose to reorganize these rules under the undesignated subheading, ''General Rules on Protection or Reduction of Existing Ratings,'' in part 5 of title 38, CFR. This reorganization will contain the general rules that relate to the protection of existing ratings, which are found in current 38 CFR 3.105. It will also include those rules pertaining to the protection of the following ratings: Those that have stabilized, those in existence for a 20-year period, those based on the 1925 Schedule of Rating Disabilities, those in effect on December 31, 1958, and those in effect for a 10-year period. These are derived from current §§ 3.344, 3.951 through 3.953, and 3.957, respectively.

This reorganized portion does not include current § 3.950, the rule relating to the awards of pension or compensation to a helpless child, because this rule does not protect an existing rating. It also does not include current § 3.954, the rule relating to awards of burial benefits, which will be addressed in another NPRM. The part 5 rule relating to federal employees' compensation cases, current § 3.958, will be located with the proposed regulations regarding concurrent receipt; the rule relating to tuberculosis (current § 3.959) will be located with the regulations regarding tuberculosis; and the rule relating to Section 306 and Old-Law pension protection (current § 3.960) is located with the regulations regarding pension.

Section 5.170 Calculation of 5-Year, 10-Year, and 20-Year Protection Periods

Current § 3.344 provides that ''ratings which have continued for long periods at the same level (5 years or more)'' cannot be reduced absent a reexamination ''disclosing improvement, physical or mental, in these disabilities.'' We propose in § 5.170 to set forth general provisions governing how VA determines whether a rating has been continuously in place for the 5-year period currently found in § 3.344. This rule also sets forth those provisions that apply to determining whether a 20-year period has been continuous, such that a rating is protected under the part 5 equivalent of 38 CFR 3.951(b). Additionally, proposed § 5.170 determines how to calculate whether service connection has been in effect for 10 years and is, therefore, protected under the part 5 equivalent of 38 CFR 3.957. It is preferable to state the general rules applicable to calculating these periods in one regulation rather than repeat the concepts in multiple regulations.

Proposed paragraph (b) states the general rule that the described periods begin on the effective date of the protected award or rating and end on the date that service connection would be severed or the rating reduced. This provision takes into account any applicable due process provisions contained in current § 3.105 and proposed § 5.176. The method of measuring the duration of a rating is explicit in current §§ 3.951 and 3.957; but it is not explicit in § 3.344. However, the implicit measurement method in § 3.344 is consistent with VA's current practice and policy, and with the interpretation of current § 3.344(c) set forth in *Brown* v. *Brown,* 5 Vet. App. 413 (1993). In that case, the Court held: ''[T]he duration of a rating for purposes of § 3.344(c) must be measured from the effective date assigned that rating until the effective date of the actual reduction. * * * [T]hose results flow from the plain and unambiguous language of the regulation.'' *Brown,* 5 Vet. App. at 418–419. We believe that making the effective-date-measurement rule explicitly applicable to the 5-year protection against reduction set forth in § 3.344, as it is in current §§ 3.951 and 3.957, will help clarify VA's practice on this issue.

The requirement that the 20-year protection period be continuous is set forth in 38 U.S.C. 110, which protects certain ratings that have been ''continuously in force for twenty or more years.'' Therefore, proposed paragraph (c) states that ''a rating is not continuous if benefits based on that rating are discontinued or interrupted because the veteran reentered active service.'' *See* VAOGCPREC 5–95 (holding that a rating discontinued based on reentry into service was not continuous for 20 years for purposes of section 110).

We believe that the holding of VAOGCPREC 5–95 logically should apply to the continuity requirement for the 5-year protection set forth in current § 3.344(c). Explicitly stating this rule in proposed § 5.170(c) will promote consistency in decision making by VA staff.

The rule of 5.170(c) regarding re-entry into active service does not apply to break the 10-year period of proposed § 5.175 for protection of service connection. Under current § 3.654(b), the prior determination ''of service connection is not disturbed'' because of the re-entry into active service. Because service connection remains in effect, the period of continuity is not broken.

Proposed paragraph (d) states that a rating period may be protected without regard to whether the beneficiary actually received VA compensation based on that rating. This is based on current VA policy. We note that this rule is intended to apply to all adjustments, except for reentry of active service, including a beneficiary whose payments were adjusted by deduction, recoupment, apportionment, reduction in compensation due to incarceration, and a beneficiary who elected to receive retirement pay. These common examples are listed in proposed paragraph (d).

Proposed paragraph (e) extends the protections found in current §§ 3.344, 3.951, and 3.957 to retroactive increases in rating or grants of service connection, including those awarded based on clear and unmistakable error (CUE) under current § 3.105(a)/proposed § 5.162. In addition, the rule clearly states that it applies to any protection period even if it includes a period based on a retroactive award. The extension to retroactive awards is not a new VA practice. First, as to retroactive awards not based on a finding of CUE, the practice is well-established, even as to current § 3.344. *See, e.g., Brown* v. *Brown,* 5 Vet. App. 413, 417 (1993). The application of the retroactive protection to the 20-year period in cases based on findings of CUE is required by 38 U.S.C. 110. *See* VAOGCPREC 68–91 (citing H.R. Rep. No. 533, 83rd Cong., 1st Sess. 2 (1953); Pub. L. No. 88–445, 78 Stat. 464 (1964); and VAOGCPREC 16–89). The legislative intent behind applying a retroactive award to form the 20-year

protection should apply as well to the regulatory 5-year protection because the purpose of § 3.344 is similar to the purpose of § 110 in that both protections support the economic and humane considerations noted above. Finally, the proposed regulation provides explicit protection to veterans, and is in keeping with our consistent treatment of the three time periods set forth in current §§ 3.344, 3.951, and 3.957 in other respects, as described in the other paragraphs in this proposed rule.

Section 5.171 Protection of 5-Year Stabilized Ratings

Proposed § 5.171 is derived from current § 3.344. Proposed paragraph (a) restates in plain language the first sentence of current § 3.344(a). Proposed paragraph (b) is primarily derived from the first sentence of current § 3.344(c), which states: ''The provisions of paragraphs (a) and (b) of this section apply to ratings which have continued for long periods at the same level (5 years or more).'' Proposed paragraph (b) rephrases the current rule, as follows: ''For the purposes of this section, if a disability has been rated at or above a specific level for 5 years or more, VA will consider it to be stabilized at that specific level.'' No substantive change is intended.

Proposed paragraph (c) states two criteria that must be present before we will reduce a stabilized rating. The first criterion is stated in proposed paragraph (c)(1), and requires that there be ''[a]n examination [that] shows sustainable material improvement, * * * in the disability.'' The requirement of ''material improvement'' is based on the third sentence of current § 3.344(c), which states, ''[r]eexaminations disclosing improvement, physical or mental, in these disabilities will warrant reduction in rating.'' We propose to change ''improvement'' to ''material improvement.'' ''Material improvement'' is what is intended in current § 3.344(c), as evidenced by the use of the term ''material improvement'' in paragraph (a) of the current regulation. Finally, ''material improvement'' is the standard used to measure a protected or stabilized rating in other similar regulations. *See* 38 CFR 3.327(b)(2)(ii) (disability will not be subject to scheduled reexamination ''[w]hen the findings and symptoms are shown by examinations * * * and hospital reports to have persisted without material improvement for a period of 5 years or more''); 38 CFR 3.343(a) (''[t]otal disability ratings * * * will not be reduced * * *. without examination showing material improvement in physical or mental condition'').

Proposed paragraph (c)(2) states the second criterion that must be present before VA will reduce a stabilized rating, which is that ''[t]he evidence shows that it is reasonably certain that the material improvement will be maintained under the ordinary conditions of life.'' This requirement is drawn directly from the seventh sentence of current § 3.344(a).

We propose not to retain the second-to-last sentence of current § 3.344(c), which states: ''[The provisions of this rule] do not apply to disabilities which have not become stabilized and are likely to improve.'' Proposed paragraph (c) clearly states that this rule applies to the reduction of stabilized ratings. The term ''stabilized ratings'' is clearly defined in proposed paragraph (b), and does ''not apply to disabilities which have not become stabilized.'' Therefore, the second-to-last sentence of current § 3.344(c) is unnecessary.

Proposed paragraph (d) is derived from current § 3.344(a). In the current regulation, paragraph (a) contains ten sentences, nine of which articulate specific and distinct adjudicative rules. Three of these sentences also contain lists of various disabilities that are affected by the specific rule articulated in the sentence. Current paragraph (a) does not organize those ten sentences either by associating similar concepts or by setting the rules out in numbered paragraphs. We apply both of these organizational tools in the proposed rule, in order to improve readability and help users locate the parts of the paragraph that apply to their particular cases.

In essence, § 3.344(a) lists and describes the evidence required by VA to justify the reduction of a stabilized rating. Hence, we propose to title the paragraph that restates most of the rules contained in current § 3.344(a), ''*How VA determines whether there has been material improvement.*''

The proposed rule required significant reorganization of the current rule. In order to show clearly what we have done, we have reproduced below the current regulation, with numbers before each of the 10 sentences. Then, we have indicated how our proposed rule would dispose of each sentence of the existing rule.

