compromise will be offset against benefits otherwise payable under 38 U.S.C. chapter 11.

(Authority: 38 U.S.C. 1151(b)(2))

* * * * *

4. Amend § 3.809 by:

a. In the section introductory text, removing ''38 U.S.C. 2101(a)'' and adding, in its place ''38 U.S.C. 2101(a) or 2101A(a)'' and by removing ''veteran'' and adding, in its place, ''veteran or a member of the Armed Forces serving on active duty'';

b. Revising paragraph (a);

c. Revising paragraph (b) introductory text;

d. In paragraph (b)(3), removing ''wheelchair.'' and adding, in its place, ''wheelchair, or'';

e. In paragraph (b)(4), removing ''with the loss of loss of use'' and adding, in its place, ''with the loss or loss of use'' and removing ''wheelchair.'' and adding, in its place, ''wheelchair, or'';

f. Adding paragraphs (b)(5) and (b)(6);

g. Removing paragraph (c);

h. Redesignating paragraph (d) as new paragraph (c); and

i. Revising the authority citation at the end of the section.

The revisions and additions read as follows:

§ 3.809 Specially adapted housing under 38 U.S.C. 2101(a).

* * * * *

(a) *Eligibility.* A veteran must have had active military, naval, or air service after April 20, 1898. Benefits are not restricted to veterans with wartime service. On or after December 16, 2003, the benefit under this section is also available to a member of the Armed Forces serving on active duty.

(b) *Disability.* A member of the Armed Forces serving on active duty must have a disability that was incurred or aggravated in line of duty in active military, naval, or air service. A veteran must be entitled to compensation under chapter 11 of title 38, United States Code, for a disability rated as permanent and total. In either case, the disability must be due to:

* * * * *

(5) The loss or loss of use of both upper extremities such as to preclude use of the arms at or above the elbow, or

(6) Full thickness or subdermal burns that have resulted in contractures with limitation of motion of two or more extremities or of at least one extremity and the trunk.

* * * * *

(Authority: 38 U.S.C. 1151(c)(1), 2101, 2101A).

5. Amend § 3.809a by:

a. In the section introductory text, removing ''38 U.S.C. 2101(b)'' and adding, in its place ''38 U.S.C. 2101(b) or 2101A(a)'' and by removing ''April 20, 1898,'' and adding, in its place, ''April 20, 1898, or to a member of the Armed Forces serving on active duty who is eligible for the benefit under this section on or after December 16, 2003,''.

b. Removing the authority citation after the section introductory text.

c. In paragraph (a), removing ''veteran'' each place it appears and adding, in each place, ''member of the Armed Forces serving on active duty or veteran'' and by removing the last sentence of paragraph (a).

d. Revising paragraph (b).

e. Removing paragraph (c).

f. Revising the authority citation at the end of the section.

g. Adding a cross-reference immediately after the authority citation at the end of the section.

The revision and addition read as follows:

§ 3.809a Special home adaptation grants under 38 U.S.C. 2101(b).

* * * * *

(b) A member of the Armed Forces serving on active duty must have a disability that was incurred or aggravated in line of duty in active military, naval, or air service. A veteran must be entitled to compensation under chapter 11 of title 38, United States Code, for a disability rated as permanent and total. In either case, the disability must:

(1) Include the anatomical loss or loss of use of both hands, or

(2) Be due to:

(i) Blindness in both eyes with 5/200 visual acuity or less, or

(ii) Deep partial thickness burns that have resulted in contractures with limitation of motion of two or more extremities or of at least one extremity and the trunk, or

(iii) Full thickness or subdermal burns that have resulted in contracture(s) with limitation of motion of one or more extremities or the trunk, or

(iv) Residuals of an inhalation injury (including, but not limited to, pulmonary fibrosis, asthma, and chronic obstructive pulmonary disease).

* * * * *

(Authority: 38 U.S.C. 1151(c)(1), 2101, 2101A, 2104).

Cross-Reference: Assistance to certain disabled veterans in acquiring specially adapted housing. *See* §§ 36.4400 through 36.4410 of this chapter.

