



Federal Register

**Monday,
April 14, 2008**

Part III

Department of Veterans Affairs

**38 CFR Part 5
VA Benefit Claims; Proposed Rule**

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 5

RIN 2900-AM16

VA Benefit Claims

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to reorganize and rewrite in plain language its regulations involving VA benefits claims. 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 regulations involving VA benefits claims.

DATES: Comments must be received by VA on or before June 13, 2008.

ADDRESSES: Written comments may be submitted through www.Regulations.gov; by mail or hand-delivery to Director, Regulations Management (00REG), Department of Veterans Affairs, 810 Vermont Ave., 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-AM16-VA Benefit Claims." 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) 461-4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at www.Regulations.gov.

FOR FURTHER INFORMATION CONTACT: William F. Russo, Director of Regulations Management (00REG), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461-4902. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: The Secretary of Veterans Affairs has established an Office of Regulation Policy and Management 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 claims. 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.

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Overview of New Part 5 Organization

We plan to organize the new part 5 regulations so that most provisions governing a specific benefit are located in the same subpart, with general provisions pertaining to all compensation and pension benefits also grouped together. This organization will allow claimants, beneficiaries, and their representatives, as well as VA adjudicators, 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 claims and benefit application filing procedures, VA's duties, rights and responsibilities of claimants and beneficiaries, general evidence requirements, and general 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 second NPRM, concerning general evidence requirements, effective dates, revision of decisions, and protection of existing ratings, was published as proposed on May 22, 2007. *See* 72 FR 28770. This document is the third of the three NPRMs that involve regulations concerning VA benefit claims.

"Subpart D—Dependents and Survivors" would inform readers how VA determines whether an individual is a dependent or a survivor for purposes of determining eligibility for VA benefits. 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 disability compensation and service connection, including direct and secondary service connection. This subpart would inform readers how VA determines service connection and entitlement to disability compensation. 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: Old-Law Pension, Section 306 Pension, and Improved 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 was published as 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. The portion concerning eligibility and entitlement requirements as well as effective dates for Improved Pension was published as proposed on September 26, 2007. *See* 72 FR 54776.

“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, proposed regulations in Subpart L will be published in two separate NPRMs. The first, concerning payments to beneficiaries who are eligible for more than one benefit, was published as proposed on October 2, 2007. *See* 72 FR 56136.

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 VA benefits claims and related procedures. 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.

Table Comparing Proposed Part 5 Rules with Current Part 3 Rules

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

| Proposed part 5 section or paragraph | Based in whole or in part on 38 CFR part 3 section or paragraph |
|--------------------------------------|---|
| 5.1—Application | New. |
| 5.1—Claim | 3.1(p). |
| 5.50 | 3.150. |
| 5.51 | 3.151(a). |
| 5.52 | 3.152. |
| 5.53 | 3.154. |
| 5.54 | 3.155. |
| 5.55 | 3.156(a), 3.400 intro, (q)(2), (r). |
| 5.56 | 3.157. |
| 5.57(a) | New. |
| 5.57(b)–(g) | 3.160. |

Readers who use this table to compare the proposed provisions with the existing regulatory 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 addressed 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 repeated in 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 Provisions

Section 5.1 General Definitions

We propose to further amend proposed § 5.1 as published in 71 FR 16464, 16473 (Mar. 31, 2006) [RIN 2900-AL87 General Provisions], to add definitions of “application” and “claim” to the general definitions in proposed § 5.1. Current § 3.1(p) and other part 3 regulations use the terms “claim” and “application” interchangeably, which we believe might confuse the user about the intended difference between a claim and an application.

We propose to define the term “application” in part 5 as follows: “*Application* means a specific form required by the Secretary that a claimant must file to apply for a benefit.” We propose to use the term “application” only when referring to a specific form that a claimant must file to apply for a benefit VA administers. By statute, a claim must be “in the form prescribed by the Secretary.” 38 U.S.C. 5101(a). Specifying that an application is “a form required,” rather than “prescribed,” should help distinguish an application from a claim. Stating the definition of “application” in § 5.1 would place it among other definitions applied generally to adjudication of entitlement to VA benefits.

The term “claim” in part 5 would have the same meaning it currently has in part 3; no substantive change is intended. We propose to define “claim” as follows: “*Claim* means a formal or informal communication in writing requesting a determination of entitlement, or evidencing a belief in entitlement, to a VA benefit.” Stating the definition of “claim” in § 5.1 would place it among other definitions generally applicable to adjudication of entitlement to VA benefits.