(a) Examination reports indicating improvement. [1] Rating agencies will handle cases affected by change of medical findings or diagnosis, so as to produce the greatest degree of stability of disability evaluations consistent with the laws and Department of Veterans Affairs regulations governing disability compensation and pension. [2] It is essential that the entire record of examinations and the medical-industrial history be reviewed to ascertain whether the recent examination is full and complete, including all special examinations indicated as a result of general examination and the entire case history. [3] This applies to treatment of intercurrent diseases and exacerbations, including hospital reports, bedside examinations, examinations by designated physicians, and examinations in the absence of, or without taking full advantage of, laboratory facilities and the cooperation of specialists in related lines. [4] Examinations less full and complete than those on which payments were authorized or continued will not be used as a basis of reduction. [5] Ratings on account of diseases subject to temporary or episodic improvement, e.g., manic depressive or other psychotic reaction, epilepsy, psychoneurotic reaction, arteriosclerotic heart disease, bronchial asthma, gastric or duodenal ulcer, many skin diseases, etc., will not be reduced on any one examination, except in those instances where all the evidence of record clearly warrants the conclusion that sustained improvement has been demonstrated. [6] Ratings on account of diseases which become comparatively symptom free (findings absent) after prolonged rest, e.g. residuals of phlebitis, arteriosclerotic heart disease, etc., will not be reduced on examinations reflecting the results of bed rest. [7] Moreover, though material improvement in the physical or mental condition is clearly reflected the rating agency will consider whether the evidence makes it reasonably certain that the improvement will be maintained under the ordinary conditions of life. [8] When syphilis of the central nervous system or alcoholic deterioration is diagnosed following a long prior history of psychosis, psychoneurosis, epilepsy, or the like, it is rarely possible to exclude persistence, in masked form, of the preceding innocently acquired manifestations. [9] Rating boards encountering a change of diagnosis will exercise caution in the determination as to whether a change in diagnosis represents no more than a progression of an earlier diagnosis, an error in prior diagnosis or possibly a disease entity independent of the service-connected disability. [10] When the new diagnosis reflects mental deficiency or personality disorder only, the possibility of only temporary remission of a super-imposed psychiatric disease will be borne in mind.

At the outset, we note that, as discussed above, sentence 1 of § 3.344(a) is reflected in the proposed paragraph (a) and sentence 7 of § 3.344(a) is reflected in proposed paragraph (c)(2).

Proposed paragraph (d)(1) is derived from current § 3.344(a) sentences 2, 3, and 4, which together emphasize the requirement that only a complete examination, including a review of the full medical record, can serve as a basis for a reduction under this section. The items needed for a complete medical record are in the proposed rule. The list

includes all of the items in the current rule.

Proposed paragraph (d)(2) restates in plain language current § 3.344(a) sentence 5, which states, ''lists those diseases that will not be reduced on any one examination, absent evidence showing sustained improvement.'' The list of diseases contained in the existing rule is set off as indented ''bullet points,'' to improve readability. In addition, we note that the term ''manic depressive'' is no longer an accepted term in the psychiatric community. It has been replaced by the term ''Bipolar Disorders.'' *See* American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 382–401 (4th ed. 2000). We therefore propose to use the term ''Bipolar Disorders'' instead of using ''manic depressive.'' In addition, we note that the term ''psychoneurotic reaction'' is no longer an accepted term in the psychiatric community. It has been replaced by the term ''Anxiety Disorders.'' *See* American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 429–484 (4th ed. 2000). We therefore propose to use the term ''Anxiety Disorders'' instead of using ''psychoneurotic reaction.''

The intent behind sentence 5 of § 3.344(a) is not that every single piece of evidence of record clearly warrants the conclusion that sustained improvement has been demonstrated. Such a literal interpretation would lead to an absurd result because in a case where a rating has been in effect for 8 years, the evidence from 6–8 years would not show sustained improvement; only more recent evidence would show sustained improvement. Sentence 5 uses ''all'' to refer to the evidentiary record as a whole. We propose to not include the word ''all'' in paragraph (d) to clarify that VA does not intend that every single piece of evidence of record must clearly warrant the conclusion that sustained improvement has been demonstrated, but rather that the evidentiary record as a whole must clearly warrant such a conclusion.

Proposed paragraph (d)(3) restates in plain language current § 3.344(a) sentence 6.

Proposed (d)(4) provides a statement of VA's policy as to when it will find ''material improvement'' to exist, as follows: ''(4) Material improvement will be held to exist only where, after full compliance with the procedure outlined in this paragraph (d), the medical record clearly demonstrates that the disability does not meet the requirements for the currently assigned disability rating.''

Proposed paragraph (d)(5) reflects the first, ninth, and tenth sentences of current § 3.344(a), and references a similar rule, 38 CFR 4.13. Section 4.13 states that in reevaluating a case based on a change in diagnosis, ''The repercussion upon a current rating of service connection when change is made of a previously assigned diagnosis or etiology must be kept in mind. The aim should be the reconciliation and continuance of the diagnosis or etiology upon which service connection for the disability had been granted.'' Section 4.13 is similar to § 3.344(a) sentence 1, but the language of § 4.13 more clearly places emphasis on the protection of the existing rating. Therefore, we explicitly require consideration of the part 4 rule when VA is confronted with evidence of a change in diagnosis.

Proposed paragraph (d)(6) restates without alteration current § 3.344(a) sentence 8.

Proposed paragraph (e) restates, in plain language, current § 3.344(b). We note that the current rule requires VA to cite ''the former diagnosis with the new diagnosis in parentheses,'' whereas the proposed rule would require VA to cite ''the former diagnosis with the new diagnosis, *if any,* in parentheses'' (emphasis added). This change clarifies that proposed paragraph (e) applies to any basis for reduction, not just to reductions based on a changed diagnosis.

Section 5.172 Protection of Continuous 20-Year Ratings

Proposed § 5.172 is based on current § 3.951(b), which protects disability ratings and ratings of permanent and total disability for pension purposes that have been in effect for at least 20 years.

Proposed paragraph (a) restates in plain language the protection in current § 3.951(b) afforded to disabilities rated for periods in which the beneficiary was receiving compensation. It would not include the phrase ''under laws administered by the Department of Veterans Affairs'' because there is no ambiguity concerning whether this regulation applies to ratings under VA regulations.

Proposed paragraph (b) restates in plain language the current protection afforded in current § 3.951(b) to a rating of permanent total disability for pension purposes.

Proposed paragraph (c) states that the 20-year protection against reduction applies ''whether or not the veteran elects to receive disability compensation or pension during all or any part of the 20-year period.'' This additional language reflects the holding of *Salgado* v. *Brown*, 4 Vet. App. 316, 320 (1993) (''The Court holds that the protection afforded by section 110 of title 38 of the United States Code applies to ratings for compensation purposes, whether or not a veteran elects to receive a monetary award.''). Because 38 U.S.C. 110 applies to both pension and compensation, we propose to include pension in proposed paragraph (c).

Section 5.173 Protection Against Reduction of Disability Ratings When Revisions Are Made to the Schedule for Rating Disabilities

Proposed § 5.173 is derived from current §§ 3.951 and 3.952. Section 3.951(a) states that VA will not reduce any disability rating in effect on the effective date of a revision of the applicable Schedule for Rating Disabilities, based on such revisions, unless medical evidence establishes that the rated disability has actually improved. Current § 3.952 applies that protection, with some modification, to ratings assigned under the Schedule of Disability Ratings, 1925, which were the basis of compensation on April 1, 1946, when the current Schedule of Disability Ratings took effect. Proposed § 5.173 combines the general rule in current § 3.951(a) with the specific rule in current § 3.952, into a single regulation titled, ''*Protection against reduction of disability ratings when revisions are made to the Schedule for Rating Disabilities.*'' At the end of the proposed regulation, we cross-reference proposed § 5.176, the regulation that describes the process required before reducing a rating.

Proposed paragraph (a) restates in plain language the general rule in current § 3.951(a), as follows: ''VA will not reduce a disability rating in effect on the effective date of a revision of the applicable Schedule for Rating Disabilities unless medical evidence establishes that the rated disability has actually improved, except when the rating was assigned under the 1925 Schedule of Disability Ratings (as provided in paragraph (b) of this section).''

Proposed paragraph (b) of § 5.173 restates in plain language the protections afforded under current § 3.952. These changes are meant to make the rules easier to follow; no substantive changes are intended.

Section 5.174 Protection of Entitlement to Benefits Established Before 1959

Proposed § 5.174 is based on current § 3.953. We propose not to include current § 3.953(b), which refers to emergency officers' retirement pay payable to veterans of World War I. We

believe it is very unlikely that VA will receive any more claims for this benefit. However, if such a claim were to be received, Section 11, Public Law 85–857 would be used to adjudicate the claim.

Section 5.175 Protection or Severance of Service Connection

Proposed § 5.175 is derived from current §§ 3.957 and 3.105(d). Proposed § 5.175(a) incorporates current § 3.957, which states that service connection for disability or death may be protected if it has been in effect for 10 years or more. Such a rating may not be severed unless any of the following are shown: (1) The original grant was obtained through fraud; or, (2) military records clearly show that the person identified as a veteran did not have the requisite qualifying service; or, (3) military records clearly show that the veteran's discharge from service was a bar to service connection. *See* 38 CFR 3.12. We would include the current rule in the provision governing severance of service connection because the rule advises claimants of circumstances when a protected rating may be severed.

