

because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

#### Environment

The Coast Guard has considered the environmental impact of this temporary regulation and concluded that, under Figure 2-1, paragraph (34)(g), of Commandant Instruction M16475.1C, it will have no significant environmental impact and it is categorically excluded from further environmental documentation. A Categorical Exclusion Determination and Environmental Analysis Checklist will be available for inspection and copying in the docket to be maintained at the address listed in ADDRESSES.

#### List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and record keeping requirements, Security measures, Waterways.

#### Regulation

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

#### PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

1. The authority citation for 33 CFR Part 165 continues to read as follows:

**Authority:** 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05-1(g) 6.04-1, 6.04-6, and 160.5; 49 CFR 1.46.

2. Add section 165.T11-036 to read as follows:

##### **§ 165.T11-036 Security Zone: San Diego Bay, CA.**

(a) *Location.* The following area is a security zone: the water area within Naval Station, San Diego enclosed by the following points: Beginning at 32°41'16.5" N, 117°08'01" W (Point A); thence running southwesterly to 32°41'06" N, 117°08'09.3" W (Point B); thence running southeasterly along the U.S. Pierhead Line to 32°39'36.9" N, 117°07'23.5" W (Point C); thence running easterly to 32°39'38.5" N, 117°07'06.5" W (Point D); thence running generally northwesterly along the shoreline of the Naval Station to the place of beginning.

(b) *Effective Dates.* This temporary regulation is effective May 2, 2001 through October 29, 2001.

(c) *Regulations.* In accordance with the general regulations in section 165.33 of this part, entry into the area of this

zone is prohibited unless authorized by the Captain of the Port or the Commanding Officer, Naval Base, San Diego.

(d) The U.S. Navy may assist the U.S. Coast Guard in the patrol and enforcement of this security zone.

Dated: April 6, 2001.

**S.P. Metruck,**

*Commander, U.S. Coast Guard, Captain of the Port, San Diego.*

[FR Doc. 01-10712 Filed 5-1-01; 8:45 am]

**BILLING CODE 4910-15-U**

#### DEPARTMENT OF VETERANS AFFAIRS

##### **38 CFR Part 3**

**RIN 2900-AJ99**

#### Review of Benefit Claims Decisions

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule.

**SUMMARY:** This document concerns the Department of Veterans Affairs' (VA) adjudication regulations. We are adding new provisions to allow any claimants who file a timely Notice of Disagreement to obtain a de novo review of their claims at the Veterans Service Center level before deciding whether to proceed with the traditional appeal process. This is intended to provide a more efficient means for resolving disagreements concerning claims.

**DATES:** *Effective Date:* June 1, 2001.

**FOR FURTHER INFORMATION CONTACT:** Bill Russo, Attorney-Advisor, Compensation and Pension Service, or John Bisset, Jr., Consultant, Compensation and Pension Service, Regulations Staff, Veterans Benefits Administration, 810 Vermont Avenue, NW., Washington, DC 20420, telephone (202) 273-7210 and (202) 273-7213, respectively.

**SUPPLEMENTARY INFORMATION:** On February 18, 2000, VA published in the **Federal Register** (65 FR 8329-8330), a proposed rule which would establish provisions at 38 CFR 3.2600 to allow any claimants who file a timely Notice of Disagreement to obtain a de novo review (a new and complete review with no deference given to the decision being reviewed) by Veterans Service Center personnel before deciding whether to proceed with the traditional appeal process. We received written comments from American Veterans of WWII, Korea and Vietnam (AMVETS), Florida Department of Veterans' Affairs, National Organization of Veterans Advocates, Paralyzed Veterans of America, Veterans of Foreign Wars (Department of Maine), three VA

employees and two concerned private individuals.