VA Benefit Claims

Section 5.50 Applications Furnished by VA

Proposed § 5.50 is based on current § 3.150. It addresses situations where VA will send the appropriate application for VA benefits to a potential recipient of VA benefits. It has been slightly rewritten. The language is more active, and we have added subheadings to improve readability. Instead of referring to an “application form,” proposed § 5.50 refers to an “application” because, according to the

proposed definition of “application,” an application is a form. To refer to an application form would be redundant of the definition of application. Section 3.150 requires VA to provide the appropriate application “upon request made in person or in writing by any person applying for benefits * * *.” We propose to use the language of the statute in requiring that VA furnish the appropriate application upon request by any person “claiming or applying for, or expressing an intent to claim or apply for” a benefit VA administers. 38 U.S.C. 5102(a). This is consistent with the law and proposed regulation that provides for informal claims. *Id.*; § 5.54 of this NPRM. The change is clarifying, not substantive.

In paragraph (b), we have inserted the word “death” before the words “compensation” and “pension” in the first sentence for clarification. The term “pension” in this context means “death pension.” The term “compensation” in this context means “death compensation.”

Paragraph (c) of proposed § 5.50, which is based on 38 CFR 3.150(c), is written to be consistent with proposed § 5.53, which is based on 38 CFR 3.154. The list of circumstances to which 38 U.S.C. 1151 currently applies is accurately stated in § 3.154, while the list in § 3.150(c) is outdated. We have written proposed § 5.50(c) to reflect accurately the scope of current 38 U.S.C. 1151.

Section 5.51 Filing a Claim for Disability Benefits

Proposed § 5.51 is based on current § 3.151(a). (Paragraph (b) of current § 3.151 has been included in § 5.383, which was published as proposed on September 26, 2007. See 72 FR 54776, 54793-94 [RIN 2900-AM04 Improved Pension].) The content of paragraph (a) of § 3.151 is rewritten in plain language, and is split into two paragraphs, with appropriate headings, for improved readability.

Section 5.52 Filing a Claim for Death Benefits

Proposed § 5.52 is based on current § 3.152. In proposed § 5.52(a), we have changed the reference to § 3.153 to proposed § 5.131(a) (published as proposed on May 22, 2007, see 72 FR 28770, 28785 [RIN 2900-AM01 General Evidence Requirements, Effective Dates, Revision of Decisions, and Protection of Existing Ratings]), and we have changed the reference to § 3.400(c) to proposed § 5.567 (published as proposed on October 1, 2004, see 69 FR 59072, 59089-90 [RIN 2900-AL71 Accrued Benefits, Death Compensation, and

Special Rules Applicable Upon Death of a Beneficiary]).

Paragraph (b) of proposed § 5.52 is based on paragraph (b) of current § 3.152 and is slightly rewritten and reorganized so that it is more readable. It addresses when VA will treat a claim for a certain death benefit as a claim for another death benefit as well. For example, VA will treat a claim for death compensation as a claim for death pension as well.

Regarding accrued benefits, current § 3.152(b) includes provisions for treating certain claims for death benefits as claims for accrued benefits as well. These provisions addressing claims for accrued benefits are not included in proposed § 5.52(b) because a similar provision already appears in proposed § 5.552(c), “Claims for accrued benefits or benefits awarded, but unpaid at death,” which was published as proposed on October 1, 2004. (See 69 FR 59072, 59086 [RIN 2900-AL71 Accrued Benefits, Death Compensation, and Special Rules Applicable Upon Death of a Beneficiary]). Proposed § 5.552(c) provides that any claim filed with VA for death pension, death compensation, or dependency and indemnity compensation will also be accepted as a claim for accrued benefits and, if applicable, for benefits awarded, but unpaid at death. *Id.* Thus, it is not necessary to include similar provisions in proposed § 5.52.

Paragraph (c) of proposed § 5.52 is based on paragraph (c) of current § 3.152 and is rewritten for improved readability. Appropriate subheadings have also been added. The last sentence of current § 3.152(c)(1) states that “[w]here the award to the surviving spouse is terminated by reason of her or his death, a claim for the child will be considered a claim for any accrued benefits which may be payable.” For the reasons stated in the preceding paragraph, we propose not to repeat that rule in § 5.52 because it would be redundant of the rule in proposed § 5.552(c).