Proposed § 5.175(b) provides that severance of service connection may also occur when evidence establishes that it is clearly and unmistakably erroneous (the burden of proof being upon VA), subject to §§ 5.152 and 5.176. This paragraph further provides that a change in medical diagnosis may be a basis for severing service connection if the examining physician or physicians or other proper medical authority certifies that, in light of all accumulated evidence, the diagnosis that was the basis of the award is clearly erroneous. That certification must be accompanied by a summary of the facts, findings, and reasons supporting the conclusion that the diagnosis is erroneous.

Section 5.176 Due Process Procedures for Severing Service Connection or Reducing or Discontinuing Compensation Benefits

Proposed § 5.176 re-states current § 3.105(d), (e). Current § 3.105(d) and (e) state that a claimant has 60 days from the date of the notice of a proposed severance of service connection or reduction or discontinuance of benefits in which to submit evidence showing the proposed action should not be taken. The last sentence of both current § 3.105(d) and current § 3.105(e) states that

> [i]f additional evidence is not received within that period, final rating action will be taken and the award will be reduced or discontinued * * * effective the last day of the month in which a 60-day period from the date of notice to the beneficiary of the final rating action expires.

We propose to clarify in § 5.176(c) that if no evidence is received within 60 days, or if evidence is received that does not demonstrate that the proposed action should not be taken, VA will notify the beneficiary that VA is severing service connection or reducing or discontinuing the benefit.

Section 5.177 Effective Dates for Severing Service Connection or Discontinuing or Reducing Benefit Payments

Proposed § 5.177 contains the effective date provisions related to severance of service connection and reduction or discontinuance of benefits. It is derived from various provisions of current § 3.105. We propose in paragraph (a) to restate the provisions found in the introductory paragraph of § 3.105 regarding effective dates for reductions or discontinuances of suspended awards. We propose in paragraph (c) to list the three exceptions to § 5.177, which are derived from the introductory paragraph of § 3.105 and current § 3.500(b). We propose not to include the exception for cases where the award of service connection was ''clearly illegal'' because such cases would properly fall within § 3.105 and proposed § 5.177(d).

We propose in paragraphs (d) through (i), to state the specific type of benefit that is the subject of the particular effective date rule and to explain when the benefit will be reduced, stopped, or severed. These effective date provisions are from paragraphs (c) through (h) of the current version of § 3.105.

Endnote Regarding Amendatory Language

We intend to ultimately remove part 3 entirely, but we are not including amendatory language to accomplish that at this time. VA will provide public notice before removing part 3.

Paperwork Reduction Act

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

Regulatory Flexibility Act

The Secretary hereby certifies that this regulatory amendment will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612. This amendment would not significantly impact any small entities. Therefore, pursuant to 5 U.S.C. 605(b), this amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Order 12866

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

The economic, interagency, budgetary, legal, and policy implications of this proposed rule have been examined, and it has been determined to be a significant regulatory action under the Executive Order because it is likely to result in a rule that may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

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 proposed rule would have no such effect on State, local, and tribal governments, or the private sector.

Catalog of Federal Domestic Assistance Numbers and Titles

The Catalog of Federal Domestic Assistance program numbers and titles for this proposal 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; 64.104, 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; 64.115, Veterans Information and Assistance; and 64.127, Monthly Allowance for Children of Vietnam Veterans Born with Spina Bifida.

List of Subjects in 38 CFR Part 5

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

Approved: February 8, 2007.

Gordon H. Mansfield,

Deputy Secretary of Veterans Affairs.

For the reasons set out in the preamble, VA proposes to further amend 38 CFR part 5, as proposed to be added at 69 FR 4832, January 30, 2004, by adding subpart C to read as follows:

PART 5—COMPENSATION, PENSION, BURIAL, AND RELATED BENEFITS

Subpart C—Adjudicative Process, General

General Evidence Requirements

Sec.

5.130 Submission of statements, evidence, or information affecting entitlement to benefits.
5.131 Applications, claims, and exchange of evidence with Social Security Administration (SSA)—death benefits.
5.132 Claims, statements, evidence, or information filed abroad; authentication of documents from foreign countries.
5.133 Information VA may request from financial institutions.
5.134 Will VA accept a signature by mark or thumbprint?
5.135 Statements certified or under oath or affirmation.
5.136–5.139 [Reserved]

Evidence Requirements for Former Prisoners of War (POWS)

5.140 Determining former prisoner of war status.
5.141 Medical evidence for former prisoners' of war compensation claims.
5.142–5.149 [Reserved]

General Effective Dates for Awards

5.150 General effective dates for awards or increased benefits.
5.151 Date of receipt.
5.152 Effective dates based on change of law or VA issue.
5.153 Effective date of awards based on receipt of evidence prior to end of appeal period.
5.154–5.159 [Reserved]

General Rules on Revision of Decisions

5.160 Binding effect of VA decisions.
5.161 Review of benefit claims decisions.
5.162 Revision of decisions based on clear and unmistakable error (CUE).
5.163 Revision of decisions based on difference of opinion.
5.164 Effective dates for revision of decisions based on difference of opinion.
5.165 Effective dates for reduction or discontinuance of awards based on error.
5.166 New and material evidence based on service department records.
5.167–5.169 [Reserved]

General Rules on Protection or Reduction of Existing Ratings

5.170 Calculation of 5-year, 10-year, and 20-year protection periods.
5.171 Protection of 5-year stabilized ratings.
5.172 Protection of continuous 20-year ratings.
5.173 Protection against reduction of disability ratings when revisions are made to the Schedule for Rating Disabilities.
5.174 Protection of entitlement to benefits established before 1959.
5.175 Protection or severance of service connection.
5.176 Due process procedures for severing service connection or reducing or discontinuing compensation benefits.
5.177 Effective dates for severing service connection or discontinuing or reducing benefit payments.
5.178–5.179 [Reserved]

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

Subpart C—Adjudicative Process, General

General Evidence Requirements

§ 5.130 Submission of statements, evidence, or information affecting entitlement to benefits.

(a) *Statement of VA policy concerning submission of written statements, evidence, or information.* (1) It is VA's general policy to allow submission of statements, evidence, or information by e-mail, facsimile (fax) machine, or other electronic means, unless a VA regulation, form, or directive expressly requires a different method of submission (for example, where a VA form directs claimants to submit certain documents by regular mail or hand delivery). This policy does not apply to the submission of a claim, Notice of Disagreement, Substantive Appeal, or any other submissions or filing requirements covered in parts 19 and 20 of this chapter.

(2) Paragraph (a)(1) of this section merely concerns the method by which written statements, evidence, or information is submitted to VA. Requirements regarding the content of the submission must still be met.

(b) *VA action following submission of statements, evidence, or information.* Except as otherwise provided, after a beneficiary or his or her fiduciary or authorized representative provides VA with a statement, evidence, or information that affects entitlement to benefits, either orally or in writing, VA may take action affecting the beneficiary's entitlement to benefits based upon the statement, evidence, or information.

(c) *Notice and documentation or oral statements.* Except as provided in paragraph (d) of this section, VA will not take action based on oral statements unless the VA employee receiving the information meets the following conditions:

(1) During the conversation in which the beneficiary, representative, or fiduciary provides the statement, the VA employee:

(i) Identifies himself or herself as a VA employee who is authorized to receive the statement (this means that the VA employee must be authorized to take actions under §§ 2.3 or 3.100 of this chapter);

(ii) Verifies the identity of the provider as the beneficiary or his or her fiduciary or authorized representative by obtaining specific information about the beneficiary that is contained in the beneficiary's VA records, such as Social Security number, date of birth, branch of military service, dates of military service, or other information; and

(iii) Informs the provider that the statement may be used to calculate benefit amounts; and

(2) During or following the conversation in which the beneficiary, representative, or fiduciary provides the statement, the VA employee documents in the beneficiary's VA record all of the following:

(i) The specific statement provided.

(ii) The date such statement was provided.

(iii) The identity of the provider.

(iv) The steps taken to verify the identity of the provider as being the beneficiary or his or her fiduciary or authorized representative.

(v) The statement of the employee that the provider was informed that the statement may be used for the purpose of calculating benefits amounts.

(d) *Exceptions to paragraph (c) notice and documentation requirements.* Paragraph (c) of this section does not apply to the following:

(1) Oral statements made at a VA hearing; and

(2) Oral statements recorded by VA personnel in reports of medical treatment or examination.

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

§ 5.131 Applications, claims, and exchange of evidence with Social Security Administration (SSA)—death benefits.

(a) *Dual-purpose SSA and VA application forms.* A claim for death benefits received by SSA on a form jointly prescribed by VA and SSA claiming such benefits is considered to be a claim for VA death benefits (including dependency and indemnity compensation (DIC), death pension, and accrued benefits). The claim will be deemed to have been received by VA on the date that it was received by SSA.

(b) *Evidence filed with SSA.* Evidence received by SSA in conjunction with a claim under paragraph (a) of this section is considered received by VA on the date that SSA received the evidence.