#### Potential Changes to the Traditional Appeal Process

We proposed to establish a new de novo review procedure that would be available to any claimant who files a Notice of Disagreement with a decision on a claim governed by 38 CFR part 3. We did not, and do not, intend the new de novo review procedure to change the procedures or rights involved with appealing such claims decisions to the Board of Veterans' Appeals. We intend it to be an additional, optional procedure to be conducted, if at all, between a claimant's filing a Notice of Disagreement and VA's issuance of a Statement of the Case. If de novo review under § 3.2600 is not requested with the Notice of Disagreement or after the Notice of Disagreement is filed but within 60 days after VA mails notice of the right of such review to the claimant, then the appeal will proceed in accordance with the traditional appeal process. However, a claimant may not pursue de novo review and the traditional appeal simultaneously. A traditional appeal is suspended until de novo review is complete. Otherwise, there would be a risk of duplicative development and inconsistent decisions made in the same claim.

Two commenters stated that the proposed regulations are unclear as to whether they change existing procedures regarding filing and processing of the Notice of Disagreement and the issuance of the Statement of the Case.

The final rule does not modify the procedures of the traditional appeal process. To make this clear, we are amending the proposed rule in two respects. At the end of § 3.2600(b), we are adding language that provides that if a claimant fails to timely request de novo review under § 3.2600, VA will proceed with the traditional appellate process by issuing a Statement of the Case. For clarity, we are also adding a sentence to § 3.2600(b) to preclude any extension of the time limit. Section 3.109(b) allows for a good cause extension of time limits within which a claimant is required to act to perfect a claim or challenge an adverse VA decision. Since the de novo review process is an optional procedure, not a required one, § 3.109(b) does not apply to the period during which a claimant may request the de novo review process. Moreover, VA believes that a 60-day time limit, without the possibility of extension, is a reasonable amount of time for a claimant to decide whether to opt for the de novo review process.

In addition, we are using the last sentence of the proposed § 3.2600(b) to begin a new § 3.2600(f). This new paragraph provides that review under § 3.2600 does not limit the appeal rights of a claimant, and, if the claimant does not withdraw his or her Notice of Disagreement as a result of this review process, VA will proceed with the traditional appellate process by issuing a Statement of the Case.

One commenter suggested that the proposed § 3.2600 be amended to make clear that claimants who have filed a Notice of Disagreement may present additional evidence.

This final rule does not modify existing procedures for submission of evidence. Under current regulations, any claimant may present additional evidence after filing a Notice of Disagreement (38 CFR 19.37, 20.304 and 20.1304). Furthermore, § 3.2600(c) allows the reviewer to obtain additional evidence. We therefore make no change based on this comment.

Two commenters expressed concern that this rulemaking would limit the right of a claimant to have a hearing at some point following this new review process.

This final rule doesn't place any limitations on existing rights: 38 CFR 3.103(c) states, "Upon request, a claimant is entitled to a hearing at any time on any issue involved in a claim within the purview of part 3 of this chapter, subject to the limitations described in § 20.1304 of this chapter with respect to hearings in claims which have been certified to the Board of Veterans' Appeals for appellate review." In fact, proposed § 3.2600(b) specified that review under § 3.2600 "does not limit the appellate rights of a claimant." For these reasons, we make no change based on these comments.

#### **Management and Personnel Matters**

One commenter predicted that implementation of the de novo review process that VA proposed would increase the backlog of pending claims because VA would assign its most productive adjudicators to this new review process. This same commenter predicted that implementation of this review process will cause a decline in the quality of VA claims decisions, for this same reason, and because there would be insufficient oversight of decisions made during this review process. Another commenter expressed concern that no benefit would be gained from the de novo review process unless Veterans Service Centers are authorized to hire additional personnel to conduct the de novo review.

VA believes that there is no evidence that implementation of the de novo review process will increase the backlog of pending claims. In addition, VA believes that any increase in the backlog of pending claims which might occur as the de novo review program begins, will be offset by a greater long-term reduction in pending appeals. At the twelve VA Veterans Service Centers that have participated in the pilot test of the Decision Review Officer program since December 1997, there has been a significant decline in the number of substantive appeals filed. VA also believes that there will be no decline in the quality of VA decisions due to the de novo review program. There has been no such decline at the twelve pilot Service Centers. Moreover, decisions rendered under the de novo review process will be subject to VA Central Office oversight under VA's Systematic Technical Advisory Review (STAR), just like other Service Center decisions. VA believes there will be significant efficiency benefits gained through the de novo review program: We believe it will reduce the number of cases that go to the Board of Veterans' Appeals, which will in turn reduce the number of claims which must be readjudicated on remand from the Board of Veterans' Appeals. We therefore make no changes based on these comments.