[FR Doc. E9–30096 Filed 12–17–09; 8:45 am]

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DEPARTMENT OF VETERANS AFFAIRS

38 CFR Parts 19 and 20

RIN 2900–AN34

Board of Veterans' Appeals: Remand or Referral for Further Action; Notification of Evidence Secured by the Board and Opportunity for Response

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend the Appeals Regulations of the Board of Veterans' Appeals (Board or BVA) to articulate the Board's practice of referring unadjudicated claims to the Agency of Original Jurisdiction (AOJ) for appropriate action, and to describe when it is appropriate for the Board to remand a claim to the AOJ for the limited purpose of issuing a Statement of the Case (SOC). We also propose to amend the Board's Rules of Practice to outline the procedures the Board must follow when supplementing the record with a recognized medical treatise, and to remove the notice procedures the Board must currently follow when considering law not considered by the AOJ. The purpose of these amendments is to codify existing practices derived from caselaw, enhance efficiency, and provide guidance and clarification.

DATES: Comments must be received by VA on or before February 16, 2010.

ADDRESSES: Written comments may be submitted through *http://www.regulations.gov;* by mail or hand-delivery to the Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue, NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. (This is not a toll-free number.) Comments should indicate that they are submitted in response to ''RIN 2900–AN34—Board of Veterans' Appeals: Remand or Referral for Further Action; Notification of Evidence Secured by the Board and Opportunity for Response.'' All 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) 461–4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Laura H. Eskenazi, Principal Deputy Vice Chairman, Board of Veterans' Appeals (01C2), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–8078. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: The Board is an administrative body within VA that decides appeals of decisions on claims for veterans' benefits, as well as a limited class of cases of original jurisdiction. The Board is under the administrative control and supervision of a Chairman who is directly responsible to the Secretary. 38 U.S.C. 7101(a). The Board's Appeals Regulations are found at 38 CFR Part 19, and its Rules of Practice are found at 38 CFR Part 20. This document proposes to amend Parts 19 and 20 to codify existing practices derived from caselaw, enhance efficiency, and provide guidance and clarification. Specifically, we propose to amend 38 CFR 19.9 to articulate the Board's practice of referring unadjudicated claims to the AOJ for appropriate action. We also propose to amend this section to describe when it is appropriate for the Board to remand a claim to the AOJ for the limited purpose of issuing an SOC. Additionally, we propose to amend 38 CFR 20.903 to codify the procedures the Board must follow when supplementing the record with a recognized medical treatise, and to eliminate the notice procedures the Board must currently follow when considering law not considered by the AOJ. The specific changes to each section will be discussed in turn.

I. 38 CFR 19.9

A. Referral of Unadjudicated Claims

In reviewing a claim on appeal, the Board sometimes discovers an unadjudicated claim in the record. The courts in recent years have addressed whether the evidence of record raises a claim and whether a claim, either implied or explicit, has been adjudicated. *See, e.g., Williams* v. *Peake,* 521 F.3d 1348 (Fed. Cir. 2008); *Deshotel* v. *Nicholson,* 457 F.3d 1258 (Fed. Cir. 2006); *Ingram* v. *Nicholson,* 21 Vet. App. 232 (2007). Whether the record contains an unadjudicated claim often depends on the factual similarity of other existing claims. *See Moody* v. *Principi,* 360 F.3d 1306, 1310 (Fed. Cir. 2004) (observing that whether various filings submitted by a claimant should be interpreted as a claim is ''essentially a factual inquiry''). The purpose of this proposed rulemaking is not to outline what filings should be interpreted as raising a claim and under what circumstances such claims are considered adjudicated; those questions are outside the scope of this rulemaking. Rather, the purpose of this proposed rulemaking is to provide guidance as to what action the Board should take when it discovers an unadjudicated claim in the record.