(c) *SSA request of copies or certifications of evidence filed with VA.* At SSA's request, VA will furnish copies or certifications of evidence that a claimant has filed with VA in support of a claim for VA death benefits, provided that the release of this evidence fully complies with all requirements in any applicable laws and regulations that protect the confidentiality of VA records.

(Authority: 38 U.S.C. 501(a), 5101(b)(1), 5105)

§ 5.132 Claims, statements, evidence, or information filed abroad; authentication of documents from foreign countries.

(a) *Claims and evidence filed abroad.* A claim, or statements, information, or evidence in support of a claim, may be submitted to a Department of State representative in a foreign country. Any claim, statement, information, or evidence filed in a foreign country will be considered received by VA on the date that it was received by the Department of State representative in that foreign country.

(b) *Authentication of foreign documents—generally.* Foreign documents listed in paragraph (c) of this section do not require authentication. All other foreign documents must be authenticated as specified in paragraph (d) of this section. ''Foreign documents'' means documents that are signed under oath or affirmation in the presence of an official in a foreign country. Examples of foreign documents include affidavits, marriage certificates, and birth certificates that have been created, executed, or validated by a foreign government. ''Authentication'' means that an official listed in paragraph (d) of this section verifies that the foreign document, including each signature, stamp, and seal appearing on it, is genuine and has not been altered.

(c) *Authentication of certain foreign documents not required.* VA does not require authentication of the following types of foreign documents:

(1) Documents approved by the Deputy Minister of Veterans Affairs for the Department of Veterans Affairs, Ottawa, Canada.

(2) Documents bearing the signature and seal of an officer authorized to administer oaths for general purposes.

(3) Documents signed before a VA employee authorized to administer oaths under § 2.3 of this chapter.

(4) Affidavits prepared in the Republic of the Philippines that are certified by a VA representative who is located there and who has the authority to administer oaths.

(5) Copies of public or church records from any foreign country used to establish birth, adoption, marriage, annulment, divorce, or death, provided that the documents have the signature and seal of the custodian of these records and there is no contrary evidence of record that tends to cast doubt on the correctness of the documents.

(d) *Authentication of foreign documents required.* Foreign documents not listed in paragraph (c) of this section must be authenticated by:

(1) An officer of the Department of State authorized to authenticate documents; or

(2) The Consul of a friendly government whose signature and seal is verified by the Department of State.

(e) *Photocopies of foreign documents.* VA will accept photocopies of any of the foreign documents described in paragraphs (c) and (d) of this section if VA determines that the photocopies satisfy the requirements of § 5.180.

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

§ 5.133 Information VA may request from financial institutions.

(a) *Names and addresses.* If VA needs to verify a person's correct name or address, VA may request this information from a financial institution, such as a bank, savings and loan association, trust company, or credit union. In its request, VA must certify that the name or address is necessary in order to administer properly its benefit programs and cannot be located by a reasonable search of VA records.

(b) *Financial information.* VA may ask a financial institution to provide financial records of a current or former claimant or a current or former beneficiary if such evidence is necessary to determine whether such person has failed to comply with a statute, regulation, rule, or order. This request, however, must be made through a subpoena. (A subpoena is a legal document commanding an individual or organization to provide specified evidence to the issuer of the subpoena. See § 2.2 of this chapter for information on VA's authority to issue subpoenas.) Before the date VA serves a subpoena on a financial institution, VA must:

(1) Serve or mail a copy of the subpoena to the beneficiary; together with

(2) A written explanation of the purpose of VA's request for financial information and the procedure for challenging the subpoena. *See* 12 U.S.C. 3405.

(c) *Limitations on use of information.* Unless permitted under the Right to Financial Privacy Act (codified at 12 U.S.C. 3401, *et seq.*), VA may not:

(1) Use information obtained from a financial institution for any purpose other than the administration of VA benefits programs; or

(2) Share this information with any other individual, group, or government entity.

(Authority: 12 U.S.C. 3401, 3405, 3412, 3413; 38 U.S.C. 501, 5711, 5319)

§ 5.134 Will VA accept a signature by mark or thumbprint?

VA will accept signatures by mark or thumbprint if:

(a) They are witnessed by two people who sign their names and give their addresses, or

(b) They are witnessed by an accredited agent, attorney, or service organization representative, or

(c) They are certified by a notary public or any other person having the authority to administer oaths for general purposes, or

(d) They are certified by a VA employee who has been delegated authority by the Secretary under 38 CFR 2.3.

(Authority: 38 U.S.C. 5101)

§ 5.135 Statements certified or under oath or affirmation.

(a) All oral testimony presented by claimants and witnesses on their behalf will be under oath or affirmation (*see* § 5.82(d)(2)).

(b) Any documentary evidence or written assertion of fact submitted by the claimant or on his or her behalf for the purpose of establishing a claim for service connection should be certified or under oath or affirmation. VA may consider such a submission that is not certified or under oath or affirmation or

may require certification, oath, or affirmation if considered necessary to establish the reliability of a material document. Documentary evidence includes records, examination reports, and transcripts material to the issue received by VA from State, county, or municipal governments, recognized private institutions, or contract hospitals.

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

§§ 5.136 through 5.139 [Reserved]

Evidence Requirements for Former Prisoners of War (POWs)

§ 5.140 Determining former prisoner of war status.

(a) *Basis for determination.* The definition of ''hostile force'' set forth in paragraph (3) of the definition of ''Former prisoner of war (or former POW)'' in § 5.1 applies to this section. VA will accept a finding by the appropriate service department that a person was a POW during a period of war when detention or internment was by an enemy government or its agents, or a hostile force, except when a reasonable basis exists for questioning that finding. The Director of the Compensation and Pension Service must approve all regional office determinations not based on service department findings. VA will apply paragraphs (b), (c), and (d) of this section and make its own determination of POW status if:

(1) The detention or internment occurred during a period other than a period of war; or

(2) If a service department has not made a finding; or

(3) A reasonable basis exists for questioning a service-department finding.

(b) *Circumstances of detention or internment.* To be considered a former POW, a serviceperson must have been forcibly detained or interned under circumstances comparable to those under which persons generally have been forcibly detained or interned by enemy governments during periods of war. Such circumstances include, but are not limited to, physical hardships or abuse, psychological hardships or abuse, malnutrition, and unsanitary conditions. In the absence of evidence to the contrary, VA will consider that each individual member of a particular group of detainees or internees experienced the same circumstances as those experienced by the group.

(c) *Reason for detention or internment.* For the purposes of determining POW status, VA will not consider the reason a service member was detained or interned, except where allegations exist that the service member violated the laws of a foreign government. A period of detention or internment by a foreign government for an alleged violation of its laws cannot be used to establish POW status, unless the charges were a sham intended to make it appear that the detention or internment was proper.

(d) *Line of duty.* VA will consider that a serviceperson was forcibly detained or interned in line of duty unless the evidence of record discloses that forcible detention or internment was the proximate result of the service member's own willful misconduct. *See* § 5.660 (defining line of duty) and § 5.661 (defining willful misconduct).

Cross-reference: *See* § 5.611 (concerning POW status and Philippine service).

(Authority: 38 U.S.C. 101(32))

§ 5.141 Medical evidence for former prisoners' of war compensation claims.

(a) *Injuries and other conditions of a former prisoner of war (POW).* As soon as sufficient evidence for a rating is available, VA will rate injuries or other conditions of a former POW that obviously were incurred in service, without awaiting receipt of the claimant's medical and other service records.

(b) *Statements by a former POW.* VA will presume true a statement by a former POW that an injury or disease was incurred or aggravated during (or immediately before) detention or internment if the statement is consistent with the circumstances, conditions, or hardships of detention or internment (or is consistent with the former POW's situation immediately before detention or internment). The presumption of truth as to such a statement is rebutted by clear and convincing evidence to the contrary. *See also* § 3.304(f)(2) (pertaining to post-traumatic stress disorder claimed by a former POW).

(c) *Evidence from fellow service members.* Evidence from fellow service members may be used to support an allegation of incurrence or aggravation of an injury or disease during detention or internment. In evaluating evidence from fellow service members that relates to a claim for disability compensation by a former POW, VA will take into account the fellow service member's statements, including statements regarding any of the following:

(1) The former POW's physical condition before capture;

(2) The circumstances during the former POW's detention or internment;

(3) The changes in the former POW's physical condition following release from detention or internment; or

(4) The existence of signs and symptoms consistent with a claimed disability following the former POW's release from detention or internment.

(d) *The absence of clinical records.* If disability compensation is claimed by a former POW, VA will not consider as determinative the lack of history or findings in clinical records made upon the claimant's return to United States control.

(e) *Disabilities first reported after discharge.* If any disability is first reported after discharge, especially if the claimed disability is poorly defined and not obviously of intercurrent origin, VA will determine whether the claimed disability is etiologically related to the POW experience. VA will consider the circumstances of the claimant's detention or internment, the duration of detention or internment, and the pertinent medical principles.

(f) *Examination requirement.* If service connection for disabilities claimed by a former POW cannot be established otherwise, VA will provide the claimant a complete medical examination.

Cross-references: Definition of prisoner of war. *See* § 5.1. Presumptive service connection for diseases specific to prisoners of war. *See* § 5.264(c).

(Authority: 38 U.S.C. 1154)

§§ 5.142–5.149 [Reserved]

General Effective Dates for Awards

§ 5.150 General effective dates for awards or increased benefits.