Current § 3.152(c)(1) cites 38 U.S.C. 5110(e). This citation is as authority for the regulation, not as a cross-reference. In proposed § 5.52(c)(1) and (c)(2), we have moved this citation to the authority citation following § 5.52.

Current § 3.152(c)(1) provides that a child must file a claim for dependency and indemnity compensation under certain circumstances. It has long been VA’s practice to implement paragraphs (c)(3) and (c)(4) of that section as exceptions to the claim filing requirement of paragraph (c)(1) of that section.

The exception in § 3.152(c)(3) applies when VA denies DIC to a surviving spouse. The exception in current paragraph (c)(4) applies when VA discontinues payment of death benefits to a surviving spouse because of the death or remarriage of the surviving spouse, or when a child becomes eligible for DIC by turning 18. In the circumstances described in current paragraph (c)(3), VA construes the surviving spouse's claim as the claim of the child named in the surviving spouse's claim. In the circumstances described in current paragraph (c)(4), VA converts the surviving spouse's claim into a claim on behalf of the child named in the surviving spouse's claim. VA construes or converts the surviving spouse's claim in the circumstances described in current paragraphs (c)(3) and (c)(4), respectively, if and only if any necessary evidence is submitted within 1 year after VA requests the evidence. Otherwise each child must file a new claim.

These exceptions are stated explicitly in proposed § 5.52(c)(1) and (c)(2). The exceptions are consistent with 38 U.S.C. § 5110(e), because they construe the surviving spouse's claim as the child's claim in the circumstances described. Construed this way, the surviving spouse's claim satisfies the date of claim requirement of 5110(e).

Current § 3.152 uses the terms "child" and "children" interchangeably. In § 5.52 we propose to use only the term "child", which encompasses both the singular and plural, for consistency. No substantive change is intended.

Section 5.53 Claims for Benefits Under 38 U.S.C. 1151 for Disability or Death Due to VA Treatment or Vocational Rehabilitation

Section 5.53 is based on current § 3.154, pertaining to claims for benefits under 38 U.S.C. 1151 for disability or death due to treatment in a VA facility or due to a VA vocational rehabilitation program. Proposed § 5.53 contains only minor stylistic changes, as well as a change in title. The new title is more accurate and descriptive. The cross-reference in proposed § 5.53 differs from the cross-reference in current § 3.154 in that only those provisions that apply to claims for benefits under 38 U.S.C. 1151 that are received by VA after September 30, 1997, are included. Current §§ 3.358 and 3.800 apply to claims under 38 U.S.C. 1151(a) that VA received before October 1, 1997. Because part 5 will apply only to future claims, we will not repeat the provisions of current §§ 3.358 and 3.800 in part 5.

Section 5.54 Informal Claims

Proposed § 5.54 is based on current § 3.155, pertaining to informal claims. Paragraph (a) of this section refers to an "application" instead of an "application form" to be consistent with the proposed definition of "application." To use plain language, we have changed the Latin expression, "*sui juris*," in the phrase "a claimant who is not *sui juris*" to its English meaning, "a claimant who does not have the capacity to manage his or her own affairs". We intend no substantive change. Further, the references to §§ 3.151 and 3.152 have been changed to their proposed part 5 counterparts, §§ 5.51 and 5.52 of this NPRM, respectively.

In paragraph (b), we have added the word "recognized" before "service organization" and the word "accredited" before "attorney or agent" to be consistent with part 14 of this chapter. We have also made explicit that the recognized service organization or accredited individual submitting an informal claim must be the designated representative of the claimant "as required by § 14.631 of this chapter".

Section 5.55 Claims Based on New and Material Evidence

Proposed § 5.55(a) is based on current § 3.156(a). No changes are proposed to this provision. Paragraphs (b) and (c) of current § 3.156 are not included in proposed § 5.55. They have been included in § 5.153 and § 5.166 respectively, which were published as proposed, in a separate NPRM, on May 22, 2007. See 72 FR 28770, 28789, 28791 [RIN 2900-AM01 General Evidence Requirements, Effective Dates, Revision of Decisions, and Protection of Existing Ratings].