A common example of this situation is a claimant submitting a new claim at a hearing before the Board. The Board may, consistent with 38 CFR 3.155(a) (''Any communication or action * * * indicating an intent to apply for one or more benefits * * * may be considered an informal claim.''), construe a particular statement as a new claim. However, the Board may not adjudicate the newly-raised claim because, with the exception of a narrow class of matters over which the Board has original jurisdiction, *see, e.g.,* 38 U.S.C. 7111, the Board is charged with deciding appeals and may not review evidence in the first instance. To do so would frustrate a claimant's right to both an initial AOJ decision and the Board's appellate review of that decision. *See Disabled Am. Veterans* v. *Sec'y of Veterans Affairs,* 327 F.3d 1339, 1347 (Fed. Cir. 2003) [hereinafter ''*DAV*''] (noting that, under 38 U.S.C. 511(a) and 7104(a), ''the Board acts on behalf of the Secretary in making the ultimate decision on claims and provides 'one review on appeal to the Secretary' ''). Because the Board may not adjudicate the new claim in the first instance, the Board ''refers'' the unadjudicated claim to the AOJ for appropriate action. These referrals help ensure that the claim will not be overlooked.

The Board's practice of referring claims was addressed favorably by the United States Court of Appeals for Veterans Claims (Court) in *Godfrey* v. *Brown,* 7 Vet. App. 398 (1995). In *Godfrey,* the Court noted that ''section 7105 of title 38, U.S. Code, establishes 'very specific, sequential, procedural steps that must be carried out by a claimant and the [AOJ] * * * before a claimant may secure ''appellate review'' by the BVA'.'' *Godfrey,* 7 Vet. App. at 409 (quoting *Bernard* v. *Brown,* 4 Vet. App. 384, 390 (1993)). The Court reasoned that allowing the Board to refer a claim to the AOJ enables the AOJ to make the ''initial review or determination'' on that claim, as referenced in 38 U.S.C. 7105(b)(1), and thus permits VA to follow the procedural prerequisites for appellate review. *Id.* at 410. Thus, the Court held that ''the Board did not err in referring [a] right-ankle claim to the [AOJ] without additional specific instructions because * * * that [claim] was not in appellate status.'' *Id.* at 409. Since *Godfrey,* the Court has often referenced the Board's ability to refer an unadjudicated claim to the AOJ for initial adjudication. *See, e.g., Jarrell* v. *Nicholson,* 20 Vet. App. 326, 334 (2006) (concluding that, because the Board lacked jurisdiction over the merits of a claim that had not been presented to and adjudicated by the AOJ, the appropriate course of action for the Board was to refer the matter to the AOJ for adjudication in the first instance); *Richardson* v. *Nicholson,* 20 Vet. App. 64, 72–73 (2006) (observing that, if the Board determines that a claim for service connection was reasonably raised but not adjudicated, the claim remains pending and must be referred to the AOJ for adjudication); *Bruce* v. *West,* 11 Vet. App. 405, 408 (1998) (holding that the Board properly referred to the AOJ a claim for service connection for tinnitus that the claimant raised for the first time in his testimony at a hearing before the Board for other claims on appeal); *Smallwood* v. *Brown,* 10 Vet. App. 93, 99–100 (1997) (concluding that the Board did not err in referring a clear and unmistakable error claim to the AOJ for adjudication).

Although the Board's regulations prescribe when a remand is and is not necessary, the regulations are silent as to the referral process. The Board's Appeals Regulations, contained in 38 CFR Part 19, include a Subpart A—Operation of the Board of Veterans' Appeals, which in turn includes a section titled ''Remand for further development.'' 38 CFR 19.9. That section indicates that, ''[i]f further evidence, clarification of the evidence, correction of a procedural defect, or any other action is essential for a proper appellate decision, a Veterans Law Judge * * * shall remand the case to the [AOJ], specifying the action to be undertaken.'' *Id.* § 19.9(a). The rule also sets forth ''exceptions'' for circumstances in which a remand is not necessary. *Id.* § 19.9(b). However, no rule mentions the Board's existing practice of referring unadjudicated claims to the AOJ for initial adjudication. Therefore, for clarity and consistency, we propose to codify this existing, court-sanctioned practice by amending 38 CFR 19.9 to describe when it is appropriate to refer a claim to the AOJ. Referral of a claim by the Board will not constitute review of the claim on appeal. Rather, the referral will be a formalized mechanism by which to notify the AOJ of an unadjudicated claim so that the AOJ may make the ''initial review or determination'' on that claim, *see* 38 U.S.C. 7105(b)(1), as

well as take any other action the AOJ deems necessary.