(a) *General rule.* Except as otherwise provided, the effective date of an award of pension, compensation, dependency and indemnity compensation, or monetary allowance under 38 U.S.C. chapter 18 for an individual who is a child of a Vietnam veteran, based on an original claim, a claim reopened after final disallowance, or a claim for increase, will be the later of:

(1) The date of receipt of the claim for the benefit awarded; or

(2) The date entitlement arose. For the purposes of this part, ''date entitlement arose'' means the date shown by the evidence to be the date that the claimant first met the requirements for the benefit awarded. VA will assume that entitlement arose before the date of receipt of the claim unless the evidence shows that entitlement arose after that date.

(b) *Location of other effective-date provisions in part 5.* The following chart is intended to provide assistance in locating various other effective-date provisions in this part. It is provided for informational use only.

Effective date provision	Part 5 location
(1) SUBPART B—SERVICE REQUIREMENTS FOR VETERANS	
(i) Individuals and groups designated by the Secretary of Defense as having performed active military service	§ 5.27(c).
(ii) Effect of discharge upgrades by Armed Forces boards for the correction of military records (10 U.S.C. 1552) on eligibility for VA benefits.	§ 5.34(d).
(iii) Effect of discharge upgrades by Armed Forces discharge review boards (10 U.S.C. 1553) on eligibility for VA benefits.	§ 5.35(e).
(2) SUBPART C—ADJUDICATIVE PROCESS, GENERAL	
(i) Filing a claim for death benefits	§ 5.53(c)(5).
(ii) New and material evidence	§ 5.56(b).
(iii) Requirement to provide Social Security numbers	§ 5.101(c), (d).
(iv) Effective dates based on change of law or VA issue	§ 5.152.
(v) Effective date of awards based on receipt of evidence prior to end of appeal period	§ 5.153.
(vi) Revision of decisions based on clear and unmistakable error (CUE)	§ 5.162(b).
(vii) Effective dates for revision of decisions based on difference of opinion under § 5.163	§ 5.164.
(viii) Effective dates for reduction or discontinuance of awards based on error	§ 5.165.
(ix) New and material evidence based on service department records	§ 5.166(c), (d).
(x) Effective dates for severing service connection or discontinuing or reducing benefit payments	§ 5.177.
(3) SUBPART D—DEPENDENTS AND SURVIVORS	
(i) Evidence of dependency-reduction or discontinuance of VA benefits	§ 5.181(c).
(ii) Effective date for additional benefits based on the existence of a dependent	§ 5.183.
(iii) Effective date of reduction or discontinuance of VA benefits due to the death of a beneficiary's dependent	§ 5.184.
(iv) Effective date of reduction or discontinuance of improved pension, compensation, or dependency and indemnity compensation due to marriage or remarriage.	§ 5.197.
(v) Effective date of reduction or discontinuance of improved pension, compensation, or dependency and indemnity compensation due to divorce or annulment.	§ 5.198.
(vi) Effective date of discontinuance of VA benefits to a surviving spouse who holds himself, or herself, out as the spouse of another person.	§ 5.204.
(vii) Effective date of resumption of benefits to a surviving spouse due to termination of a remarriage	§ 5.205.
(viii) Effective date of resumption of benefits to a surviving spouse who stops holding himself, or herself, out as the spouse of another.	§ 5.206.
(ix) Effective date of award of pension or dependency and indemnity compensation to, or based on the existence of, a child born after the veteran's death.	§ 5.230.
(x) Effective date of reduction or discontinuance—child reaches age 18 or 23	§ 5.231.
(xi) Effective date of reduction or discontinuance—terminated adoptions	§ 5.232.
(xii) Effective date of reduction or discontinuance—stepchild no longer a member of the veteran's household	§ 5.233.
(xiii) Effective date of an award, reduction, or discontinuance of benefits based on child status due to permanent incapacity for self support.	§ 5.234.
(xiv) Effective date of an award of benefits due to termination of a child's marriage	§ 5.235.
(4) SUBPART E—CLAIMS FOR SERVICE CONNECTION AND DISABILITY COMPENSATION	
(i) Effective dates—award of disability compensation based on direct service connection	§ 5.310.
(ii) Effective dates—award of disability compensation based on presumptive service connection	§ 5.311.
(iii) Effective dates—increased compensation due to increased disability	§ 5.312.
(iv) Effective dates—reduction or severance of service-connected disability compensation	§ 5.313.
(v) Effective dates—discontinuance of total disability rating based on individual unemployability	§ 5.314.
(vi) Effective dates—reduction or discontinuance of additional disability compensation based on parental dependency	§ 5.315.
(vii) Effective dates—award of additional disability compensation based on decrease in the net worth of dependent parents.	§ 5.316.
(viii) Effective dates—Special monthly compensation under §§ 5.331 through 5.332	§ 5.333.
(ix) Effective dates—Additional compensation for aid and attendance payable for a veteran's spouse	§ 5.334.
(x) Effective date: Tuberculosis, special compensation for arrested	§ 5.349.
(xi) Benefits under 38 U.S.C. 1151(a) for additional disability or death due to hospitalization, medical or surgical treatment, examinations, or vocational rehabilitation training.	§ 5.352(a)(2).
(xii) Effective dates for disability or death due to hospitalization, medical or surgical treatment, examinations, or vocational rehabilitation training.	§ 5.353.
(5) SUBPART F—NONSERVICE-CONNECTED DISABILITY PENSIONS AND DEATH PENSIONS	
(i) Permanent and total disability ratings for Improved Disability Pension purposes	§ 5.381(b)(2).
(ii) Effective dates for Improved Disability Pension	§ 5.383.
(iii) Effective dates for awards of special monthly pension	§ 5.392.
(iv) Automatic adjustment of maximum annual pension rates	§ 5.401(a).
(v) Effective dates for Improved Pension awards based on a change in net worth	§ 5.415.
(vi) Effective dates for changes to Improved Pension payments due to a change in income	§ 5.422.
(vii) Time limits to establish entitlement to Improved Pension or to increase the annual Improved Pension amount based on income.	§ 5.424(b), (c).
(viii) Effective dates for Improved Death Pension	§ 5.431.
(ix) Effective date of discontinuance of Improved Death Pension payments to a beneficiary no longer recognized as the veteran's surviving spouse.	§ 5.433.

Effective date provision	Part 5 location
(x) Award, or discontinuance of award, of Improved Death Pension to a surviving spouse where Improved Death Pension payments to a child are involved.	§ 5.434(b), (c).
(xi) Effective dates of improved pension elections	§ 5.463.
(xii) Effective dates for section 306 and old-law pension reductions or discontinuances	§ 5.477.
(6) SUBPART G—DEPENDENCY AND INDEMNITY COMPENSATION, DEATH COMPENSATION, ACCRUED BENEFITS, AND SPECIAL RULES APPLICABLE UPON DEATH OF A BENEFICIARY	
(i) Awards of dependency and indemnity compensation benefits to children when there is a retroactive award to a school child.	§ 5.524(c).
(ii) Effective dates for DIC or death compensation awards	§ 5.567.
(iii) Effective dates for discontinuance of DIC or death compensation payments to a person no longer recognized as the veteran's surviving spouse.	§ 5.568.
(iv) Effective date for award, or termination of award, of DIC or death compensation to a surviving spouse where DIC or death compensation payments to children are involved.	§ 5.569.
(v) Effective date for reduction in DIC—surviving spouses	§ 5.570.
(vi) Effective date for an award or increased rate based on amended income information—parents' DIC	§ 5.571.
(vii) Effective date for reduction or discontinuance based on increased income—parents' DIC	§ 5.572.
(viii) Effective date for dependency and indemnity compensation rate adjustments when an additional dependent files an application.	§ 5.573.
(ix) Effective dates of awards and discontinuances of special monthly dependency and indemnity compensation	§ 5.574.
(7) SUBPART H—SPECIAL AND ANCILLARY BENEFITS FOR VETERANS, DEPENDENTS, AND SURVIVORS	
(i) Medal of Honor pension	§ 5.580(c).
(ii) Awards of VA benefits based on special acts or private laws	§ 5.581(d).
(iii) Special allowance payable under section 156 of Pub. L. 97–377	§ 5.588(f).
(iv) Effective dates of awards for certain disabled children of Vietnam veterans	§ 5.591.
(v) Clothing allowance	§ 5.606(e).
(8) SUBPART I—BENEFITS FOR CERTAIN FILIPINO VETERANS AND SURVIVORS	
(i) Filipino veterans and their survivors: Effective dates for benefits at the full-dollar rate	§ 5.614.
(ii) Filipino veterans and their survivors: Effective dates of reductions and discontinuances for benefits at the full-dollar rate.	§ 5.618.
(9) SUBPART K—MATTERS AFFECTING THE RECEIPT OF BENEFITS	
(i) Remission of forfeiture	§ 5.680(c)(2).
(ii) Effective dates—forfeiture	§ 5.681.
(iii) Presidential pardon for offenses causing forfeiture	§ 5.682(b), (d).
(iv) Renouncement of benefits	§ 5.683(c), (e)(1)(ii).
(10) SUBPART L—PAYMENTS AND ADJUSTMENTS TO PAYMENTS	
(i) Benefits paid to a child attending an approved educational institution	§ 5.695(c)–(g).
(ii) General effective dates for reduction or discontinuance of benefits	§ 5.705.
(iii) Eligibility verification reports	§ 5.708(f).
(iv) Adjustment in benefits due to reduction or discontinuance of a benefit to another payee	§ 5.710(b).
(v) Disappearance of veteran for 90 days or more	§ 5.711(b)(2), (c)(2), (d)(1).
(vi) Resumption of payments when a payee's whereabouts become known	§ 5.712.
(vii) Restriction on VA benefit payments to an alien located in enemy territory	§ 5.713.
(viii) Reduction of Improved Pension when a veteran is receiving domiciliary or nursing home care	§ 5.720(a)(4), (d).
(ix) Reduction of Section 306 Pension when a veteran is receiving hospital care	§ 5.721(a)(4), (d).
(x) Reduction of Old-Law Pension when a veteran is receiving hospital care	§ 5.722(a)(4).
(xi) Reduction of Improved Pension when a veteran or surviving spouse is receiving Medicaid-covered nursing home care.	§ 5.723(b).
(xii) Reduction of special monthly compensation involving aid and attendance when a veteran is receiving hospital care	§ 5.724(b), (e), (f).
(xiii) Reduction of special monthly pension involving aid and attendance for Improved Pension when a veteran is receiving hospital care.	§ 5.725(b), (d), (e).
(xiv) Reduction of special monthly pension involving aid and attendance for Old-Law Pension or Section 306 Pension when a veteran is receiving hospital care.	§ 5.726(b), (e).
(xv) Resumption of Section 306 Pension and special monthly pension involving aid and attendance when a veteran is discharged or released from hospital care.	§ 5.727(b), (e), (f).
(xvi) Resumption of Old-Law Pension and special monthly pension involving aid and attendance when a veteran is discharged or released from hospital care.	§ 5.728(b), (d), (e).
(xvii) General effective dates for awarding, reducing, or discontinuing VA benefits because of an election	§ 5.743.
(xviii) Prohibition against receipt of active military service pay and VA benefits for the same period	§ 5.746(c), (d)(1).
(xix) Procedures for elections between VA benefits and FECA compensation	§ 5.752(b).
(xx) Effect of election of compensation under the Radiation Exposure Compensation Act of 1990 on payment of certain VA benefits.	§ 5.754(d).
(xxi) Payment of multiple VA benefits to a surviving child based on the service of more than one veteran	§ 5.762(c)(6)(ii).