Paragraph (b) of proposed § 5.55 consolidates the effective date rules for claims reopened based on new and material evidence. The rules are currently found in the introduction to § 3.400 and in § 3.400(q)(2) and (r). Current § 3.400(q)(2) provides that when new and material evidence is submitted after a claim has been finally disallowed, VA will assign the effective date of an award based on the "[d]ate of receipt of new claim or date entitlement arose, whichever is later." That rule is substantively identical to the general rule governing the effective date for an award based on "a claim reopened after final disallowance" set forth in the introductory text of § 3.400. The same rule is stated a third time in § 3.400(r).

Proposed § 5.55(b) consolidates these provisions into one rule: "[e]xcept as otherwise provided in this chapter, if VA reopens a finally denied claim on

the basis of new and material evidence and awards the benefit sought, the award is effective on the date entitlement arose or the date that VA received the claim to reopen, whichever is later." Throughout this proposed rulemaking, we use the terms "deny" or "denied" instead of "disallow" or "disallowed" because we believe the former is easier for the public to understand. No substantive change is intended by this use of terminology.

Section 5.56 Report of Examination or Hospitalization as Claim for Increase or To Reopen

Section 5.56 is based on current § 3.157. It has been slightly reorganized. Proposed paragraph § 5.56(a) is based on the second sentence of current § 3.157(a). The first sentence of current § 3.157(a) has not been repeated, since it is redundant of the general effective date rule in proposed § 5.150. The third sentence of current § 3.157(a), which contains a provision on liberalizing laws or VA issues, is now in a new paragraph (d) of proposed § 5.56. In paragraph (d), the reference to § 3.114 has been changed to the proposed part 5 counterpart, § 5.152, which was published as proposed on May 22, 2007. See 72 FR 28770, 28789 [RIN 2900-AM01 General Evidence Requirements, Effective Dates, Revision of Decisions, and Protection of Existing Ratings].

Proposed paragraph (b) is based on the introductory paragraph of current § 3.157(b) and is split into three subparagraphs. Proposed paragraphs (c)(1), (c)(2), and (c)(3) are based on current § 3.157(b)(1), (b)(2), and (b)(3).

The regulation has also been rewritten in plain language and subheadings have been added for greater readability. There are no substantive changes.

Section 5.57 Status of Claims

Proposed § 5.57 is based on current § 3.160, which provides definitions of informal claim, original claim, pending claim, finally adjudicated claim, reopened claim, and claim for increase, respectively.

Proposed § 5.57 includes a new paragraph, (a), defining "formal claim". In proposed paragraph (a) we define "formal claim" as "A claim filed on the application required for a specific benefit." VA has implicitly defined "formal claim" in current § 3.155(a) with the language, "Upon receipt of an informal claim, if a formal claim has not been filed, an application form will be forwarded to the claimant for execution." The term "formal claim" also appears in current §§ 3.154 and 3.157(b). The new definition in § 5.57(a) makes the implicit definition explicit

and clarifies the relationship between a claim and an application, as those terms are defined in proposed § 5.1.

In § 5.57(b) through (g), we propose to use slightly different language in our definitions of “original claim,” “pending claim,” “finally adjudicated claim,” “reopened claim,” and “claim for increase” than is used in § 3.160. Because we propose to distinguish an application from a claim, as discussed above under § 5.50, we have modified the language; instead of defining them as “application[s],” we propose to define them as “claim[s]” and describe their distinguishing characteristics. In the definitions of “finally adjudicated claim” and “pending claim” we have not repeated unnecessary language referring to “formal or informal” claims. No substantive changes are proposed.

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 of 1995

Although this document contains provisions constituting a collection of information, at 38 CFR §§ 5.51, 5.52, 5.54, 5.55, and 5.56, under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521), no new or proposed revised collections of information are associated with this proposed rule. The information collection requirements for §§ 5.51, 5.52, 5.54, 5.55, and 5.56 are approved by the Office of Management and Budget (OMB) and have been assigned OMB control numbers 2900–0001, 2900–0003, 2900–0004, 2900–0005, and 2900–0006.

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed 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. This proposed amendment would not affect any small entities. Therefore, pursuant to 5 U.S.C. 605(b), this proposed 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 1 year. This proposed 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; 64.104, 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, Health care, Pensions, Radioactive materials, Veterans, Vietnam.

Approved: December 26, 2007.

