

## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 5

RIN 2900-AL82

#### Duties of VA; Rights and Responsibilities of Claimants and Beneficiaries

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of Veterans Affairs (VA) proposes to reorganize and rewrite in plain language its disability compensation and pension regulations relating to the duties of VA and the rights and responsibilities of claimants and beneficiaries. These revisions are proposed as part of VA's rewrite and reorganization of all of its compensation and pension regulations in a logical, claimant-focused, and user-friendly format. The intended effect of the proposed revisions is to assist claimants, beneficiaries, and VA personnel in locating and understanding these regulations.

**DATES:** Comments must be received by VA on or before July 11, 2005.

**ADDRESSES:** Mail or hand-deliver written comments to: Director, Regulations Management (00REG1), Department of Veterans Affairs, 810 Vermont Avenue, NW., Room 1068, Washington, DC 20420; or fax comments to (202) 273-9026; or e-mail comments to [VAregulations@va.gov](mailto:VAregulations@va.gov) or through <http://www.Regulations.gov>. Comments should indicate that they are submitted in response to "RIN 2900-AL82." 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 202-273-9515 for an appointment.

**FOR FURTHER INFORMATION CONTACT:** Clay Witt, Chief, Regulations Rewrite Project (00REG2), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273-9515.

**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 duties of VA and rights and responsibilities of claimants and beneficiaries. After review and consideration of public comments, final versions of these proposed regulations will ultimately be published in a new part 5 in 38 CFR.

#### Outline

Overview of New Part 5 Organization  
Overview of Proposed Subpart C

Organization  
Table Comparing Current Part 3 Rules with Proposed Part 5 Rules  
Content of Proposed Regulations

#### Rights of Claimants and Beneficiaries

- 5.80 Right to representation.
- 5.81 Submission of information, evidence, or argument.
- 5.82 Right to a hearing.
- 5.83 Right to notice of decisions and proposed adverse actions.
- 5.84 Restoration of benefits following adverse action.

#### Duties of VA

- 5.90 [Reserved]
- 5.91 Medical evidence for disability claims.
- 5.92 Independent medical opinions.
- 5.93 Service records which are lost, destroyed, or otherwise unavailable.

#### Responsibilities of Claimants and Beneficiaries

- 5.100 Time limits for claimant or beneficiary responses.
- 5.101 Requirement to provide Social Security numbers.
- 5.102 Meeting reexamination requirements.
- 5.103 Failure to report for VA examination or reexamination.
- 5.104 Certifying continuing eligibility to receive benefits.

Endnote Regarding Amendatory Language  
Paperwork Reduction Act  
Regulatory Flexibility Act  
Executive Order 12866  
Unfunded Mandates  
Catalog of Federal Domestic Assistance  
numbers

List of Subjects in 38 CFR Part 5

#### Overview of New Part 5 Organization

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

The first major subdivision would be "Subpart A—General Provisions." It would include information regarding the scope of the regulations in new part 5, delegations of authority, general definitions, and general policy provisions for this part.

- "Subpart B—Service Requirements for Veterans" would include information regarding a veteran's military service, including minimum service requirements, 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 portion concerning claimants' and beneficiaries' rights and responsibilities and VA's duties is the subject of this document.

- "Subpart D—Dependents and Survivors" would inform readers how VA determines whether an individual is a dependent or a survivor for purposes of determining eligibility for VA benefits. It would also provide the evidence requirements for these determinations.

- "Subpart E—Claims for Service Connection and Disability Compensation" would define service-connected disability compensation, including direct and secondary service connection. This subpart would inform readers how VA determines entitlement to service connection. The subpart would also contain those provisions governing presumptions related to service connection, rating principles, and effective dates, as well as several special ratings. This subpart will be published as three separate NPRMs due

to its size. The first, concerning presumptions related to service connection, was published on July 27, 2004. See 69 FR 44614.

- “Subpart F—Nonservice-Connected Disability Pensions and Death Pensions” would include information regarding the three types of nonservice-connected pension: Improved Pension, Old-Law Pension, and Section 306 Pension. This subpart would also include those provisions that state how to establish entitlement to Improved Pension, and the effective dates governing each pension. This subpart will be 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.

- “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 will be published as two separate NPRMs due to its size. The portion concerning accrued benefits, 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 will be the subject of a separate NPRM.

- “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.

- “Subpart I—Benefits for Filipino Veterans and Survivors” would pertain to the various benefits available to Filipino veterans and their survivors.

- “Subpart J—Burial Benefits” would pertain to burial allowances.

- “Subpart K—Matters Affecting Receipt of Benefits” would contain provisions regarding bars to benefits, forfeiture of benefits, and renouncement of benefits.

- “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 final subpart, “Subpart M—Apportionments and Payments to Fiduciaries or 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 as part of the Project, we cite the proposed part 5 section. 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.

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 part of the Project, if the matter being commented on relates to both NPRMs.

**Overview of Proposed Subpart C Organization**

This NPRM pertains to compensation and pension regulations that apply to the duties of VA and the rights and responsibilities of claimants and beneficiaries. 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 in these proposed regulations are the same as in their existing counterparts in 38 CFR part 3. However, a few substantive changes are proposed.

**Table Comparing Current Part 3 Rules With Proposed Part 5 Rules**

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

Proposed part 5 section or paragraph	Based in whole or in part on 38 CFR part 3 section or paragraph (or “New”)
5.80 .....	1st sentence, 3.103(e); 2nd sentence, new.
5.81(a) .....	3.103(d)
5.81(b) .....	New.
5.82(a)(1) .....	3.103(c)(1)
5.82(a)(2) .....	New.
5.82(b) .....	3.103(c)(2)
5.82(c) .....	3.103(c)(1)
5.82(d)(1) .....	3.103(c)(1)
5.82(d)(2) .....	3.103(c)(2)
5.82(d)(3) .....	New.
5.82(e)(1) .....	3.103(c)(2)
5.82(e)(2) .....	3.103(c)(1)
5.82(e)(3) .....	New.
5.82(f)(1) .....	3.105(i)(1)
5.82(f)(2) .....	3.105(i)(1)
5.82(f)(3) .....	3.105(i)(1)
5.82(f)(4) .....	3.105(i)(1)
5.82(f)(5) .....	3.105(i)(2)
5.83(a) .....	3.1(q); 3.103(b)
5.83(a)(1) .....	3.103(b)(1), (f)
5.83(a)(2) .....	3.103(b)(1), (f)
5.83(a)(3) .....	3.103(b)(1), (f)
5.83(a)(4) .....	3.103(b)(1), (f)
5.83(a)(5) .....	3.103(b)(1), (f)
5.83(b) .....	3.103(b)(2)
5.83(c)(1) .....	3.103(b)(3)(i)
5.83(c)(2) .....	3.103(b)(3)(ii)
5.83(c)(3) .....	3.103(b)(3)(iii)
5.83(c)(4) .....	3.103(b)(3)(iv)
5.83(c)(5) .....	3.103(b)(3)(v)
5.83(c)(6) .....	3.103(b)(3)(vi)
5.84 .....	3.103(b)(4)
5.91(a) .....	3.326 (b)–(c)
5.91(b) .....	3.304(c)
5.92 .....	3.328
5.93 .....	New.
5.100 .....	3.110
5.101(a) .....	3.216
5.101(b)(1) .....	3.216
5.101(b)(2) .....	3.216
5.101(c) .....	3.400(w)
5.101(d) .....	New.
5.101(e) .....	3.216
5.101(f) .....	3.216
5.102(a) .....	3.327(a)
5.102(b) .....	3.327(a)
5.102(c)(1) .....	3.327(b)(1)
5.102(c)(2)(i) .....	3.327(b)(2)(i)
5.102(c)(2)(ii) .....	3.327(b)(2)(ii)–(iii)
5.102(c)(2)(iii) .....	3.327(b)(2)(iv)
5.102(c)(2)(iv) .....	3.327(b)(2)(v)
5.102(c)(2)(v) .....	3.327(b)(2)(vi)
5.102(c)(3) .....	3.327(b)(1); 4.28
5.102(d)(1)–(2) .....	3.327(c)
5.103, except for 5.103(e).	3.655
5.103(e) .....	3.330
5.104(a) .....	3.652(a)
5.104(b) .....	3.652(a)(1)
5.104(c) .....	3.652(a)(1)–(2)
5.104(d) .....	3.652(b)