Effective date provision	Part 5 location
(xxii) Payment of dependents' educational assistance (DEA) and VA pension or dependency and indemnity compensation (DIC) for the same period.	§ 5.764(a)(3).
(11) SUBPART M—APPORTIONMENTS TO DEPENDENTS AND PAYMENTS TO FIDUCIARIES AND INCARCERATED BENEFICIARIES	
(i) Effective date of apportionment grant or increase	§ 5.783.
(ii) Effective date of apportionment discontinuance or reduction	§ 5.784.
(iii) Determinations of incompetency	§ 5.791(d).
(iv) Effective date after certification or when a beneficiary regains competency	§ 5.794.
(v) Payments upon reaching age of majority	§ 5.795(b).
(vi) Incarcerated beneficiaries—general provisions and definitions	§ 5.810(c).
(vii) Discontinuance of pension during incarceration	§ 5.813(b)(2).
(viii) Apportionment where a primary beneficiary is incarcerated	§ 5.814(e).
(ix) Resumptions of disability compensation, dependency and indemnity compensation, or death compensation upon a beneficiary's release from incarceration.	§ 5.815(a), (b)(1), (c)(2).
(x) Resumptions of pension upon a beneficiary's release from incarceration	§ 5.816(b), (c)(1).

(Authority: 38 U.S.C. 501, 5110(a))

§ 5.151 Date of receipt.

(a) *General*. The date of receipt of a document, claim, information, or evidence is the date on which it was received by VA, except as provided in paragraph (b) of this section, in specific provisions for claims or evidence received in a foreign country by a Department of State representative (§ 5.132(a)) or in the Social Security Administration (§§ 5.131(a) or 5.131(b)), or in rules of the Department of Defense relating to initial claims filed at or before separation.

(b) *Exception to date-of-receipt rule*. VA may establish, by notice published in the **Federal Register**, exceptions to paragraph (a), using factors such as postmark or the date the claimant signed the correspondence, when VA determines that a natural or man-made interference with the normal channels through which VA ordinarily receives correspondence has resulted in one or more VA regional offices experiencing extended delays in receipt of documents, claims, information, or evidence from claimants served by the affected office or offices to an extent that, if not addressed, would adversely affect such claimants through no fault of their own.

(Authority: 38 U.S.C. 501(a), 512(a), 5110)

§ 5.152 Effective dates based on change of law or VA issue.

(a) *Effective date of award*. Where pension, compensation, dependency and indemnity compensation, or a monetary allowance under 38 U.S.C. chapter 18 for an individual who is a child of a Vietnam veteran is awarded or increased pursuant to a liberalizing law, or a liberalizing VA issue approved by the Secretary or by the Secretary's direction, the effective date of such award or increase shall be fixed in accordance with the date entitlement arose, but shall not be earlier than the effective date of the act or administrative issue. Where pension, compensation, dependency and indemnity compensation, or a monetary allowance under 38 U.S.C. chapter 18 for an individual who is a child of a Vietnam veteran is awarded or increased pursuant to a liberalizing law or VA issue which became effective on or after the date of its enactment or issuance, in order for a claimant to be eligible for a retroactive payment under the provisions of this paragraph the evidence must show that the claimant met all eligibility criteria for the liberalized benefit on the effective date of the liberalizing law or VA issue and that such eligibility existed continuously from that date to the date of claim or administrative determination of entitlement. The provisions of this paragraph are applicable to original and reopened claims as well as claims for increase.

(1) If a claim is reviewed on the initiative of VA within 1 year from the effective date of the law or VA issue, or at the request of a claimant received within 1 year from that date, benefits may be authorized from the effective date of the law or VA issue.

(2) If a claim is reviewed on the initiative of VA more than 1 year after the effective date of the law or VA issue, benefits may be authorized for a period of 1 year prior to the date of administrative determination of entitlement.

(3) If a claim is reviewed at the request of the claimant more than 1 year after the effective date of the law or VA issue, benefits may be authorized for a period of 1 year prior to the date of receipt of such request.

(Authority: 38 U.S.C. 1822, 5110(g))

(b) *Reduction or discontinuance of benefits*. Where the reduction or discontinuance of an award is in order because of a change in law or a Department of Veterans Affairs issue, or because of a change in interpretation of a law or Department of Veterans Affairs issue, the payee will be notified at his or her latest address of record of the contemplated action and furnished detailed reasons therefor, and will be given 60 days for the presentation of additional evidence. If VA receives no additional evidence within the 60-day period, or the evidence received does not demonstrate that the proposed action should not be taken, the award will be reduced or discontinued effective the last day of the month in which the 60-day period expired.

(Authority: 38 U.S.C. 5112(b)(6))

§ 5.153 Effective date of awards based on receipt of evidence prior to end of appeal period.

VA will consider information or evidence received before the expiration of the period for initiating or perfecting an appeal to the Board, or before the Board renders a decision (if a timely appeal was filed), without regard to whether the information or evidence is ''new and material.'' An award of the benefit sought based on that information or evidence is effective on the date prescribed by § 5.150.

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

§§ 5.154–5.159 [Reserved]

General Rules on Revision of Decisions

§ 5.160 Binding effect of VA decisions.

(a) *General rule*. A decision of a duly constituted rating agency or other agency of original jurisdiction shall be binding on all field offices of the Department of Veterans Affairs as to conclusions based on the evidence on file at the time VA issues written notification in accordance with 38 U.S.C. 5104. A binding agency decision shall not be subject to revision on the same factual basis except by duly

constituted appellate authorities or except as provided in §§ 5.161, 5.162, and 5.163 of this part.

(b) *Particular issues.* A decision made by a Veterans Service Center on any one of the issues listed below is binding on the VA Insurance Center, and vice versa, unless the decision was based on clear and unmistakable error. Absent clear and unmistakable error, neither a Veterans Service Center nor the VA Insurance Center may change a decision of the other if doing so would involve applying the same criteria and be based on the same facts. The issues to which this paragraph (b) applies are:

(1) Line of duty;

(2) Character of discharge;

(3) Relationship;

(4) Dependency;

(5) Domestic relations issues such as marriage, divorce, adoption and child custody and support;

(6) Homicide; and

(7) Findings of fact of death or presumption of death.

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

§ 5.161 Review of benefit claims decisions.

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

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

(c) The reviewer may conduct whatever development he or she considers necessary to resolve any disagreements in the Notice of Disagreement, consistent with applicable law. This may include an attempt to obtain additional evidence or the holding of an informal conference with the claimant. Upon the request of the claimant, the reviewer will conduct a hearing under § 5.82.

(d) The reviewer may grant a benefit sought in the claim notwithstanding § 5.163, but, except as provided in paragraph (e) of this section, may not revise the decision in a manner that is less advantageous to the claimant than the decision under review. A review decision made under this section will include a summary of the evidence, a citation to pertinent laws, a discussion of how those laws affect the decision, and a summary of the reasons for the decision.