We propose to revise the section heading of § 19.9 to read, ''Remand or referral for further action'', to reflect inclusion of the referral action under this section. We also propose to list in a new paragraph (d) the situations for which neither a remand nor referral is required and to revise paragraph (b) to describe the details of the referral action. New paragraph (b) would require that the Board refer to the AOJ for appropriate consideration and handling in the first instance all claims reasonably raised by the record that have not been initially adjudicated by the AOJ, except for claims over which the Board has original jurisdiction. An example of a claim over which the Board has original jurisdiction is a motion for revision of a final Board decision based on clear and unmistakable error. 38 U.S.C. 7111(e) (request for revision of a Board decision based on clear and unmistakable error must be decided by the Board on the merits without referral to any adjudicative or hearing official acting on the Secretary's behalf).

B. Remand for Issuance of an SOC

A similar situation arises when the Board discovers a Notice of Disagreement (NOD) that was timely filed in response to a decision by the AOJ, but the record does not reflect that the AOJ issued an SOC as required by 38 U.S.C. 7105(d)(1) before forwarding the claims file to the Board. If the Board discovers a timely-filed NOD, and it is apparent that the NOD was not withdrawn or the claim was not granted in full following the NOD, but an SOC was never issued, the Board is faced with a question as to the proper handling of that claim.

The Court addressed this procedural situation in *Manlincon* v. *West,* 12 Vet. App. 238, 240 (1999), recognizing that an NOD initiates ''review by the Board.'' The Court held that if a timely NOD is filed but an SOC is not issued, the proper remedy for the Board is to remand, not refer, the issue to the AOJ for issuance of a SOC. *Id.* at 240–41. Since *Manlincon* was decided, the Board has been following the practice mandated by the Court. If during the course of reviewing an appeal properly before it, the Board discovers a timely filed NOD as to a claim adjudicated by the AOJ but not granted in full, and the NOD has not been withdrawn, but no SOC was issued as to that claim, the Board remands the claim to the AOJ for the limited purpose of issuing an SOC. In other words, the Board takes jurisdiction over the claim for the limited purpose of remanding it to the AOJ to issue an SOC. The appeal initiated by the filing of the NOD will be subsequently returned to the Board only if, after the AOJ issues the SOC, the appellant files a timely Substantive Appeal that perfects the appeal to the Board. *See* 38 U.S.C. 7105(d)(3).

The Board's Appeals Regulations, Subpart A—Operation of the Board of Veterans' Appeals, currently contain guidance as to when it is proper for the Board to remand a case to the AOJ, but the guidance does not cover the *Manlincon* situation. Therefore, the Board proposes to amend its regulations to codify this existing practice for clarity and consistency in adjudication. Specifically, we propose to revise paragraph (c) of 38 CFR 19.9 to address the *Manlincon* situation. New paragraph (c) would instruct the Board to remand a claim for issuance of an SOC if an NOD has been timely filed and not withdrawn, but the AOJ has not subsequently granted the claim in full or furnished the claimant with an SOC.

Although the *Manlincon* decision did not specifically address the action the Board should take if the AOJ partially grants a claim following an NOD but does not issue an SOC, proposed § 19.9(c) would extend the *Manlincon* remand procedures to cover this situation. It is generally presumed that a claimant is ''seeking the maximum benefit allowed by law and regulation'' and that a claim ''remains in controversy where less than the maximum benefit available is awarded.'' *AB* v. *Brown,* 6 Vet. App. 35, 38 (1993). The AOJ is therefore required to issue an SOC in cases where the claim is partially granted following the NOD, just as it would in cases where the benefit sought is denied outright. We believe that it is consistent with *Manlincon* for the Board to remand for issuance of an SOC if the claim was only partially granted following the NOD and no SOC was furnished. Proposed § 19.9(c) would therefore require remand for issuance of an SOC unless the claim is granted in full following the NOD or the claimant, consistent with the withdrawal requirements of 38 CFR 20.204, withdraws the NOD.