One commenter suggested that the Decision Review Officers should be placed outside the chain of command of the Veterans Service Center Manager and report directly to the Director of their VA Regional Office to ensure that the Decision Review Officer is independent.

VA believes that it is not necessary to remove the Decision Review Officers from the chain of command of the Veterans Service Center Manager in order for them to function independently. Under the final rule, a Service Center Manager has no authority, other than the existing clear and unmistakable error authority under § 3.105(a) or the difference of opinion authority under § 3.105(b) (which must be approved by VA Central Office), to overturn a Decision Review Officer's decision. We therefore make no change based on this comment.

This same commenter suggested that attorneys perform de novo reviews under § 3.2600, since attorneys are most familiar with the statutes, regulations and adjudication manual provisions regarding veterans benefits.

VA believes that other staff besides attorneys are qualified to serve as Decision Review Officers. For example, staff which are currently working as Hearing Officers or Master Rating

Specialists have extensive knowledge of statutes, regulations and adjudication manual provisions regarding veterans benefits, and are well qualified to serve as Decision Review Officers. We therefore make no change based on this comment.

#### **Representation for Claimants**

Two commenters urged that the de novo review process include a claimant's duly appointed representative, and that the proposed § 3.2600 be amended for that purpose.

Nothing in this final rule excludes or discourages the participation of claimants' representatives. Furthermore, § 3.103(e) states, "Subject to the provisions of §§ 14.626 through 14.637 of this title [concerning recognition of veterans service organizations and accreditation of individual representatives], claimants are entitled to representation of their choice at every stage in the prosecution of a claim." Therefore, we believe that VA regulations make it clear that a claimant is allowed to have representation during this new review process, and we make no change based on these comments.

#### **Timing of VA Notice of Right to De Novo Review**

One commenter said that the proposed regulation fails to make it clear when the VA will send the claimant notice of the right to the de novo review.

Based on this comment, we have specified in § 3.2600(b) that VA will send the notice "upon receipt of the Notice of Disagreement."

#### **Timing of Claimant's Request for De Novo Review**

Two commenters said the proposed rule was unclear as to whether a request for a de novo review, filed at the same time as the Notice of Disagreement, would be considered valid.

VA concurs. We have amended § 3.2600(b) to provide that a claimant may request review under § 3.2600 with his or her Notice of Disagreement or after the Notice of Disagreement is filed but not later than 60 days after VA mails notice of the right to de novo review.

#### **Time Limits for VA Action**

One commenter suggested that this rulemaking include a provision to require VA to respond to a Notice of Disagreement within 30 days. We believe the intent of the comment is to require, by regulation, that VA furnish notice of the right to a review under § 3.2600 within 30 days of the receipt of the Notice of Disagreement. This

commenter felt that this would improve VA's accountability to claimants.

VA believes that it would be inadvisable to set a deadline for VA to furnish this notice. Instances arise where VA must ask the claimant to clarify some aspect of the Notice of Disagreement. This would make it impracticable for VA to furnish the notice within a specified time period. We therefore make no change based on this comment.

One commenter suggested that this rulemaking strictly limit the time VA has to conclude the de novo review, for example, within 30–60 days.

We believe that it would be inadvisable to set time limits on the review process. Due to factors such as VA's workload or illness of the claimant, there may be unavoidable delays in scheduling an informal conference or obtaining additional relevant evidence. We therefore make no change based on this comment.

#### **Clear and Unmistakable Error**

One commenter stated the rulemaking is unclear as to whether the reviewer will have independent authority to revise decisions based on clear and unmistakable error, or whether the Veterans Service Center Manager must approve such decisions.