(e) Notwithstanding any other provisions of this section, the reviewer may reverse or revise (even if disadvantageous to the claimant) prior decisions of an agency of original jurisdiction (including the decision being reviewed or any prior decision that has become final due to failure to timely appeal) on the grounds of clear and unmistakable error (*see* § 5.162).

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

(g) This section applies to all claims in which a Notice of Disagreement is filed on or after June 1, 2001.

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

§ 5.162 Revision of decisions based on clear and unmistakable error (CUE).

(a) *General.* In the absence of clear and unmistakable error (CUE), VA will accept all final decisions as correct. Where evidence establishes such CUE, a prior decision will be reversed or revised. Review to determine whether CUE exists in a case may be instituted by VA on its own motion or upon request of the claimant. A request for revision of a VA decision based on CUE may be made at any time after that decision is made.

Cross-reference: Explanation of what constitutes CUE and what does not. See § 20.1403 of this chapter.

(b) *Effect of revision on benefits.* For the purpose of granting benefits, a new decision that constitutes a reversal or revision of a prior decision on the grounds of CUE has the same effect as if the new decision had been made on the date of the prior decision. For effective dates for reductions or discontinuances, based on CUE, VA will apply § 5.165(c)(1). However, for reductions or discontinuances based on CUE resulting from an act of commission or omission by the beneficiary or with the beneficiary's knowledge, VA will apply § 5.165(b).

(Authority: 38 U.S.C. 5109A)

§ 5.163 Revision of decisions based on difference of opinion.

If the Veterans Service Center Manager (VSCM) within an agency of original jurisdiction (AOJ) believes that revision of a previous AOJ decision (that is not final and has not been the subject of a Substantive Appeal) is warranted, based on a difference of opinion, and that revision would lead to a more favorable decision on the claim that was the subject of that previous decision, the VSCM will recommend such revision to the Director of the Compensation and Pension Service of the Veterans Benefits Administration for a binding determination.

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

§ 5.164 Effective dates for revision of decisions based on difference of opinion.

If a decision is revised based on difference of opinion under § 5.163, the effective date of the revision is the date the benefits would have been paid if the previous decision had been favorable.

(Authority: 38 U.S.C. 501, 5110)

§ 5.165 Effective dates for reduction or discontinuance of awards based on error.

(a) *Scope.* The rules in this section apply when determining the proper effective date to assign for the reduction or discontinuance of VA benefits based on error. This section does not apply to a payment amount not authorized by a rating decision, such as a payment of an incorrect amount or a duplicative payment. Such amounts are overpayments, subject to recoupment.

(b) *Effective date of reduction or discontinuance based on beneficiary error.* If an award was based on an act of commission or omission by the beneficiary or any act of omission or commission with the beneficiary's knowledge, VA will pay a reduced rate or discontinue benefits effective the latest of the following dates:

(1) The effective date of the award;

(2) The date preceding the act of commission or omission; or

(3) The date entitlement to the benefit ceased.

(c) *VA administrative error.* (1) *Effective date.* Except as provided in

§ 5.177 (d) and (f), if an award was based solely on administrative error or an error in judgment by VA, VA will pay a reduced rate or discontinue benefits effective the first of the month that follows the month for which VA last paid benefits.

(2) *Administrative error or an error in judgment.* Administrative errors or errors in judgment include:

(i) Overlooking facts;

(ii) Clerical errors; or

(iii) Failure to follow or properly apply VA instructions, regulations, or statutes.

(Authority: 38 U.S.C. 5112(b)(9) and (10))

§ 5.166 New and material evidence based on service department records.

(a) Notwithstanding any other section in this part, at any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim, notwithstanding § 3.156(a). Such records include, but are not limited to:

(1) Service records that are related to a claimed in-service event, injury, or disease, regardless of whether such records mention the veteran by name, as long as the other requirements of this § 5.166 are met;

(2) Additional service records forwarded by the Department of Defense or the service department to VA any time after VA's original request for service records; and

(3) Declassified records that could not have been obtained because the records were classified when VA decided the claim.

(b) Paragraph (a) of this section does not apply to records that VA could not have obtained when it decided the claim because the records did not exist when VA decided the claim, or because the claimant failed to provide sufficient information for VA to identify and obtain the records from the respective service department, the Joint Services Records Research Center, or from any other official source.

(c) An award made based all or in part on the records identified by paragraph (a) of this section is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later, or such other date as may be authorized by the provisions of this part applicable to the previously decided claim.

(d) A retroactive rating of disability resulting from disease or injury subsequently service connected on the basis of the new evidence from the service department must be supported adequately by medical evidence. Where such records clearly support the assignment of a specific rating over a part or the entire period of time involved, a retroactive rating will be assigned accordingly, except as it may be affected by the filing date of the original claim.

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

§§ 5.167–5.169 [Reserved]

General Rules on Protection or Reduction of Existing Ratings

§ 5.170 Calculation of 5-year, 10-year, and 20-year protection periods.

(a) VA will apply the following principles in determining whether service connection has been ''in effect'' for the 10-year period in § 5.175 and whether a rating has been ''continuous'' for the 5-year period in § 5.171 or the 20-year period in § 5.172.

(b) A protection period begins on the effective date of the rating decision and ends on the date that service connection would be severed or the rating would be reduced, after due process has been provided.

Cross-reference: Due process provisions for reducing compensation benefits or severing service connection. *See* § 5.176.

(c) For purposes of §§ 5.171 and 5.172, a rating is not continuous if benefits based on that rating are discontinued or interrupted because the veteran reentered active service.

Cross-reference: Rule on discontinuance of awards based on reentry into active service. *See* § 3.654(b).

(d) A rating period may be protected even if the beneficiary did not receive VA compensation based on that rating. This includes a beneficiary whose payments were adjusted by deduction, recoupment, apportionment, reduction in compensation due to incarceration, or because the beneficiary elected to receive retirement pay.

(e) A retroactive increase or award of service connection, including one made under § 5.162 of this part (revision based on clear and unmistakable error), which results in a veteran being rated or awarded service connection for a period of 5, 10, or 20 years will be protected under §§ 5.171, 5.175, and 5.172, respectively, of this part. This paragraph applies to any protection period, even if it includes a period based on a retroactive award.

Cross-reference: Specific procedural due process in reducing ratings or severing service connection. *See* § 5.176.

(Authority: 38 U.S.C. 110, 501, 1159)

§ 5.171 Protection of 5-year stabilized ratings.

(a) *Purpose.* VA will adjudicate cases affected by change of medical findings or diagnosis to produce the greatest degree of stability of disability ratings consistent with the laws and regulations governing disability compensation and pension.

(b) *Stabilized rating.* For the purposes of this section, if a disability has been rated at or above a specific level for 5 years or more, VA will consider it to be stabilized at that specific level.

(c) *Material improvement.* VA will not reduce a stabilized rating unless there is evidence of material improvement. VA may reduce a stabilized rating when:

(1) An examination shows sustainable material improvement, physical or mental, in the disability, as explained in paragraph (d) of this section; and

(2) The evidence shows that it is reasonably certain that the material improvement will be maintained under the ordinary conditions of life.

(d) *How VA determines whether there has been material improvement.* VA will consider the following when determining whether a disability has undergone material improvement:

(1) In order to reduce a stabilized rating, there must be evidence of an examination demonstrating improvement. Examinations less complete than those on which payments were authorized or continued will not be used as a basis for reduction. A complete medical record includes all of the following, when such records exist:

(i) The entire case history;

(ii) Medical-industrial history;

(iii) Records related to treatment of intercurrent diseases and exacerbations, including hospital reports, bedside examinations, examinations by designated physicians, and examinations that reflect the results of tests conducted by laboratory facilities and the cooperation of specialists in related lines;

(iv) Private and VA medical examination records; and

(v) Special examinations indicated as a result of general examination.

(2) VA will not use only one examination as the basis for a reduction of stabilized ratings assigned to diseases that tend to show temporary or episodic improvement, unless the evidence of record clearly demonstrates sustained improvement. Diseases subject to temporary or episodic improvement include but are not limited to:

(i) Arteriosclerotic heart disease;

(ii) Bronchial asthma;

(iii) Epilepsy;

(iv) Gastric or duodenal ulcer;

(v) Bipolar disorders or other psychotic reaction;

(vi) Anxiety disorders;

(vii) Many skin diseases.

(3) VA will not reduce a stabilized rating assigned to a disease that becomes comparatively symptom free (findings absent) after bed rest based on an examination that reflects the results of bed rest.

(4) Material improvement will be held to exist only where, after full compliance with the procedure outlined in this paragraph (d), the medical record clearly demonstrates that the disability does not meet the requirements for the currently assigned disability rating.

(5) Where there is evidence of a change in diagnosis, VA will follow 38 CFR 4.13 (''Effect of change of diagnosis''), as well as this section. VA will consider whether evidence of a change in diagnosis represents a progression of the previously diagnosed condition, an error in prior diagnosis, or a disease entity independent of the service-connected disability. When a new diagnosis reflects only a mental deficiency or personality disorder, VA will consider the possibility of temporary remission of a super-imposed psychiatric disease.