We also propose to make additional changes to 38 CFR 19.9 to enhance clarity and readability. Current paragraph (b) of § 19.9 is titled ''Exceptions'' and sets forth several specific situations in which remand to the AOJ is unnecessary. Current paragraph (c) is titled ''Scope'' and outlines specific matters over which the provisions of § 19.9 do not apply. While these paragraphs are titled differently, the purpose of each is essentially the same: Namely, to outline various circumstances in which a remand to the AOJ is not legally required. Because the provisions of current paragraphs (b) and (c) are meant to accomplish the same purpose, we propose to combine the provisions of each paragraph in a new paragraph (d) that would set forth the situations in which a remand or referral to the AOJ is not necessary. Specifically, new paragraph (d) would provide that remand to the AOJ is not necessary for each of the activities outlined in current paragraphs (b)(1) through (3) and (c)(1) through (3). Additional proposed changes to current paragraph (b)(2) are discussed in greater detail below.

II. 38 CFR 20.903

A. Thurber Procedures

We propose to amend 38 CFR 20.903 to clarify the procedures the Board must follow when it supplements the record with a recognized medical treatise.

The Court has long held that the Board is free to supplement the record on appeal with a recognized medical treatise. *See, e.g., Hatlestad* v. *Derwinski,* 3 Vet. App. 213, 217 (1992) (noting that the Board should ''include in its decisions quotations from medical treatises * * * and [that] such quotations should be of sufficient length so that their context * * * is able to be determined''); *Colvin* v. *Derwinski,* 1 Vet. App. 171, 175 (1991) (observing that if ''the medical evidence of record is insufficient, or, in the opinion of BVA, of doubtful weight or credibility, the BVA is always free to supplement the record by . . . citing recognized medical treatises in its decisions that clearly support its ultimate conclusions''). When the Board does supplement the record in this way, however, the Court has also held that the Board must ''provide the appellant with notice of its intention to use a medical treatise as well as an opportunity to respond thereto.'' *See Kirwin* v. *Brown,* 8 Vet. App. 148, 153 (1995) (citing *Thurber* v. *Brown,* 5 Vet. App. 119, 126 (1993)); *see also Hatlestad, supra.* The Board's Appeals Regulations provide that such notice does not require remand to the AOJ. 38 CFR 19.9(c)(2); *see also Kirwin* and *Thurber, supra.*

In compliance with *Kirwin* and *Thurber,* when the Board wishes to supplement the record with a recognized medical treatise, the Board's practice has been to provide the appellant with a copy of the medical treatise evidence to be used and offer the appellant and his or her representative, if any, 60 days to

respond. Similar ''notice and response'' procedures are currently codified for situations where the Board considers an opinion from the Veterans Health Administration (VHA), the Armed Forces Institute of Pathology (AFIP), VA's General Counsel (GC), or an independent medical expert (IME). 38 CFR 20.901, 20.903.

Thus, the notice and opportunity to respond provisions are currently set forth by regulation with respect to the Board's consideration of VHA, AFIP, GC, and IME opinions, but the regulations are silent with respect to the Board's obligation to provide an appellant with notice of the Board's intent to supplement the record with a recognized medical treatise. Essentially, the Board's Rules of Practice contain a gap because § 19.9(c)(2) allows the Board to supplement the record with a recognized medical treatise without first remanding the claim to the AOJ, but the regulations do not contain a corresponding provision that outlines the ''notice and response'' procedures required by *Kirwin* and *Thurber.*

To fill this gap, and for other reasons discussed below, we propose to revise paragraph (b) of 38 CFR 20.903. Proposed § 20.903(b)(1) would set forth the general rule that when the Board supplements the record with a recognized medical treatise it must notify the appellant and his or her representative, if any, that the Board will consider such recognized medical treatise in the adjudication of the appeal. Proposed 38 CFR 20.903(b)(1) would also require that such notice contain a copy of the relevant portions of the recognized medical treatise. A 60-day period would be allowed for response. Such an approach is consistent with the ''notice and response'' provisions provided for in situations where the Board considers an opinion from VHA, AFIP, VA's GC, or an IME. 38 CFR 20.901, 20.903(a).