Section 3.2600(e) clearly authorizes the reviewer to reverse or revise prior decisions based on clear and unmistakable error under § 3.105(a) without obtaining the approval of any other VA official. We therefore make no change to § 3.2600 based on this comment. However, VA has amended § 3.104 to make clear that not only § 3.105 but also new § 3.2600 are valid bases for revision of decisions on the same factual basis as the initial decision by the agency of original jurisdiction.

One commenter stated the rulemaking is unfair because it gives the reviewer authority to revise decisions based on clear and unmistakable error in a manner unfavorable to the claimant, without any prior notice to the claimant. This same commenter stated that the rulemaking should be amended to allow a claimant to obtain de novo review of a clear and unmistakable error. This commenter also stated that the potential for clear and unmistakable error review of prior, final decisions may be a disincentive to seeking a review under § 3.2600.

As stated in § 3.2600(e), the reviewer will have the same clear and unmistakable error authority as any other VA adjudicator under § 3.105(a). However, we note that § 3.103(b) and § 3.105(e) and (f) do already require advanced notice of proposed reductions

or terminations of benefits. With respect to clear and unmistakable error claims filed by claimants, under § 3.2600, if such claims are denied, the claimant may file a Notice of Disagreement, and will then be notified of his or her right to the de novo review process, just as with any other claim governed by 38 CFR part 3. The potential for clear and unmistakable error review is not unique to the de novo review process under § 3.2600. It applies to any claim filed subsequent to a final VA decision. We therefore make no change based on this comment.

#### **Date of Implementation**

One commenter said that the proposed regulations fail to make it clear which claimants will be eligible for the de novo review (i.e. those with appeals pending on the effective date of the regulation, or those filing claims on or after the effective date).

To clarify this issue, we have added to proposed § 3.2600 a new paragraph (g), which states: "This section applies to all claims in which a Notice of Disagreement is filed on or after June 1, 2001." This will provide claimants with a date certain on which the de novo review will be available. We believe that including claims which are pending at various stages of the appellate process would be administratively difficult because the de novo review is designed to occur prior to the traditional appellate process.

#### **Other Comments**

One commenter suggested that VA conduct de novo review in every claim in which a Notice of Disagreement is filed, unless claimants specifically state they do not want to go through this review process.

As was stated in proposed § 3.2600(b), "This [de novo] review does not limit the appellate rights of a claimant." We believe the suggestion made by this commenter would interfere with the traditional appeal process by requiring claimants who want only the traditional process (and not the de novo process) to file an extra document which makes that statement. We also believe that the de novo review process should be optional for claimants, not mandatory. We therefore make no change based on this comment.

One commenter suggested that a favorable decision resulting from the de novo review process need not contain a citation to the pertinent laws.

We believe that requiring all decisions issued under the de novo review process to contain the items listed in § 3.2600(d) will provide more consistent, uniform decisions. This will

benefit both claimants and the Board of Veterans' Appeals (if the claim is ultimately appealed there). We therefore make no change based on this suggestion.

One commenter urged that VA allow claimants whose cases have been remanded to the Veterans Service Center by the Board of Veterans' Appeals to obtain review under § 3.2600 at that stage.

Nothing in this final rule modifies the post-remand VA claims process. We note, however, that no existing regulations or policies prohibit a Veterans Service Center from assigning whatever staff they deem appropriate (including the Decision Review Officer) to review a case following a remand by the Board of Veterans' Appeals. Review by a Decision Review Officer following remand from the Board would not, however, be made under § 3.2600 procedures because, as we stated above, the de novo review under § 3.2600 is designed to occur prior to the traditional appellate process. We therefore make no change based on this suggestion.

One commenter suggested that the proposed § 3.2600 be revised to give the reviewer authority to grant entitlement to non-service connected pension on an extra-schedular basis under 38 CFR 3.321(b)(2).

This final rule is not intended to modify the procedure or authority established by § 3.321(b)(2), which authorizes only Adjudication Officers to grant pension on an extra-schedular basis if schedular percentage standards are not met. That procedure and authority is intended to function as a rare exception to the general requirement in § 4.17 that a claimant must meet certain minimum disability rating percentage criteria to be entitled to pension benefits. VA believes that the Adjudication Officer (now called Veterans Service Center Manager in certain VA Regional Offices) is capable of deciding all such claims. We therefore make no change based on this comment.