Readers who use this table to compare existing regulatory provisions with the proposed provisions, and who observe a substantive difference between them, should consult the text that appears later in this document for an explanation of any significant changes

in each regulation. Not every paragraph of every current part 3 regulation 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

#### Rights of Claimants and Beneficiaries

##### 5.80 Right to Representation

We propose to state the provisions pertaining to claimants' and beneficiaries' right to representation, located in current § 3.103(e), in § 5.80. We believe that this concept is difficult to find in the current Part 3 organization and that assigning it a separate section would make it more prominent than it is in Part 3. We also propose to add a provision stating that VA will inform a claimant or beneficiary of this right when VA sends them a decision or a proposed reduction, discontinuance, or other adverse action. Current 38 CFR 19.25 only requires VA to inform claimants of this right when a decision is rendered. However, it has been long-standing VA practice to inform beneficiaries of this right when we propose an adverse action. To ensure that beneficiaries and their representatives know that VA will provide such notice, we propose to include this provision in §§ 5.80 and 5.83(a).

##### 5.81 Submission of Information, Evidence, or Argument

We also propose that current § 3.103(d), "Submission of evidence," be set forth without substantive change in a new regulation, designated as § 5.81(a). This proposed regulation states that any information, evidence, or argument offered in support of a claim is to be made part of the record of proceedings. Also to be included in the record are any issues raised by the claimant.

New § 5.81(b) clarifies who may submit information, evidence, or argument. Of course a claimant or beneficiary may make such submissions, or, where applicable, do so through a fiduciary or guardian acting as his or her surrogate. In addition, unless provided otherwise in another part 5 section, we propose to permit a representative to submit any information, evidence, or argument on behalf of a claimant or beneficiary pursuant to any part 5 regulation that allows or requires submission of information, evidence, or argument. VA's regulations do not explicitly state that a representative may submit any information, evidence, or argument on behalf of a claimant or beneficiary, but it has long been VA's practice to allow such submissions. This practice allows a representative to properly assist a claimant or beneficiary in submitting items needed by VA in the adjudication process.

##### 5.82 Right to a Hearing

We also propose a regulation, § 5.82, pertaining to a claimant's right to a hearing before the agency of original jurisdiction. The regulation would consist of all the provisions relating to this right that are currently in §§ 3.103(c) and 3.105(i). It is logical to place all provisions pertaining to a single subject in one regulation.

We propose not to include in § 5.82 the last sentence of current § 3.103(c)(2), which reads as follows: "In cases in which the nature, origin, or degree of disability is in issue, the claimant may request visual examination by a physician designated by VA and the physician's observations will be read into the record." We believe that the right of a claimant to request an examination or opinion is no longer needed because under 38 U.S.C. 5103A(d), enacted in 2000, VA will provide a medical examination or opinion if it is "necessary to make a decision on the claim." This statutory provision has been codified at 38 CFR 3.159(c)(4)(i).

Current 38 CFR 3.103(c)(1) states in relevant part, "[u]pon request, a claimant is entitled to a hearing at any time on any issue or issues involved in a claim." We propose to replace the reference to "a hearing" with "one hearing." A claimant generally requests a hearing after receiving an initial decision on a claim or after receiving an adverse decision affecting the receipt of VA benefits (or a proposed decision to reduce or discontinue VA benefits). The hearing is generally requested for the purpose of presenting additional evidence or argument to substantiate the

claim. The VA official conducting the hearing is obligated to elicit any information or evidence not already of record in support of the benefits claimed. Therefore, the current regulatory language that provides for multiple hearing opportunities for a claimant to present information or evidence is unnecessarily expansive. We also note that this proposed change does not affect a claimant's right to a hearing before the Board of Veterans' Appeals. The third sentence of proposed 5.82(a)(1) states, "A claimant is also entitled to a hearing before the Board of Veterans" Appeals. See § 20.700 and § 20.1304 of this chapter."

At proposed § 5.82(a)(2), we state that, under certain circumstances, one additional hearing on an issue will be provided to a claimant. The additional hearing will be provided if the claimant asserts that a new witness has been discovered or new evidence found that could substantiate the claim and that this witness or evidence could only be presented at a hearing and could not be presented at the original hearing. This limits the circumstances when the additional hearing can be requested and serves the interests of claimants, beneficiaries, and VA in expeditiously handling claims. We believe that including this exception to the one-hearing rule is fair to claimants and beneficiaries.

Neither current § 3.103, nor any other part 3 regulation, generally provides that VA will provide advance notice of a scheduled hearing to a claimant. (Section 3.105(i)(1) provides for such notice only of predetermination hearings.) It has long been VA's practice to provide advance notice of all hearings, and we have put such a provision in 5.82(d)(1).

In § 5.82(d)(3), we propose to add a provision setting forth current VA procedure: to make a decision based upon evidence and testimony presented during the hearing in addition to all other evidence of record. This is consistent with VA's duty to consider all evidence of record when making a decision.

In § 5.82(e)(3), we propose to add a provision stating that if a claimant fails without good cause to report for a scheduled hearing, VA's decision will be based upon the evidence of record. (Examples of good cause in our proposed provision include, but are not limited to, illness or hospitalization of the claimant, or death of an immediate family member). This provision is similar to a rule in current § 3.105(i)(2), which concerns predetermination hearings. We believe that establishing a fair, consistent policy for all hearings

will ensure that all claimants and beneficiaries are treated the same and will help make the hearing process more efficient.

Current § 3.105(i) contains the rules pertaining to a claimant's or beneficiary's rights in predetermination hearings. We propose to place these provisions into paragraph (f) of § 5.82 because it is logical to place those regulations pertaining to predetermination hearings in the same regulation that covers other hearing rights.

Current § 3.105(i)(1) provides that if a beneficiary wants a predetermination hearing, VA must receive the request within 30 days from the date of VA's notice to the beneficiary of the right to a hearing. We propose to include the word "timely" in proposed paragraph (f)(1) to reinforce the existence of a time limitation.

In a separate NPRM, "Subpart A—General Provisions", we plan to expand upon the current definition of "notice" (found in 38 CFR § 3.1(q)) to state in part 5 that copies of VA notices will be sent to a claimant or fiduciary, as well as a representative, to the last known address of record. Therefore, we propose in §§ 5.82, 5.83, 5.103 and 5.104, to simply state that VA notices will be sent to claimants or beneficiaries (as appropriate) to avoid unnecessary repetition.

### 5.83 *Right to Notice of Decisions and Proposed Adverse Actions*

Current § 3.103 is titled, "Procedural due process and appellate rights," and states the requirements for providing notice of decisions to claimants. The current section also includes those provisions that VA must follow when advising a beneficiary of a proposal to reduce or discontinue benefit payments.