Although *Thurber* stated that the Board must provide the appellant with notice of the ''reliance proposed to be placed on [the medical treatise evidence],'' 5 Vet. App. at 126, we have slightly modified this language in proposed § 20.903(b)(1). We believe that the word ''reliance'' could be misconstrued as suggesting that the Board has already reached a preliminary decision on the claim. We do not, however, believe that *Thurber* requires the Board to pre-adjudicate a claim before following the required notice procedures. To the contrary, the notice procedures outlined in *Thurber* are meant to elicit additional evidence and argument that will more fully inform the Board's eventual decision. To clarify that the Board need not pre-adjudicate the claim to employ the *Thurber* notice procedures, proposed § 20.903(b)(1) would require only that the Board notify the appellant that it ''will consider such recognized medical treatise in the adjudication of the appeal.'' We believe that this language serves the purpose of alerting the appellant that the Board will rely upon such evidence in reaching its ultimate determination as required by *Thurber,* while at the same time avoiding any implication that the Board has reached a preliminary decision on the appeal.

Proposed § 20.903(b)(2) would provide that notice is not required if the Board uses a recognized medical treatise or a medical dictionary for the limited purpose of defining a medical term and that definition is not material to the Board's disposition of the appeal. The Board routinely cites medical dictionaries to define words that are not in common usage among lay people, such as names of rare diseases or obscure anatomical terms. The Court has followed a similar practice over the years. *See, e.g., Fritz* v. *Nicholson,* 20 Vet. App. 507, 511 (2006) (relying on Dorland's Illustrated Medical Dictionary to define ''care''); *Felden* v. *West,* 11 Vet. App. 427, 430 (1998) (relying on Dorland's Illustrated Medical Dictionary to define ''convalescence''); *Lendenmann* v. *Principi,* 3 Vet. App. 345, 347 (1992) (relying on Webster's Medical Desk Dictionary to define several medical terms). Where the Board cites a definition contained in a medical treatise or dictionary solely for the purpose of clarifying or explaining a medical term, following the notice procedures required by *Thurber* would serve no useful purpose because in such circumstances the definition is being provided for general background information and is not being relied on by the Board in its adjudication of the appeal. However, under proposed § 20.903(b)(2), if the Board intends to use a definition found in a medical treatise or dictionary in a manner that would materially affect its decision, the notice procedures required by *Thurber* would still need to be followed.

B. Board Consideration of Law Not Already Considered by the AOJ

As outlined above, we propose to revise current paragraph (b) of § 20.903 to include the *Thurber* notice provisions. We further propose to completely remove the provisions of current 38 CFR 20.903(b) from the Board's Rules of Practice.

Current § 20.903(b) requires that if the Board intends to consider law not already considered by the AOJ, and such consideration could result in denial of the appeal, the Board must notify the appellant and his or her representative of its intent to do so, provide a copy or summary of the law to be considered, and allow 60 days for a response. A predecessor of this provision was first added to the Board's Rules of practice in 2002 as part of a larger rulemaking that, among other things, established procedures allowing the Board to develop the record and consider evidence in the first instance without remanding the appeal to the AOJ. *See* 67 FR 3099, 3105 (Jan. 23, 2002). A predecessor to current 38 CFR 19.9(b)(2), which permits the Board to consider law not considered by the AOJ without remanding the appeal, was also added to the Board's Rules of Practice as part of the same rulemaking. *Id.* at 3104.

The United States Court of Appeals for the Federal Circuit (Federal Circuit) subsequently invalidated several regulatory provisions in the Board's Rules of Practice that allowed the Board to conduct development and consider evidence in the first instance without remand to the AOJ. *See DAV,* 327 F.3d at 1341–42. As a result of the *DAV* decision, VA substantially revised §§ 19.9 and 20.903, but the predecessors to current §§ 19.9(b)(2) and 20.903(b) were retained, with minimal, largely non-substantive changes. *See* 69 FR 53807, 53808 (Sept. 3, 2004).