Gordon H. Mansfield,

Deputy Secretary of Veterans Affairs.

For the reasons set forth in the preamble, VA proposes to further amend 38 CFR part 5, as proposed to be added at 69 FR 4832, January 30, 2004, and as further proposed to be amended at 70 FR 24680, May 10, 2005; 71 FR 16464, March 31, 2006; and 72 FR 28770, May 22, 2007, as follows:

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

Subpart A—General Provisions

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

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

2. Section 5.1 is amended by adding definitions of “application” and “claim” in alphabetical order to read as follows:

§ 5.1 General definitions.

* * * * *

Application means a specific form required by the Secretary that a claimant must file to apply for a benefit.

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

* * * * *

Claim means a formal or informal communication in writing requesting a determination of entitlement, or evidencing a belief in entitlement, to a VA benefit.

(Authority: 38 U.S.C. 501(a), 5100)

* * * * *

Subpart C—Adjudicative Process, General

3. The authority citation for part 5, subpart C, continues to read as follows:

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

4. Sections 5.50 through 5.57 and their undesignated center heading are added to subpart C to read as follows:

Subpart C—Adjudicative Process, General**VA Benefit Claims**

Sec.

- 5.50 Applications furnished by VA.
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Authority: 38 U.S.C. 501(a) and as noted in specific sections.

Subpart C—Adjudicative Process, General**VA Benefit Claims****§ 5.50 Applications furnished by VA.**

(a) *General.* Upon request in person or in writing, VA will furnish the appropriate application to a person claiming or applying for, or expressing intent to claim or apply for, benefits under the laws administered by VA.

(b) *VA will furnish an application to a dependent upon the death of a veteran.* Upon the receipt of notice of the death of a veteran, VA will forward the appropriate application for execution by or on behalf of any dependent who has apparent entitlement to death compensation, death pension, or dependency and indemnity compensation. If it is not indicated that any person would be entitled to such benefits, but an accrued benefit that has not been paid during the veteran's lifetime is payable, VA will forward the appropriate application to the preferred dependent. VA will include notice of the time limit for filing a claim for accrued benefits in letters accompanying applications for such benefits.

Cross Reference: Extension of time limit. *See* § 3.109(b) of this chapter.

(c) *VA will not forward an application for claims for disability or death due to hospital treatment, medical or surgical treatment, examination, or training.* When disability or death is due to VA hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program, VA will not forward an application for benefits under 38 U.S.C. 1151. (*See* § 5.53 for the requirements for filing a claim pursuant to 38 U.S.C. 1151.)

(Authority: 38 U.S.C. 501(a), 5101, 5102)

§ 5.51 Filing a claim for disability benefits.

(a) *A claim must be filed in order for benefits to be paid.* An individual must file a specific claim in the form prescribed by the Secretary in order for disability benefits to be paid under the laws administered by VA.

(b) *Claims for compensation or pension.* VA may consider a claim for compensation as a claim for pension also, and VA may consider a claim for pension as a claim for compensation also. VA will award the greater benefit, unless the claimant specifically elects the lesser benefit.

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

Cross References: Definition of claim. *See* § 5.1. Informal claims. *See* § 5.54.

§ 5.52 Filing a claim for death benefits.

(a) *Form of claim.* An individual must file a specific claim in the form prescribed by the Secretary (or jointly with the Commissioner of Social Security, as prescribed by § 5.131(a)) in order for death benefits to be paid under the laws administered by VA. (*See* §§ 5.431 and 5.567 concerning effective dates of awards of improved death pension and of DIC, respectively.)

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

(b) *VA treats certain claims as claims for more than one benefit.*

(1) A claim by a surviving spouse or child for death compensation will also be considered a claim for death pension.

(2) A claim by a surviving spouse or child for dependency and indemnity compensation (DIC) will also be considered a claim for death pension.

(3) A claim by a surviving spouse or child for death pension will also be considered a claim for DIC and, if the veteran died before January 1, 1957, for death compensation.

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

(c) *Claims for death benefits by, or on behalf of, a child.*

(1) *Child turns 18 years old.* Except as provided in paragraphs (c)(4) and (c)(5) of this section, where a child's entitlement to DIC arises by reason of the child turning 18 years old, a claim will be required.

(2) *Termination of a surviving spouse's right to DIC.* Except as provided in paragraph (c)(5) of this section, when a surviving spouse's right to DIC is terminated, a child's entitlement to DIC in his or her own right arises and a claim is required.