In paragraph (a) of proposed § 5.83, we state the general notice procedures that VA must follow when advising a claimant or beneficiary of any decision that affects a benefit payment or the granting of relief. Proposed paragraphs (a)(1) through (5) provide that the notice must explain the following: the reason for the decision; the effective date of the decision; the right to a hearing; the right to representation; and the right to an appeal. This material is derived from current § 3.103(b)(1) and (f).

In paragraph (b) of proposed § 5.83, VA proposes to describe the advance notice that VA must provide to a beneficiary if VA intends to take action adverse to the beneficiary (e.g., reduce or discontinue benefits). This paragraph restates provisions in current § 3.103(b)(2) without substantive change, and adds a requirement that VA

will "inform the beneficiary of the 30-day time limit to request a predetermination hearing under § 5.82(f)." We propose to include a cross-reference in this paragraph to current § 3.105, which governs the procedures applicable to the type of action VA is taking.

In proposed § 5.83(c), we propose to list the situations in which VA need not provide notice of an adverse action before VA takes that action. This list is not new, but is a restatement of those exceptions found at current § 3.103(b)(3)(i) through (vi). Section 5.83(c) states that, under certain circumstances, VA will send contemporaneous notice of an adverse action, particularly when the information leading to the action came from the beneficiary, or the fiduciary. We propose to list these in paragraphs (c)(1) through (6).

In addition to those listed in the current regulation, there are two other circumstances in which notice of discontinuance of benefits is not required. Notice of discontinuance of benefits is not required if VA receives a Record of Interment from the National Cemetery Administration or if VA receives an Application for United States Flag for Burial Purposes. The Record of Interment or the Application for United States Flag for Burial Purposes are reliable indications of a beneficiary's death and therefore no notice is required to terminate benefits. Therefore, we propose to add receipt of such documents to the proposed list in paragraph (c).

We intend to move current § 3.103(a), which is a statement of policy, to the beginning of part 5, where it would serve as a general introductory statement concerning the entire part 5 regulations. This change will be addressed in a separate NPRM.

### 5.84 *Restoration of Benefits Following Adverse Action*

Proposed § 5.84 is derived from current § 3.103(b)(4). No substantive changes to this regulation are intended.

### **Duties of VA**

#### 5.90 *VA Assistance in Developing Claims*

Title 38 CFR 3.159 is currently the subject of a separate VA rulemaking which will implement changes made by section 701 of Pub. L. 108-183, 117 Stat. 2670. When that rulemaking is complete, we plan to repeat the language of the amended § 3.159 as § 5.90. We therefore propose in this rulemaking to reserve space for proposed § 5.90.

#### 5.91 *Medical Evidence for Disability Claims*

Proposed paragraph (a) of § 5.91 would state rules regarding alternative sources of medical evidence that VA may rely on in lieu of a VA medical examination or period of observation, assuming the evidence is adequate for adjudicating a claim. This paragraph, derived from current § 3.326(b) and (c), as well as 38 U.S.C. 5125, notes that VA may rely on a hospital or examination report from another government agency, private facility, or private physician. We note, further, that VA will make reasonable efforts to obtain such non-federal reports under its § 3.159(c)(1) duty to assist.

The third sentence of current § 3.326(a) requires that a claimant report to a scheduled VA examination. Because this requirement is discussed in detail in current § 3.655 and will be addressed in § 5.103 as proposed in this notice, we believe that restating it in proposed § 5.91 would be redundant. Therefore, we propose not to include this sentence in proposed § 5.91.

We also plan to restate the second sentence of current § 3.326(b) and place it in a separate regulation specifically relating to medical examinations for former prisoners of war. That change will be addressed in a separate NPRM.

Proposed § 5.91(b) states a rule regarding adjudicating claims based on combat injuries and conditions that are obviously due to service. The paragraph provides that VA may rate such injuries and conditions pending receipt of service records. This paragraph is derived from the last sentence of current § 3.304(c).

We propose to not include the first two sentences of current § 3.304(c). The first sentence of current § 3.304(c) states, "The development of evidence in connection with claims for service connection will be accomplished when deemed necessary but it should not be undertaken when evidence present is sufficient for this determination." The second sentence of current § 3.304(c) states, "In initially rating disability of record at the time of discharge, the records of the service department, including the reports of examination at enlistment and the clinical records during service, will ordinarily suffice." We believe that in light of the requirements of the Veterans Claims Assistance Act of 2000, Pub. L. 106-475, 114 Stat. 2096, and its implementing regulation, current § 3.159, VA is required to obtain all relevant federal records pertinent to substantiating a claim, and to make reasonable attempts to obtain non-federal reports. Because

current law and regulations define the information and evidence that VA is required to obtain or try to obtain, the first sentence of current § 3.304(c) is unnecessary. In addition, because the examinations conducted by the Department of Defense for service members at the time of discharge do not ordinarily yield the evidence required for VA to assign a proper evaluation under 38 CFR part 4, Schedule of Rating Disabilities, service medical records rarely will “suffice” without a VA examination.

#### 5.92 *Independent Medical Opinions*

We propose to repeat the content of § 3.328 in § 5.92 without change.

#### 5.93 *Service Records Which Are Lost, Destroyed, or Otherwise Unavailable*

We propose to establish a new rule to apply if potentially relevant service records which were in the custody of specified U.S. Government entities are lost or destroyed, or otherwise became unavailable. Our goal is to help claimants and adjudicators identify sources of alternative evidence. The proposed rule is derived from existing VA procedures and policies.

As indicated in paragraph (a) of the proposed rule, in certain cases records in the custody of the Department of Defense have been destroyed or are otherwise unavailable due to no fault of the claimant. In such cases, VA attempts to obtain alternative evidence in order to assist the claimant in developing the evidence necessary to substantiate his or her claim. Proposed paragraph (a) requires VA to attempt to obtain potentially relevant alternative evidence before denying a claim based on a lack of evidence that may have been contained in the unavailable records.

Proposed paragraph (b) describes the most common situation in which VA must seek alternative evidence, which is when the original records were destroyed in the 1973 fire at the National Personnel Records Center. That fire destroyed approximately 80 percent of the stored records for Army veterans who served between November 1, 1912, and January 1, 1960. The United States Court of Appeals for Veterans Claims (CAVC) has taken judicial notice of certain provisions of the VA Veterans Benefits Administration Adjudication Procedures Manual, (Manual M21–1), which detail the assistance that VA generally provides if a claimant’s records were destroyed in the 1973 fire. See *McCormick v. Gober*, 14 Vet. App. 39, 44–45 (2000) (remanding for VA consideration of Manual M21–1 provisions); *Dixon v. Derwinski*, 3 Vet. App. 261, 263 (1992) (holding that VA

“had a duty to advise appellant that, even though his service records could not be found, alternative methods of supporting the claim would be considered,” and citing Manual M21–1 provisions). In proposed paragraph (b) we identify the records most likely to have been affected by the 1973 fire.

In proposed paragraph (c), we state some of the sources of alternative evidence that VA uses when the primary records are unavailable due to the 1973 fire. The list of sources in this paragraph is not all-inclusive; it is intended to assist claimants by alerting them to potential sources of relevant evidence.

### **Responsibilities of Claimants and Beneficiaries**

#### 5.100 *Time Limits for Claimant or Beneficiary Responses*

We propose to repeat the content of § 3.110 in § 5.100 without change.