In light of the Federal Circuit's decision in *DAV* and several statutory provisions, we believe that the notice procedures outlined in current § 20.903(b) are unnecessary and should be removed from the Board's Rules of Practice. In *DAV,* the Federal Circuit considered a challenge to the validity of § 19.9(b)(2), which permitted the Board to consider law not considered by the AOJ in the first instance. *DAV,* 327 F.3d at 1349. The Federal Circuit deferred to VA's interpretation that the ''Board's status as an appellate body does not bar it from considering law not considered by the AOJ,'' and held that in considering ''whether the proper law was applied by the AOJ in a particular claim, the Board inherently provides legal questions 'one review on appeal to the Secretary' as required by [38 U.S.C.] 7104(a).'' *Id.* The Federal Circuit's holding was not predicated on the Board's adherence to the notice provisions outlined in current § 20.903(b). *Id.*

Several statutory provisions also contemplate the Board's consideration of all applicable law, whether or not such law has been considered by the AOJ and regardless of whether the notice provisions of current § 20.903(b)

have been satisfied. As pointed out by the Federal Circuit in *DAV,* 38 U.S.C. 7104(a) requires that ''[d]ecisions of the Board * * * be based * * * upon consideration of all * * * applicable provisions of law and regulation.'' *Id.* Section 7104(c) provides that the ''Board shall be bound in its decisions by the regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department.'' 38 U.S.C. 7104(c). Moreover, 38 U.S.C. 7104(d) requires that each Board decision include ''a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on *all material issues of fact and law* presented on the record.'' (emphasis added). None of these provisions is conditioned on the Board's following notice procedures similar to those currently outlined in 38 CFR 20.903(b). To the contrary, the notice procedures outlined in current 38 CFR 20.903(b) are not the product of any specific statutory requirement. We believe that removing this provision is consistent with the jurisprudence of both the Court and the Federal Circuit, and more accurately depicts the Board's statutory obligation to consider all applicable provisions of law and regulation.

To be consistent with our proposed removal of these provisions from current paragraph (b), we also propose to remove the reference to notification of law to be considered by the Board from the section heading of § 20.903. We also propose to remove the reference to Board consideration of law not considered by the AOJ from 38 CFR 20.1304(b)(2) and not to include in proposed § 19.9(d)(2) any reference to § 20.903.

Paperwork Reduction Act

This document contains no provisions constituting a 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, 5 U.S.C. 601–612. These amendments would not directly affect any small entities. Only VA beneficiaries and their survivors could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), these amendments are exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Order 12866—Regulatory Planning and Review

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 Order classifies a rule as a significant regulatory action requiring review by the Office of Management and Budget if it meets any one of a number of specified conditions, including: Having an annual effect on the economy of $100 million or more, creating a serious inconsistency or interfering with an action of another agency, materially altering the budgetary impact of entitlements or the rights of entitlement recipients, or raising novel legal or policy issues. VA has examined the economic, legal, and policy implications of this proposed rule and has concluded that it is not a significant regulatory action under Executive Order 12866 because it primarily codifies longstanding VA practice and already existing law, does not raise any novel legal or policy issues, and will have little to no effect on the economy.

Unfunded Mandates

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

Catalog of Federal Domestic Assistance Numbers and Titles

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

List of Subjects in 38 CFR Parts 19 and 20

Administrative practice and procedure, Claims, Veterans.

Approved: November 13, 2009.

John R. Gingrich,

Chief of Staff, Department of Veterans Affairs.

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

PART 19—BOARD OF VETERANS' APPEALS: APPEALS REGULATIONS

1. The authority citation for part 19 continues to read as follows:

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

Subpart A—Operation of the Board of Veterans' Appeals

2. Amend § 19.9 by:

a. Revising the section heading and paragraph (a) heading.

b. Revising paragraphs (b) and (c).

c. Adding paragraph (d).

d. Revising the authority citation at the end of the section.

The revisions and addition read as follows:

§ 19.9 Remand or referral for further action.

(a) *Remand.* * * *

* * * * *

(b) *Referral.* The Board shall refer to the agency of original jurisdiction for appropriate consideration and handling in the first instance all claims reasonably raised by the record that have not been initially adjudicated by the agency of original jurisdiction,

except for claims over which the Board has original jurisdiction.