One commenter suggested that VA should discuss the applicability of the U.S. Court of Appeals for the Federal Circuit decisions in *Hayre v. West*, 188 F.3d 1327 (Fed. Cir. 1999), and *Brown v. West*, 203 F.3d 1378 (Fed. Cir. 2000), but did not elaborate.

These cases have no applicability to the subject of this rulemaking, which is de novo review of certain appealed decisions, so we make no change based on this comment. We note, however, that the de novo review process will be available in any claim for which a Notice of Disagreement has been filed on or after the effective date of this

regulation, including claims for an earlier effective date (e.g., *Hayre*) and clear and unmistakable error (e.g., *Brown*).

Finally, we are making one other change from the proposed rule. We proposed to add a new subpart D to part 3 and a new § 3.2100, which would have governed the scope of applicability of provisions in subpart D. After the proposed rule was published, VA published another final rule that added subpart D and new § 3.2100. Accordingly, we do not include either subpart D or § 3.2100 in this final rule.

#### *Executive Order 12866*

The Office of Management and Budget has reviewed this final rule under Executive Order 12866.

#### *Paperwork Reduction Act*

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3520).

#### *Unfunded Mandates*

The Unfunded Mandates Reform Act requires (in section 202) that agencies prepare an assessment of anticipated costs and benefits before developing any rule that may result in an expenditure by State, local, or tribal governments, in the aggregate, or by the private sector of \$100 million or more in any given year. This final rule will have no consequential effect on State, local, or tribal governments.

#### *Regulatory Flexibility Act*

The Secretary hereby certifies that the adoption of this final rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. The final rule does not directly affect any small entities. Only VA beneficiaries are 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.

The Catalog of Federal Domestic Assistance program numbers are 64.100, 64.101, 64.104, 64.105, 64.106, 64.109, 64.110, and 64.127.

#### **List of Subjects in 38 CFR Part 3**

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

Approved: February 15, 2001.

**Anthony J. Principi,**

*Secretary of Veterans Affairs.*

For the reasons set forth in the preamble, 38 CFR part 3 is amended as follows:

### **PART 3—ADJUDICATION**

#### **Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation**

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

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

##### **§ 3.104 Amended**

2. In § 3.104, paragraph (a), the second sentence is amended by removing “§ 3.105” and adding, in its place, “§ 3.105” and adding, in its place, “§ 3.105 and § 3.2600”.

##### **§ 3.105 Amended**

3. In § 3.105, paragraph (b) is amended by adding, as the last sentence, “However, a decision may be revised under § 3.2600 without being recommended to Central Office.”

#### **Subpart D—Universal Adjudication Rules That Apply to Benefit Claims Governed by Part 3 of this Title**

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

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

5. A new undesignated center heading and § 3.2600 are added to subpart D to read as follows:

#### **Revisions**

##### **§ 3.2600 Review of benefit claims decisions.**

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

deference to the decision being reviewed.

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

(c) The reviewer may conduct whatever development he or she considers necessary to resolve any disagreements in the Notice of Disagreement, consistent with applicable law. This may include an attempt to obtain additional evidence or the holding of an informal conference with the claimant. Upon the request of the claimant, the reviewer will conduct a hearing under § 3.103(c).

(d) The reviewer may grant a benefit sought in the claim notwithstanding § 3.105(b), but, except as provided in paragraph (e) of this section, may not revise the decision in a manner that is less advantageous to the claimant than the decision under review. A review decision made under this section will include a summary of the evidence, a citation to pertinent laws, a discussion of how those laws affect the decision, and a summary of the reasons for the decision.

(e) Notwithstanding any other provisions of this section, the reviewer may reverse or revise (even if disadvantageous to the claimant) prior decisions of an agency of original jurisdiction (including the decision being reviewed or any prior decision that has become final due to failure to timely appeal) on the grounds of clear and unmistakable error (see § 3.105(a)).

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

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

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

[FR Doc. 01–11028 Filed 5–1–01; 8:45 am]

**BILLING CODE 8320–01–U**