#### 5.101 *Requirement To Provide Social Security Numbers*

Section 5101(c)(1) of title 38, United States Code, requires claimants applying for disability compensation or pension benefits, as well as persons already in receipt of such benefits, to provide VA, on request, the Social Security numbers for themselves and any dependent or beneficiary on whose behalf, or based upon whom, the claimant or beneficiary receives or has applied for benefits. Further, 38 U.S.C. 5101(c)(2) requires that VA deny the claims of, or discontinue paying benefits to, those persons who fail to provide such Social Security number upon request. Pursuant to 38 U.S.C. 1822, these requirements also apply to claims for or awards of monetary benefits under chapter 18 of title 38, United States Code. VA has implemented these statutes in current § 3.216.

Section 5101(c)(2) of title 38, United States Code, and current § 3.216 both refer only to terminating payments when a person fails to disclose a requested Social Security number to VA. We have proposed in 38 CFR § 5.101(b) that VA may reduce rather than discontinue payments in certain circumstances (for example, when we have a beneficiary’s Social Security number but not the number of a dependent for whom additional benefits are being paid). Although 38 U.S.C. 5101(c)(2) refers to termination of payments, we believe it is reasonable to construe it to require only a reduction in cases where we have the beneficiary’s Social Security number but not a dependent’s. According to VAOPGCPREC 24–95, 38 U.S.C.

5101(c)(2) was enacted to prevent fraudulent payments by allowing for the verification of the existence and income of beneficiaries and their dependents. We believe it is reasonable to conclude that Congress did not intend that a beneficiary who has provided his or her own Social Security number would forfeit all of his or her benefits based on the failure to provide the Social Security number of a dependent for whom or based upon whom additional benefits were being paid.

We propose to rewrite § 3.216 in plain language and reorganize its provisions logically but without substantive change. In addition, current § 3.500(w) provides the effective date of a discontinuance or reduction of benefits based upon the failure to provide a Social Security number. VA proposes to include this brief effective date provision in proposed 38 CFR 5.101(c) to allow the reader to easily find the effective date provisions for a discontinuance or reduction of benefits based on a failure to provide VA with a Social Security number.

Section 5101(c)(2) of title 38, U.S.C., states that VA may reinstate benefits if a beneficiary whose benefits have been discontinued for failure to provide a Social Security number subsequently provides it. We propose to add a provision, in 38 CFR 5.101(d), that clarifies that VA will reinstate benefits from the date VA received the Social Security number if the number is ultimately provided. This is consistent with VA practice and with the authorizing statute.

Current § 3.216 gives beneficiaries 60 days to submit a requested Social Security number. We believe this a reasonable time limit and propose to apply it to claimants as well, in 38 CFR 5.101(e).

#### 5.102 *Meeting Reexamination Requirements*

In § 5.102, we propose to include provisions in current § 3.327, which governs the circumstances under which beneficiaries may be required to report for reexaminations to verify the continued presence and/or current level of a disability. In proposed § 5.102, we would restate the language used in § 3.327 to clarify some terms, to illustrate those situations that would warrant a reexamination, and to increase readability.

At § 5.102(a) we propose to replace the phrase “material change,” which may be ambiguous, with the phrase “if reexamination is otherwise necessary to ensure that the disability is accurately evaluated.”

We also propose to more clearly refer to the three types of circumstances under which VA would request periodic future reexaminations. Current § 3.327(a) states that “reexaminations will be required if it is likely that a disability has improved, or if evidence indicates there has been a material change in a disability or that the current rating may be incorrect.” We propose to clarify that these examinations are needed to: verify that the beneficiary still has the disability at issue; ascertain whether or not a disability has improved to the point that a reduction in rating would be warranted; or otherwise ensure that the disability is accurately evaluated. This language is broad enough to encompass those disabilities that are evaluated under the criteria in the Schedule for Rating Disabilities, as well as those that are not, such as disabilities for which VA is paying special monthly compensation or special monthly pension. This would also include both ratings for disability compensation and pension. The third circumstance encompasses those situations where a disability still exists and has not improved, but reexamination is still necessary because the rating schedule or other pertinent regulations have changed, or there is an indication that the rating assigned was based on inaccurate or incomplete information.

We also propose to expand the rule contained in current § 3.327(a) that a beneficiary is required to report for VA reexaminations. We propose to include a cross-reference to § 5.103 in proposed § 5.102(b), and also propose to state that if the beneficiary fails to report for a scheduled VA examination, a determination of the claim will be made based upon the other evidence of record. This would help ensure that the reader is made aware of the consequences of failing to report for a VA examination.

Current § 3.327(b)(2) lists six circumstances when a periodic future reexamination will not be requested in disability compensation cases. Current § 3.327(b)(2)(i) states that in service-connected cases, no periodic future examinations will be scheduled when the disability is static. Current § 3.327(b)(2)(iii) states that in service-connected cases, no periodic future examinations will be scheduled where the disability from disease is permanent in character and of such nature that there is no likelihood of improvement. We believe that paragraphs (b)(2)(i) and (b)(2)(iii) address essentially the same situation, that no reexamination is necessary if the disability is “static” or is “permanent” and unlikely to

improve. Therefore, we propose to consolidate these two provisions into one paragraph, (c)(2)(i).

We also propose to revise the provisions governing “pre-stabilization ratings” found in current paragraph (b)(1) and to use terms from the chart in current § 4.28. In order to clarify the meaning of “pre-stabilization ratings,” we propose to refer, in § 5.102(c)(3), more specifically to ratings assigned to “a disability that has not yet become stable” and to “a disability caused by a wound or injury that has not yet completely healed.”

#### *5.103 Failure To Report for VA Examination or Reexamination*

Proposed § 5.103 includes provisions of §§ 3.330 and 3.655. Current § 3.655(b) provides for two possible consequences of a claimant’s or beneficiary’s failure to report for a scheduled VA examination. If an “original disability compensation claim” is pending and a claimant fails to report for an examination, VA will decide the claim based upon the evidence of record. If, however, “any other original claim,” a “reopened claim,” or a “claim for increase” is pending and a veteran fails to report for a scheduled VA examination, VA denies the claim. We propose to retain this distinction in proposed paragraph (b).

In current § 3.655(c)(1), when a beneficiary fails to report for a scheduled reexamination, and, as a result, VA proposes to reduce or discontinue benefits, VA is required to issue a “pretermination notice.” The pretermination notice currently must, among other things, advise the beneficiary of his or her “procedural and appellate rights.” We believe that it is unnecessary and potentially misleading to refer to the provision of “appellate rights” in a pretermination notice, which is not, by its nature, an appealable decision. We therefore propose to eliminate the reference to “appellate rights.” Additionally, we propose to change the term “pretermination notice” to “notice of proposed discontinuance or reduction.” The term “pretermination notice” could be confusing, as current § 3.655(c) contemplates notice of not only discontinuance of benefits, but also notice of a proposed reduction of benefits. For example, current § 3.655(c)(1) states, “[s]uch notice shall also include the prospective date of discontinuance or reduction, the reason therefore and a statement of the claimant’s procedural and appellate rights.” We believe the phrase “notice of proposed discontinuance or reduction” is more accurate.

Current § 3.330 applies to resumption of disability ratings following a period during which benefit payments were discontinued or reduced because of a beneficiary’s failure to report for a reexamination. The resumption is triggered by the beneficiary’s subsequent willingness to undergo a reexamination. We consider this material to fit logically into the substance of § 3.655, and we therefore propose to integrate § 3.330 into proposed § 5.103(e).