(c) *Remand for a Statement of the Case.* In cases before the Board in which a claimant has timely filed a Notice of Disagreement with a determination of the agency of original jurisdiction on a claim, but the record does not reflect that the agency of original jurisdiction subsequently granted the claim in full or furnished the claimant with a Statement of the Case, the Board shall remand the claim to the agency of original jurisdiction with instructions to prepare and issue a Statement of the Case in accordance with the provisions of subpart B of this part. A remand for a Statement of the Case is not required if the claimant, consistent with the withdrawal requirements of § 20.204 of this chapter, withdraws the Notice of Disagreement.

(d) *Exceptions.* A remand or referral to the agency of original jurisdiction is not necessary for any of the following purposes:

(1) Clarifying a procedural matter before the Board, including the appellant's choice of representative before the Board, the issues on appeal, or requests for a hearing before the Board;

(2) Considering law not already considered by the agency of original jurisdiction, including, but not limited to, statutes, regulations, and court decisions;

(3) Reviewing additional evidence received by the Board, if, pursuant to § 20.1304(c) of this chapter, the appellant or the appellant's representative waives the right to initial consideration by the agency of original jurisdiction, or if the Board determines that the benefit or benefits to which the evidence relates may be fully allowed on appeal;

(4) Requesting an opinion under § 20.901 of this chapter;

(5) Supplementing the record with a recognized medical treatise; or

(6) Considering a matter over which the Board has original jurisdiction.

(Authority: 38 U.S.C. 7102, 7103(c), 7104(a), 7105).

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

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

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

Subpart J—Action by the Board

4. Amend § 20.903 by:

a. Revising the section heading.

b. Revising paragraph (b).

The revisions read as follows:

§ 20.903 Rule 903. Notification of evidence to be considered by the Board and opportunity for response.

* * * * *

(b) *If the Board supplements the record with a recognized medical treatise.* (1) *General.* If, pursuant to § 19.9(d)(5) of this chapter, the Board supplements the record with a recognized medical treatise, the Board will notify the appellant and his or her representative, if any, that the Board will consider such recognized medical treatise in the adjudication of the appeal. The notice from the Board will contain a copy of the relevant portions of the recognized medical treatise. The appellant will be given 60 days after the date of the notice described in this section to file a response, which may include the submission of relevant evidence or argument. The date the Board gives the notice will be presumed to be the same as the date of the notice letter for purposes of determining whether a response was timely filed.

(2) *Exception.* The notice described in paragraph (b)(1) of this section is not required if the Board uses a recognized medical treatise or medical dictionary for the limited purpose of defining a medical term and that definition is not material to the Board's disposition of the appeal.

5. Revise paragraph (b)(2) of § 20.1304 to read as follows:

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

* * * * *

(b) * * *

(2) *Exception.* The motion described in paragraph (b)(1) of this section is not required to submit evidence in response to a notice described in § 20.903 of this chapter.

* * * * *

[FR Doc. E9–30094 Filed 12–17–09; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2009–0859, FRL–9093–7]

Revisions to the California State Implementation Plan, San Joaquin Valley Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the San Joaquin Valley Air Pollution Control District (SJVAPCD) portion of the California State Implementation Plan (SIP). Under authority of the Clean Air Act as amended in 1990 (CAA or the Act), we are proposing to approve local rules that address reduction of animal matter and volatile organic compound (VOC) emissions from crude oil production, cutback asphalt, and petroleum solvent dry cleaning.

DATES: Any comments must arrive by January 19, 2010.

ADDRESSES: Submit comments, identified by docket number EPA–R09–OAR–2009–0859, by one of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions.

2. *E-mail: steckel.andrew@epa.gov.*

3. *Mail or deliver:* Andrew Steckel (Air–4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *http://www.regulations.gov* or e-mail. *http://www.regulations.gov* is an ''anonymous access'' system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Docket: The index to the docket for this action is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (*e.g.*, copyrighted material), and some may not be publicly available in either location (*e.g.*, CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.