(3) *When a surviving spouse does not have entitlement.* When a claim is filed by a surviving spouse who does not have entitlement, VA will accept the claim as a claim for a child in the

surviving spouse's custody, if the child is named in the claim.

(4) *Effective date when a surviving spouse's claim is denied.* If VA denies a claim of a surviving spouse for any reason whatsoever, an award for a child named in the surviving spouse's claim will be made as though the denied claim had been filed solely on the child's behalf, provided that evidence requested from the child in order to determine entitlement is submitted within 1 year after the date of such request. This provision applies regardless whether the evidence was requested before or after VA denied the surviving spouse's claim. If the evidence requested is not submitted within 1 year after the date of VA's request, payments may not be made for the child for any period prior to the date of receipt of a new claim.

(5) *Effective date when a surviving spouse's claim is converted to a claim on behalf of a child.* Where payments of death pension, death compensation, or DIC to a surviving spouse have been discontinued because of remarriage or death, or where a child becomes eligible for DIC by reason of turning 18 years old, and any necessary evidence is submitted within 1 year after the date of a request from VA, an award for the child named in the surviving spouse's claim will be made on the basis of the surviving spouse's claim having been converted to a claim on behalf of the child. Otherwise, payments may not be made for any period prior to the date of receipt of a new claim from the child.

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

Cross Reference: Other claims accepted as a claim for accrued benefits or benefits awarded, but unpaid at death. *See* § 5.552(c).

§ 5.53 Claims for benefits under 38 U.S.C. 1151 for disability or death due to VA treatment or vocational rehabilitation.

VA may accept as a claim for benefits under 38 U.S.C. 1151 and § 3.361 of this chapter any communication in writing indicating an intent to file a claim for disability compensation or dependency and indemnity compensation (DIC) under the laws governing entitlement to VA benefits for disability or death due to VA hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program. Such communication may be contained in a formal claim for pension, disability compensation, or DIC, or in any other document.

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

Cross References: Effective dates. *See* § 3.400(i) of this chapter. Injury or death

due to hospitalization and treatment, including effective dates. See §§ 3.361 to 3.363 of this chapter.

§ 5.54 Informal claims.

(a) Any communication or action, indicating an intent to apply for one or more benefits under the laws administered by VA, from a claimant, his or her duly authorized representative, a Member of Congress, or some person acting as next friend of a claimant who does not have the capacity to manage his or her own affairs may be considered an informal claim. Such informal claim must identify the benefit sought. Upon receipt of an informal claim, if a formal claim has not been filed, an application will be forwarded to the claimant for execution. If received within 1 year after the date it was sent to the claimant, it will be considered filed as of the date of receipt of the informal claim.

(b) A communication received from a recognized service organization, or an accredited attorney or agent may not be accepted as an informal claim if a power of attorney as required by § 14.631 of this chapter was not executed at the time the communication was written.

(c) When a claim has been filed which meets the requirements of § 5.51 or § 5.52, an informal request for increase or reopening will be accepted as a claim.

(Authority: 38 U.S.C. 501(a), 5102(a))

§ 5.55 Claims based on new and material evidence.

(a) *New and material evidence.* A claimant may reopen a finally adjudicated claim by submitting new and material evidence. New evidence means existing evidence not previously submitted to agency decisionmakers. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim.

(b) *Effective date.* Except as otherwise provided in this chapter, if VA reopens a finally denied claim on the basis of new and material evidence and awards the benefit sought, the award is effective on the date entitlement arose or the date that VA received the claim to reopen, whichever is later.

(Authority: 38 U.S.C. 501(a), 5103A(f), 5108, 5110(a))

Cross Reference: See § 20.1304(b)(1)(i) of this title for the rule on effective date assigned when evidence is submitted to the Board of Veterans' Appeals during a pending appeal.

§ 5.56 Report of examination or hospitalization as claim for increase or to reopen.

(a) *General.* A report of examination or hospitalization that meets the requirements of this section will be accepted as an informal claim for benefits under an existing law or for benefits under a liberalizing law or VA issue, if the report relates to a disability which may establish entitlement.