We propose not to include in part 5 paragraph (a) of current § 3.655. We regard the initial clause of current paragraph (a), “[w]hen entitlement or continued entitlement to a benefit cannot be established or confirmed without a current VA examination or reexamination,” as unnecessary. VA generally will schedule an examination or reexamination when it appears necessary to do so in order to establish or confirm entitlement to a benefit. However, it may be the case that, since the scheduling of the examination or reexamination, additional evidence associated with the claims file indicates that the claim may be granted or the benefit continued without recourse to an examination or reexamination. In such a case, it would be unfair to penalize the claimant or beneficiary for failure to report for the examination or reexamination by denying the claim or reducing or discontinuing the benefit when there is otherwise sufficient evidence to grant the claim or continue to provide the benefit.

In proposed paragraph (f), we propose to add language that would emphasize that the examples of good cause described therein are not exclusive—that other circumstances not listed may be considered as “good cause” provided their gravity is similar to that of the currently listed examples of illness or hospitalization of the claimant or beneficiary, and death of an immediate family member. We propose to include a statement that VA will make these determinations on a case-by-case basis.

#### *5.104 Certifying Continuing Eligibility To Receive Benefits*

We propose to amend those regulations that pertain to informing beneficiaries of the need to submit specific information to VA to certify continuing eligibility to receive benefits or the amount of benefits payable. These provisions are contained in current § 3.652 and are proposed as § 5.104. We believe that these provisions may be revised to more clearly inform beneficiaries of the procedures that must be followed to certify eligibility and the types of information that must

be provided upon the request of VA. We propose to revise the language so that it would be clear to beneficiaries that they must submit, upon request, information such as marital status, income, number of dependents or any other information that is necessary to establish continuing eligibility to receive benefits. We also believe that current § 3.652 could more clearly inform beneficiaries of the consequences of failing to provide the information requested, such as the reduction or discontinuance of benefits. We would include in § 5.104 appropriate clarification.

Current § 3.500(v), "Failure to furnish evidence of continued eligibility," simply refers the reader back to current § 3.652 (proposed § 5.104). Therefore, we will not include this paragraph in any part 5 regulation.

#### 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

Although this document contains provisions constituting a collection of information, at 38 CFR 5.82, 5.101, and 5.104, under the provisions of the Paperwork Reduction Act (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 §§ 5.82, 5.101, and 5.104 are currently approved by the Office of Management and Budget (OMB) and have been assigned OMB control numbers 2900–0001, 2900–0004, 2900–0005, 2900–0006, 2900–0085, 2900–0572, and 2900–0624.

#### 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. This amendment would not significantly affect any small entities. Therefore, pursuant to 5 U.S.C. 605(b), this amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

#### Executive Order 12866

This document has been reviewed by the Office of Management and Budget under Executive Order 12866.

#### 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 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 (adjusted annually for inflation) in any given year. This proposed rule would have no such effect on State, local, or tribal governments, or the private sector.

#### Catalog of Federal Domestic Assistance Numbers

The Catalog of Federal Domestic Assistance program numbers for this proposal are 64.100–.102, 64.104–.110, 64.115, and 64.127.

#### List of Subjects in 38 CFR Part 5

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

Approved: January 31, 2005.

**Anthony J. Principi,**  
*Secretary of Veterans Affairs.*

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

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

##### Subpart C—Adjudication Process, General

##### Rights of Claimants and Beneficiaries

Sec.

- 5.80 Right to representation.
- 5.81 Submission of information, evidence, or argument.
- 5.82 Right to a hearing.
- 5.83 Right to notice of decisions and proposed adverse actions.
- 5.84 Restoration of benefits following adverse action.

##### Duties of VA

- 5.90 [Reserved]
- 5.91 Medical evidence for disability claims.
- 5.92 Independent medical opinions.
- 5.93 Service records which are lost, destroyed, or otherwise unavailable.

##### Responsibilities of Claimants and Beneficiaries

- 5.100 Time limits for claimant or beneficiary responses.
- 5.101 Requirement to provide Social Security numbers.
- 5.102 Meeting reexamination requirements.
- 5.103 Failure to report for VA examination or reexamination.
- 5.104 Certifying continuing eligibility to receive benefits.

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

#### Subpart C—Adjudicative Process, General

##### Rights of Claimants and Beneficiaries

##### § 5.80 Right to representation.

Subject to the provisions of §§ 14.626 through 14.635 of this chapter, a claimant or beneficiary is entitled to the representation of his or her choice at every stage in the claims process. When VA notifies a claimant or beneficiary under § 5.83 of a decision or a proposed reduction, discontinuance, or other adverse action, VA will also notify him or her of the right to representation.

(Authority: 38 U.S.C. 501, 5901–5904)

*Cross Reference:* Section 19.25 of this chapter (concerning notification of the right to appeal, which includes notification of the right to representation).

##### § 5.81 Submission of information, evidence, or argument.

(a) *Submissions included in the record.* VA will include in the record of proceedings any information, evidence (whether documentary, testimonial, or in other form), and any argument that a claimant offers in support of a claim. VA will also include in the record of proceedings with respect to the claim any issues a claimant raises, either in writing or at a hearing.

(b) *Who may submit information, evidence, or argument.* Information, evidence, or argument may be submitted by a claimant or beneficiary, or, where applicable, through a guardian or fiduciary acting on his or her behalf. Unless specifically provided otherwise in this part, a claimant's or beneficiary's authorized representative may submit information, evidence, or argument pursuant to any section of this part that allows or requires submission of information, evidence or argument.

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

##### § 5.82 Right to a hearing.

(a) *General—(1) The one-hearing rule.* Upon request, a claimant is entitled to one hearing before the agency of original jurisdiction at any time on any issue or issues involved in a pending claim before the agency of original jurisdiction. When VA notifies a claimant or beneficiary of a decision or a proposed reduction, discontinuance, or other adverse action under § 5.83, VA will also notify the claimant or beneficiary of the right to a hearing. A claimant is also entitled to a hearing before the Board of Veterans' Appeals. See §§ 20.700 and 20.1304 of this

chapter. Except as provided in paragraph (a)(2) of this section, a claimant who received a hearing before the claim was reviewed by the Board of Veterans' Appeals (Board) is not entitled to an additional hearing after that claim is remanded by the Board to the agency of original jurisdiction.

(2) *Exception to the one-hearing rule.* A claimant will be provided one additional hearing on any issue involved in a claim when the claimant asserts that: He or she has discovered a new witness or new evidence to substantiate the claim; he or she can present that witness or evidence only at an oral hearing; and the witness or evidence could not have been presented at the original hearing.

(b) *Purpose of hearings; requirement for oath or affirmation.* The purpose of a hearing under this section is to provide the claimant with an opportunity to introduce into the record of proceedings, in person, any available evidence, arguments, or contentions which he or she considers important to the case. Testimony at a hearing will be under oath or affirmation.

(c) *Where VA will conduct hearings.* The hearing will be held in the VA office that has jurisdiction over the claim or in the VA office with adjudicative functions nearest the claimant's home. Subject to available resources and solely at the option of VA, the hearing may be held at any other VA facility or Federal building at which suitable hearing facilities are available.

(d) *VA responsibilities in conjunction with hearings.* (1) VA will provide advance notice to a claimant of the time and place of the hearing. If the hearing arises in the context of a proposed reduction, discontinuance, other adverse action or an appeal, a VA employee or employees having decision-making authority and who did not previously participate in the case will conduct the hearing. The employee or employees will establish a record of the hearing and will issue a decision after the hearing.