(6) When syphilis of the central nervous system or alcoholic deterioration is diagnosed following a long prior history of psychosis, psychoneurosis, epilepsy, or the like, it is rarely possible to exclude persistence, in masked form, of the preceding innocently acquired manifestations.

(e) *Reexamination.* If VA cannot conclude that a reduction is warranted after considering the evidence as described in paragraphs (c) and (d) of this section, VA will continue the rating in effect, citing the former diagnosis with the new diagnosis, if any, in parentheses, with a notation that the rating will be continued pending reexamination to be conducted on a date to be determined on the basis of the facts of each individual case.

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

Cross-reference: For specific procedural due process in reducing ratings, *see* § 5.176.

§ 5.172 Protection of continuous 20-year ratings.

(a) *Compensation rating.* If a disability has been rated at or above a specific level for 20 years, VA may not reduce the rating below such level unless the rating was based on fraud.

(b) *Pension rating.* VA will not reduce a permanent total disability rating for pension purposes that has been continuously in effect for 20 or more years, unless the rating was based on fraud.

(c) *Effect of election regarding receipt of disability compensation.* The provisions of paragraph (a) or (b) of this section apply whether or not the veteran elects to receive disability compensation or pension during all or any part of the 20-year period.

(Authority: 38 U.S.C. 110)

§ 5.173 Protection against reduction of disability ratings when revisions are made to the Schedule for Rating Disabilities.

(a) *General.* VA will not reduce a disability rating in effect on the effective date of a revision of the applicable Schedule for Rating Disabilities unless medical evidence establishes that the rated disability has actually improved, except when the rating was assigned under the 1925 Schedule of Disability Ratings (as provided in paragraph (b) of this section).

(Authority: 38 U.S.C. 1155)

(b) *Ratings under 1925 Schedule.* (1) VA will reduce a rating that was assigned under the 1925 Schedule of Disability Ratings that was the basis of compensation on April 1, 1946, when the rated disability has undergone a sustained material improvement that would have required a reduction under the 1925 Schedule.

(2) Subject to paragraph (b)(3) of this section, VA will modify a rating that was assigned under the 1925 Schedule when an increased rating is appropriate under the Schedule for Rating Disabilities in part 4 of this chapter. After such modification, VA will assign all future ratings of that disability under the Schedule for Rating Disabilities in part 4 of this chapter. The increase in disability level must not be temporary (due to hospitalization, surgery, etc.). If a temporary increased rating is assigned, VA will restore the prior rating under the 1925 Schedule after the period of increase has elapsed unless:

(i) The permanent residuals require reduction under the 1925 Schedule; or

(ii) An increased rating is appropriate under the Schedule for Rating Disabilities in part 4 of this chapter.

(3) VA will not increase a rating assigned under the 1925 Schedule when the changed condition represents an increased degree of disability under either the 1925 Schedule or the Schedule for Rating Disabilities in part 4 of this chapter, but the rating provided by the Schedule for Rating Disabilities in part 4 of this chapter is less than the rating in effect under the 1925 Schedule on April 1, 1946.

Cross-reference: For procedural due process before reduction of rating under this section, *see* § 5.176.

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

§ 5.174 Protection of entitlement to benefits established before 1959.

(a) *Persons in receipt of or entitled to receive benefits on December 31, 1958.* Any person receiving or entitled to receive benefits under any public law administered by VA on December 31, 1958, may, except where there was fraud, clear and unmistakable error of fact or law, or misrepresentation of material facts, continue to receive such benefits as long as the conditions warranting such payment under those laws continue. VA will pay the greater benefit under the previous law or the corresponding current section of title 38 U.S.C. in the absence of an election to receive the lesser benefit.

(Authority: Section 10, Pub. L. 85–857)

(b) *Service connection established under prior laws.* Awards of service connection and the rate of disability compensation paid under prior laws repealed by Public Law 85–56 are protected, provided that the conditions warranting such status and rate continue and the award was not based on fraud, misrepresentation of facts, or clear and unmistakable error. With respect to such protected awards, VA may award compensation and special monthly compensation under current law if such award would result in compensation payment at a rate equal to or higher than that payable on December 31, 1957. Where a changed physical condition warrants re-rating of service-connected disabilities, the amounts of compensation and special monthly compensation will be determined under 38 U.S.C. 1114.

(Authority: Pub. L. 85–86; Pub. L. 85–857)

§ 5.175 Protection or severance of service connection.

(a) *Protected service connection.* (1) VA may not sever service connection that has been in effect for 10 years or more unless evidence shows that:

(i) The original grant was obtained through fraud, or;

(ii) It is clear from military records that the person identified as a veteran did not have the requisite qualifying military service or the veteran's discharge from service is of a type to prevent service connection as described in § 5.30.

(2) The protection afforded in this section extends to determinations of service connection that were the basis for grants of entitlement to dependency and indemnity compensation or death compensation.

(b) *Severance of service connection.* (1) VA will sever service connection when evidence establishes that it is clearly and unmistakably erroneous (the

burden of proof being upon VA), subject to §§ 5.152 and 5.176.

(2) A change in diagnosis may be accepted as a basis for severance of service connection if the examining physician or physicians or other proper medical authority certifies that, in the light of all accumulated evidence, the diagnosis that was the basis of the award of service connection is clearly erroneous. This certification must be accompanied by a summary of the facts, findings, and reasons supporting the conclusion that the diagnosis is erroneous.

(Authority: 38 U.S.C. 1159, 5104)

§ 5.176 Due process procedures for severing service connection or reducing or discontinuing compensation benefits.

Except as provided in § 5.83(c), when VA is contemplating severing service connection or reducing or discontinuing compensation benefit payments (including those based on individual unemployability), VA will:

(a) Prepare a rating proposing severance of service connection or reduction or discontinuance of compensation benefit payments and setting forth all material facts and reasons;

(b) Consistent with § 5.83, notify the beneficiary at his or her latest address of record of the contemplated action and furnish detailed reasons therefor; and

(c) Allow the beneficiary 60 days from the date of the notice proposing severance, reduction, or discontinuance, to present additional evidence to show that service connection should be maintained, the rating should not be reduced, or the benefits should remain intact. If VA receives no additional evidence within the 60-day period, or the evidence received does not demonstrate that the proposed action should not be taken, VA will notify the beneficiary that VA is severing service connection or reducing or discontinuing the benefit.

(Authority: 38 U.S.C. 501, 1159)

§ 5.177 Effective dates for severing service connection or discontinuing or reducing benefit payments.

(a) *Suspended awards.* If an award has been suspended and it is determined that no additional payments are in order, VA will discontinue the award effective the first of the month that follows the month for which VA last paid benefits.

(b) *Running awards.* If an award is running, VA will discontinue the award effective as appropriate under paragraphs (d) through (i) of this section.

(c) *Exceptions.* This section does not apply if:

(1) There is a change in law or a VA administrative issue or a change in interpretation of law or VA issue; if so, § 5.152 applies (effective dates based on change of law or VA issue);

(2) An award was erroneous due to an act of commission or omission by the beneficiary or with the beneficiary's knowledge; if so, § 5.165(b) applies; or

(3) An award was based solely on administrative error or an error in judgment by VA; if so, § 5.165(c) applies in cases other than severance of service connection under paragraph (d) of this section or reduction of compensation under paragraph (f) of this section.

(d) *Severance of service connection.* This paragraph (d) applies when VA severs service connection. In such cases, two 60-day periods apply. After applying the 60-day notice period described in § 5.176, VA will sever service connection effective the first day of the month after a second 60-day period beginning on the day of notice to the beneficiary of the final decision.

(e) *Character of discharge or line of duty.* This paragraph (e) applies when VA discontinues benefits based on a determination as to character of discharge or line of duty. In such cases, two 60-day periods apply. After applying the 60-day notice period described in § 5.176, VA will discontinue benefits effective the first day of the month after a second 60-day period beginning on the day of notice to the beneficiary of the final decision.

(f) *Disability compensation.* This paragraph (f) applies when VA reduces or discontinues disability compensation because of a change in service-connected disability or employability status. In such cases, two 60-day periods apply. After applying the 60-day notice period described in § 5.176, VA will pay a reduced rate or discontinue compensation effective the first day of the month after a second 60-day period beginning on the day of notice to the beneficiary of the final decision.

(g) *Pension.* This paragraph (g) applies when VA reduces or discontinues pension payments because of a change in disability or employability status. In such cases, VA will reduce the rate or discontinue pension effective the first day of the month after a second 60-day period beginning on the day of notice to the beneficiary of the final decision.

(h) *Chapter 18 monetary allowance.* This paragraph (h) applies when VA reduces or discontinues payments of a monetary allowance under 38 U.S.C. chapter 18 for children with certain birth defects. In such cases, VA will pay a reduced rate or discontinue the monetary allowance effective the first day of the month that follows the end of the 60-day notice period concerning the proposed reduction or discontinuance. The 60-day notice period is the one described in § 5.176.

(i) *Other.* The effective date for other reductions or discontinuances of benefit payments will be based upon the reasons for the change as described in § 3.500 through § 3.503 of this chapter.

(Authority: 38 U.S.C. 1110, 1131, 1117, 5112)

§§ 5.178–5.179 [Reserved]

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