(b) *Requirements—(1) Prior claim for pension or disability compensation allowed, or prior claim for compensation denied because the service-connected disability was not compensable in degree.* Once a formal claim for pension or disability compensation has been allowed, or once a formal claim for disability compensation has been denied because the service-connected disability is not compensable in degree, receipt of evidence as described in paragraph (c) of this section will be accepted as an informal claim for increased benefits or an informal claim to reopen.

(2) *Prior claim for pension or compensation denied because the veteran is receiving retirement pay.* If a formal claim for pension or compensation from a retired member of a uniformed service has been denied because the veteran was receiving retirement pay, receipt of evidence as described in paragraph (c) of this section will be accepted as an informal claim for pension or compensation.

(3) *Prior claim for pension denied because the disability was not permanently and totally disabling.* If a claim for pension has been denied because the disability was not permanently and totally disabling, receipt of evidence as described in paragraph (c) of this section will be accepted as an informal claim for pension.

(c) *Evidence—(1) Report of examination or hospitalization by VA or uniformed services.*

(i) *General.* The provisions of paragraph (c)(1) of this section apply only when the reports described in paragraph (c)(1)(ii) of this section relate to examination or treatment of a disability for which service-connection has previously been established or when a claim specifying the benefit sought is received within 1 year after the date of an examination, treatment, or hospital admission described in paragraph (c)(1)(ii) of this section.

(ii) *Date of claim.* The date of the outpatient or hospital examination or date of admission to a VA or uniformed services hospital will be accepted as the date of receipt of the claim. In the case of a uniformed service examination which is the basis for granting severance pay to a former member of the Armed Forces on the temporary disability retired list, the date of the examination will be accepted as the date of receipt of the claim. In the case of an admission to a non-VA hospital where a veteran was maintained at VA expense, the date of admission will be accepted as the date of receipt of claim, if VA maintenance was previously authorized. If VA maintenance was authorized after admission, the date VA received notice of admission will be the date of receipt of the claim.

(2) *Evidence from a private physician or layman—(i) General.* Evidence from a private physician or layman will be accepted when the evidence furnished by or on behalf of the claimant is within the competence of the physician or lay person and shows a reasonable probability of entitlement to benefits.

(ii) *Date of claim.* The date that VA received such evidence will be accepted as the date of claim.

(3) *Evidence from State and other institutions—(i) General.* Examination reports, clinical records, or transcripts of records from State, county, municipal, or recognized private institutions, or other Government hospitals (except those described in paragraph (c)(1) of this section) will be accepted, provided the following requirements are met. These records must be authenticated by an appropriate official of the institution. Benefits will be granted if the records are adequate for rating purposes; otherwise findings will be verified by official examination. Reports received from private institutions not listed by the American Hospital Association must be certified by the Chief Medical Officer of VA or physician designee.

(ii) *Date of claim.* When submitted by or on behalf of the veteran and entitlement is shown, the date VA received such evidence will be accepted as the date of the claim.

(d) *Liberalizing law or VA issue.* Acceptance of a report of examination or treatment as a claim for increase or to reopen is subject to the requirements of § 5.152 with respect to action on VA initiative or at the request of the claimant and the payment of retroactive benefits from the date of the report or for a period of 1 year prior to the date of receipt of the report.

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

§ 5.57 Status of claims.

The following definitions are applicable to claims for pension, disability compensation, and dependency and indemnity compensation.

(a) *Formal claim.* A claim filed on the application required for a specific benefit.

(b) *Informal claim.* See § 5.54.

(c) *Original claim.* An initial formal claim. (See §§ 5.51 and 5.52.)

(d) *Pending claim.* A claim which has not been finally adjudicated.

(e) *Finally adjudicated claim.* A claim which has been allowed or denied 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 denial, or by denial on appellate review, whichever is the earlier. (See §§ 20.1103 and 20.1104 of this chapter.)

(f) *Reopened claim.* Any claim for a benefit received after a final denial of an earlier claim, or any claim based on additional evidence or a request for a personal hearing submitted more than 90 days after notice is provided to the appellant of the certification of an appeal and transfer of applicable records to the Board of Veterans' Appeals which was not considered by

the Board in its decision and was referred to the agency of original jurisdiction for consideration as provided in § 20.1304(b)(1) of this chapter.

(g) *Claim for increase.* Any claim for an increase in rate of a benefit being paid under a current award, or for resumption of payments previously discontinued.

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

§§ 5.58–5.79 [Reserved]

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