(2) The VA employee or employees conducting the hearing will explain fully the issues and suggest the submission of evidence the claimant may have overlooked that would tend to prove the claim. To assure clarity and completeness of the hearing record, questions directed to the claimant and to witnesses will be framed to explore fully the basis for entitlement rather than with an intent to refute evidence or to discredit testimony. The employee, or employees, conducting the hearing will ensure that all testimony is given under oath or affirmation.

(3) If a hearing is conducted, VA will make a decision based upon evidence and testimony presented during the hearing in addition to all other evidence of record.

(e) *Claimant rights and responsibilities in conjunction with hearings.* (1) The claimant is entitled to have witnesses testify. The claimant and witnesses must appear at the hearing, either in person or by videoconferencing. Normally, VA will not schedule a hearing for the sole purpose of receiving argument from a representative.

(2) All expenses incurred by the claimant in conjunction with the hearing are the responsibility of the claimant.

(3) If a claimant fails without good cause to report for a scheduled hearing, VA will decide the claim based upon the evidence of record. Examples of good cause include, but are not limited to, illness or hospitalization of the claimant, or death of an immediate family member.

(f) *Requirements for predetermination hearings.* Except as otherwise provided in § 5.83(c), VA will provide notice of the right to a hearing before VA reduces, discontinues, or otherwise adversely affects benefits. A predetermination hearing will not be provided unless VA receives a request for one no more than 30 days after the date of the notice of the proposed action.

(1) If the beneficiary does not timely request a predetermination hearing, or fails without good cause to report for a scheduled predetermination hearing, VA will make a determination on the proposed action based on the evidence of record. Examples of good cause include, but are not limited to, illness or hospitalization of the beneficiary, or death of an immediate family member.

(2) If VA receives a request for a predetermination hearing no more than 30 days after the date of the notice of the proposed action, VA will send the beneficiary written notice of the time and place for the hearing.

(3) VA will send the notice of the time and place for the predetermination hearing at least 10 days before the scheduled hearing date. This 10-day advance notice requirement may be waived by the beneficiary or representative.

(4) If a predetermination hearing is timely requested, VA will not make a final determination reducing, discontinuing, or otherwise adversely affecting benefits before the scheduled date of the hearing.

(5) If a predetermination hearing is conducted, VA will make the determination based upon evidence and

testimony presented during the hearing in addition to all other evidence of record.

*Cross Reference:* See § 3.105 of this chapter for the procedures VA follows when revising decisions and the effective date of these decisions.

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

#### **§ 5.83 Right to notice of decisions and proposed adverse actions.**

(a) *General.* VA will send to a claimant or beneficiary written notice of any decision, or proposed adverse action, that affects the payment of benefits or the granting of relief to that claimant or beneficiary. The notice will explain:

(1) If a claim is not fully granted, the reason for the decision and a summary of the evidence considered;

(2) The effective date of any adjustment of benefits;

(3) The right to a hearing on any issue involved in the claim;

(4) The right to representation; and

(5) The right to appeal, including how and when to exercise this right to appeal. (Appellate procedures are found in part 20 of this chapter.)

(b) *VA will send an advance notice of adverse action.* Except as otherwise provided in paragraph (c) of this section, VA will notify a beneficiary at least 60 days before it reduces, discontinues, or otherwise adversely affects the beneficiary's receipt of VA benefits. The notice will inform the beneficiary of the 30-day time limit to request a predetermination hearing under § 5.82(f). VA will allow the beneficiary 60 days after the date of the notice to submit evidence and/or argument to show why the adverse action should not be taken.

*Cross Reference:* See § 3.105 of this chapter for procedures applicable to the type of action VA is taking.

(c) *When VA will send a contemporaneous notice of reduction, discontinuance, or other adverse action.* VA will send a written notice to a beneficiary at the same time it reduces, discontinues, or otherwise takes an adverse action under any of the circumstances described in paragraphs (c)(1) through (c)(6) of this section.

(1)(i) The adverse action results solely from information or statements, provided orally or in writing to VA by the beneficiary or the fiduciary, as to income, net worth, dependency, or marital status;

(ii) The information or statements are factual and unambiguous; and

(iii) The beneficiary or fiduciary has knowledge or notice that such information or statements may be used to calculate benefit amounts. See § 3.217

of this chapter for procedures governing the submission by a beneficiary or his or her fiduciary of oral or written information or statements.

(2) The adverse action results from the beneficiary's or fiduciary's failure to return an eligibility verification report as required by § 3.277 of this chapter.

(3) VA receives credible evidence indicating that a beneficiary has died. However, VA is not required to send a notice of discontinuance of benefits (contemporaneous or otherwise) if VA receives:

- (i) A death certificate;
- (ii) A terminal hospital report verifying the death of a beneficiary;
- (iii) A claim for VA burial benefits;
- (iv) An "Application for United States Flag for Burial Purposes"; or
- (v) A "Record of Interment" from the National Cemetery Administration.

(4) The adverse action results from a beneficiary's written and signed statement renouncing VA benefits (*see* § 3.106 of this chapter on renouncement).

(5) The adverse action results from a veteran's written and signed statement that he or she has returned to active service. The statement must include each of the following:

- (i) The branch of service;
- (ii) The date of reentry into service;
- (iii) The veteran's acknowledgement that receipt of active military service pay precludes receipt at the same time of VA disability compensation or pension. *See* § 3.654 of this chapter regarding active service pay.

(6) The adverse action results from a garnishment order issued under 42 U.S.C. 659(a), allowing the U.S. to consent to garnishment or withholding of pay for members of the Armed Forces and, in certain circumstances, disability compensation, to enforce child support and alimony obligations. *See* 42 U.S.C. 659(h)(1)(A)(ii)(V) for the limited circumstance of garnishing certain disability pay.

(Authority: 38 U.S.C. 501, 5104)

#### **§ 5.84 Restoration of benefits following adverse action.**

(a) If VA reduces or discontinues benefits, or takes other action adverse to a beneficiary, based upon information or an oral statement provided by the beneficiary or fiduciary, VA will retroactively restore such benefits if the beneficiary or fiduciary asserts no more than 30 days after the date of the VA notice of adverse action either of the following:

- (1) The information or statement is inaccurate.
- (2) The information or statement was not provided by the beneficiary or his or her fiduciary.

(b) Restoration of benefits under this section does not preclude VA from later taking action that adversely affects the beneficiary's receipt of benefits based on the information or oral statements referred to in paragraph (a) of this section.

(Authority: 38 U.S.C. 501, 5104)

#### **Duties of VA**

##### **§ 5.90 [Reserved]**

##### **§ 5.91 Medical evidence for disability claims.**

(a) *Medical evidence rendering VA examination unnecessary.* If they are adequate for purposes of adjudicating a claim, VA may rely on hospital or examination reports from a government or private facility, or reports from private physicians. When such reports are of record, VA does not need to provide a VA examination or period of hospital observation.

(b) *Rating injuries and conditions obviously incurred in service.* VA may assign an evaluation for combat injuries or other conditions that obviously were incurred in service as soon as sufficient evidence to rate the severity of the condition is available, even if VA has not yet received the claimant's enlistment examination and other service records.

(Authority: 38 U.S.C. 1154, 5103A, 5125)

##### **§ 5.92 Independent medical opinions.**

(a) *General.* When warranted by the medical complexity or controversy involved in a pending claim, an advisory medical opinion may be obtained from one or more medical experts who are not employees of VA. Opinions shall be obtained from recognized medical schools, universities, clinics or medical institutions with which arrangements for such opinions have been made, and an appropriate official of the institution shall select the individual expert(s) to render an opinion.

(b) *Requests.* A request for an independent medical opinion in conjunction with a claim pending at the regional office level may be initiated by the office having jurisdiction over the claim, by the claimant, or by his or her representative. The request must be submitted in writing and must set forth in detail the reasons why the opinion is necessary. All such requests shall be submitted through the Veterans Service Center Manager of the office having jurisdiction over the claim, and those requests which in the judgment of the Veterans Service Center merit consideration shall be referred to the

Compensation and Pension Service for approval.

(c) *Approval.* Approval shall be granted only upon a determination by the Compensation and Pension Service that the issue under consideration poses a medical problem of such obscurity or complexity, or has generated such controversy in the medical community at large, as to justify solicitation of an independent medical opinion. When approval has been granted, the Compensation and Pension Service shall obtain the opinion. A determination that an independent medical opinion is not warranted may be contested only as part of an appeal on the merits of the decision rendered on the primary issue by the agency of original jurisdiction.

(d) *Notification.* The Compensation and Pension Service shall notify the claimant when the request for an independent medical opinion has been approved with regard to his or her claim and shall furnish the claimant with a copy of the opinion when it is received. If, in the judgment of the Secretary, disclosure of the independent medical opinion would be harmful to the physical or mental health of the claimant, disclosure shall be subject to the special procedures set forth in § 1.577 of this chapter.

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

##### **§ 5.93 Service records which are lost, destroyed, or otherwise unavailable.**

(a) *Records in the custody of the Department of Defense.* When records that are potentially relevant to a claim for benefits and that were in the custody of the Department of Defense have been lost or destroyed, or otherwise have become unavailable, VA will not deny the claim without attempting to obtain potentially relevant alternative evidence. (Examples of sources of alternative evidence are listed in paragraph (c) of this section).

(b) *Destruction due to fire at the National Personnel Records Center.* On July 12, 1973, there was a fire at the National Archives and Records Administration's National Personnel Records Center (NPRC). When the NPRC reports that it does not have the claimant's records because they were destroyed by this fire, VA will not deny the claim without attempting to obtain potentially relevant alternative evidence. (Examples of sources of alternative evidence are listed in paragraph (c) of this section). The following are the two main groups of records destroyed by the NPRC fire:

- (1) *Army.* Records for certain Army veterans who served between November

1, 1912, and January 1, 1960. Records of Army retirees who were alive on July 12, 1973, were not destroyed by the fire because they were stored at a different location.

(2) *Air Force*. Records for certain Air Force veterans with surnames "Hubbard" through Z who were discharged between September 25, 1947 and January 1, 1964, and had no retired or Reserve status.

(c) *Alternative evidence development*. Depending on the facts of the case, sources of potentially relevant alternative evidence for records described in paragraphs (a) or (b) of this section include the following:

(1) A claimant's personal copies of discharge papers, service medical records, or other evidence of military service;

(2) State Adjutant Generals' offices or State historical commissions;

(3) The Office of Personnel Management (if the veteran was employed by a Federal or State agency), a private employer, or the Railroad Retirement Board (if the veteran was employed by a railroad);

(4) The Social Security Administration;

(5) VA or military files or records relating to an earlier claim filed with VA;

(6) Service medical personnel or people who knew the veteran during his or her service;

(7) State or local accident and police reports from the time and place the veteran served;

(8) Employment physical examinations or insurance examinations;

(9) Hospitals, clinics, or private physicians who treated a veteran, especially soon after separation, or pharmacies that filled prescriptions;

(10) Letters written during service or photographs taken during service.

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

### Responsibilities of Claimants and Beneficiaries

#### § 5.100 Time limits for claimant or beneficiary responses.

(a) In computing the time limit for any action required of a claimant or beneficiary, including the filing of claims or evidence requested by VA, the first day of the specified period will be excluded and the last day included. This rule is applicable in cases in which the time limit expires on a workday. Where the time limit would expire on a Saturday, Sunday, or holiday, the next succeeding workday will be included in the computation.

(b) The first day of the specified period referred to in paragraph (a) of

this section shall be the date of mailing of notification to the claimant or beneficiary of the action required and the time limit therefor. The date of the letter of notification shall be considered the date of mailing for purposes of computing time limits. As to appeals, see §§ 20.302 and 20.305 of this chapter.

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

#### § 5.101 Requirement to provide Social Security numbers.

(a) *General requirement to provide Social Security number*. If requested to do so by VA, each claimant for, or beneficiary of, compensation, pension, dependency and indemnity compensation, or a monetary benefit under 38 U.S.C. chapter 18 must provide to VA his or her Social Security number, as well as the Social Security number of any dependent or other person on whose behalf, or based upon whom, benefits are sought or received.

(b) *Individuals receiving VA benefits*. If 60 days after VA requests a Social Security number, the beneficiary fails either to provide the requested Social Security number or to show that no Social Security number was assigned, VA will take the following action:

(1) If the beneficiary fails to provide his or her own Social Security number, VA will discontinue benefits.

(2) If the beneficiary fails to provide the Social Security number for any dependent, VA will reduce the benefits payable by the amount payable to or on behalf of such dependent; however, VA may still consider that dependent's income for purposes of determining entitlement to income-based benefits.

(c) *Effective date of reduction or discontinuance*. VA's discontinuance or reduction of benefits under paragraph (b) of this section will be effective on the first day of the first month beginning more than 60 days after the date VA requested the Social Security number.

(d) *Effective date of resumed payments*. If a claimant or beneficiary provides VA with the requested Social Security number, VA will resume payment of benefits at the prior rate, effective on the date VA received the Social Security number, provided that payment of benefits at that rate is otherwise in order.

(e) *Claimant's application for VA benefits*. If 60 days after VA requests a Social Security number, the claimant fails either to provide the requested Social Security number or to show that no Social Security number was assigned, VA will deny the claim. If a claimant fails to provide to VA the Social Security number of a dependent, then VA will deny benefits that are based on the existence of the dependent.

(f) *When a Social Security number is not required*. A claimant or beneficiary is not required to provide a Social Security number for any person to whom a Social Security number has not been assigned.

(Authority: 38 U.S.C. 501, 1822, 5101(c))

#### § 5.102 Meeting reexamination requirements.

(a) *General*. VA may reexamine a beneficiary, or require a period or periods of hospital observation, at any time to ensure that the beneficiary's disability rating is accurate. For example, VA may reexamine a beneficiary if evidence indicates that the disability for which VA is making payments may no longer exist or may have improved to such a degree that a reduced rating might be appropriate; or if reexamination is otherwise necessary to ensure that the disability is accurately evaluated. Paragraphs (c) and (d) of this section provide general guidelines for scheduling reexaminations, but do not limit VA's authority to schedule reexaminations or periods of hospital observation at any time in order to ensure that a disability is accurately rated.

(b) *Beneficiaries are required to report for scheduled reexaminations*. A beneficiary must report for a VA-scheduled reexamination. If he or she does not report, VA will take the steps described in § 5.103 of this part, "Failure to report for VA examination or reexamination."

(c) *Scheduling reexaminations in disability compensation cases*. The following rules apply to disability compensation cases:

(1) *General rule*. As a general rule, if periodic future reexaminations are warranted, VA may schedule such reexaminations to occur between two and five years after the date on which VA last examined the beneficiary, unless some other law or regulation specifies another time period.

(2) *When VA will not schedule periodic reexaminations*. VA will not schedule periodic future reexaminations under the following circumstances:

(i) The disability is static;

(ii) Medical examinations or hospital reports show that the symptoms and findings of the disability have persisted without significant improvement for at least five years;

(iii) The beneficiary has attained the age of 55, except in unusual circumstances;

(iv) The disability in question is rated at a prescribed mandatory minimum level under the Schedule for Rating Disabilities in part 4 of this chapter; or

(v) The combined disability rating would not decrease even if a reexamination for the specific disability at issue would result in a decreased rating for that disability; however, if a reexamination potentially would reduce an award of special monthly compensation, reexamination may be warranted even if the combined disability rating would not be reduced.

*Cross Reference:* See § 4.25 of this chapter for information on “combined ratings” and how they are calculated.

(3) *Discharge from service with unstabilized disability.* If a person is discharged from military service with a disability that has not yet become stable or with a disability caused by a wound or injury that has not yet completely healed, VA may, pursuant to § 4.28 of this chapter, temporarily assign a prestabilization disability rating of either 100 percent or 50 percent to the disability. If VA assigns a prestabilization rating under § 4.28 of this chapter, VA will schedule a reexamination to occur 6 to 12 months after the date the person separates from service, to determine the appropriate schedular evaluation under the Schedule for Rating Disabilities in part 4 of this chapter.

(d) *Pension cases.* The following rules apply to pension cases:

(1) If the beneficiary has attained the age of 55, VA will schedule a reexamination only in unusual circumstances.

(2) VA generally will not schedule a reexamination if it is obvious that the disability is unlikely to improve over the long term or the medical history has confirmed the presence of a permanent and total nonservice-connected disability. In other cases, VA will reexamine only in unusual circumstances.

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

### **§ 5.103 Failure to report for VA examination or reexamination.**

(a) *General.* VA will schedule a VA examination when needed to establish entitlement to a benefit or an increased disability evaluation. VA will schedule a VA reexamination when needed to confirm continued entitlement to a benefit or continued entitlement to a particular disability evaluation. See § 3.159(c)(4) of this chapter, “Providing medical examinations or obtaining medical opinions.” If a claimant or beneficiary, with good cause, fails to report for a VA examination or reexamination, VA will reschedule the examination or reexamination. Examples of good cause are listed in paragraph (f) of this section.

(b) *Failure without good cause to report for a scheduled examination.* If a claimant or beneficiary, without good cause, fails to report for a VA examination, VA will decide the claim as follows:

(1) For an original disability compensation claim, VA will make a decision based on the evidence in the claims file.

(2) For any other original claim, a new claim, a reopened claim, or a claim for increase, VA will deny the claim.

(c) *Failure without good cause to report for a scheduled reexamination—*

(1) *Continuing entitlement to a benefit.* If a beneficiary fails, without good cause, to report for a VA reexamination and continuing entitlement to the benefit cannot be confirmed without a VA reexamination, VA will propose to discontinue the benefit.

(2) *Continuing entitlement to a particular evaluation.* If a beneficiary fails, without good cause, to report for a VA reexamination and continuing entitlement to a particular disability evaluation for one or more of the beneficiary’s disabilities cannot be confirmed without a VA reexamination, VA will propose to reduce the evaluation for the disability or disabilities at issue to one of the following, as applicable:

(i) The highest disability evaluation assigned to that disability that is protected under § 3.951(b) of this chapter.

(ii) The evaluation specified as the minimum evaluation permitted for that disability under the Schedule for Rating Disabilities in part 4 of this chapter.

(iii) Zero percent if there is neither an evaluation protected under the provisions of § 3.951 of this chapter nor a minimum evaluation specified in the Schedule for Rating Disabilities in part 4 of this chapter.

*Cross Reference:* See § 3.344 of this chapter, “Stabilization of disability evaluations.”

(d) *Advance notice of proposed discontinuance or reduction—*(1) *Notice.* If VA proposes to discontinue or reduce payment under paragraph (b) or (c) of this section, VA will notify the beneficiary by letter of its intended action. The letter must include the date on which the proposed discontinuance or reduction will be effective, and the beneficiary’s procedural rights. See §§ 5.80 through 5.83.

(2) *Time period during which the beneficiary must respond.* No more than 60 days after the date of VA’s notice, VA must receive either notification that the beneficiary will report for reexamination or evidence showing that VA should not discontinue or reduce

payments. If VA receives notification that the beneficiary will report for reexamination, it will schedule a reexamination. If VA receives evidence showing that VA should not discontinue or reduce payments, it will not do so.

(3) *No response or inadequate response.* If VA does not receive the notification or evidence required by paragraph (d)(2) of this section, VA will take the action described in the letter referred to in paragraph (d)(1) of this section. The action will be effective on the date identified in the letter or the day after the date of the last payment made by VA to the beneficiary, whichever is later.

(4) *Hearing.* The beneficiary may request a hearing to challenge VA’s proposed adverse action as provided in § 5.82(f). If, within 30 days after the date on the notice letter, VA does not receive the beneficiary’s request for a hearing, then VA will discontinue or reduce payments effective on the date the notice letter specified or the date of VA’s last payment, whichever is later, unless evidence is presented which warrants a different determination.

(5) *Rescheduled reexamination.* The beneficiary may ask VA to schedule another date for reexamination, either instead of or in addition to asking for a hearing. If VA receives the request to reschedule before the payments are discontinued or reduced, VA will halt its action to discontinue or reduce payments and will schedule a new reexamination date. VA will notify the beneficiary that if he or she fails to report for the rescheduled reexamination, then VA will immediately discontinue or reduce the payments as of the date of the last payment.

(e) *Resumption of payments.* If VA discontinues or reduces payments for failure to report for a reexamination, VA will issue a new decision after the beneficiary reports for a VA reexamination. VA will notify the beneficiary of any period of time for which it could not pay benefits at the previous level and the reason(s) why, and identify the period of time for which it has resumed paying such benefits.

(f) *Examples of good cause.* Examples of good cause for failure to report for a VA examination or reexamination include a claimant’s or beneficiary’s illness or hospitalization, and the death of an immediate family member. VA will determine on a case-by-case basis whether good cause is established.

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

**§ 5.104 Certifying continuing eligibility to receive benefits.**

Except as otherwise provided, the following rules govern the certification of continuing eligibility.

(a) *Responsibility to certify continuing eligibility upon request.* Each beneficiary, if requested to do so by VA, must certify whether the factual basis that established entitlement to benefits still exists. The requested certification may concern marital status, income, number of dependents, or any other fact affecting entitlement to a benefit or the amount of benefits payable. VA must receive the beneficiary's certification, including any requested information, not later than 60 days after the date of VA's request.

(b) *If VA does not receive the certification within 60 days.* If VA does not receive the requested certification within 60 days after the date of VA's request, VA will assume that the fact(s) about which the certification was requested ceased to exist as of the end of the month in which VA received the last evidence of record establishing or confirming the fact(s).

(c) *Additional 60 days provided.* If VA does not receive the requested certification within 60 days after the date of VA's request, VA will notify, in writing, the beneficiary that VA proposes to reduce or discontinue the benefits and will allow the beneficiary 60 days in which to provide VA with the required certification. The notice must include the effective date of the

proposed reduction or discontinuance. If the beneficiary does not provide the required certification within the additional 60 days, VA will reduce or discontinue the benefit, according to the appropriate effective date provisions of §§ 3.500 through 3.504 of this chapter in effect on the date the eligibility factor(s) is considered to have ceased to exist.

(d) *VA action when the evidence is received.* When the certification requested is provided, VA will adjust the benefits, if necessary, according to the information provided and the other evidence in the claims file.

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

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