

## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 3

RIN 2900-AJ99

#### Review of Benefit Claims Decisions

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Proposed rule.

**SUMMARY:** This document concerns the Department of Veterans Affairs (VA) adjudication regulations. We are proposing new provisions to allow any claimants who have filed a timely Notice of Disagreement to obtain a *de novo* review of their claims at the Veterans Service Center level. We believe this would provide a more efficient means for resolving disagreements concerning claims.

**DATES:** Comments must be received on or before April 18, 2000.

**ADDRESSES:** Mail or hand-deliver written comments to: Director, Office of Regulations Management (O2D), Department of Veterans Affairs, 810 Vermont Ave., NW, Room 1154, Washington, DC 20420. Comments should indicate that they are submitted in response to "RIN 2900-AJ99." All comments received will be available for public inspection at the above address in the Office of Regulations Management, Room 1158, between the hours of 8:00 a.m. and 4:00 p.m., Monday through Friday (except holidays).

**FOR FURTHER INFORMATION CONTACT:** Jack Bisset, Consultant, Compensation and Pension Service, Regulations Staff, or Bob White, Team Leader, Plain Language Regulations Project, Veterans Benefits Administration, 810 Vermont Avenue, NW, Washington, DC 20420, telephone (202) 273-7213 and (202) 273-7228, respectively (these are not toll-free numbers).

**SUPPLEMENTARY INFORMATION:** This document proposes to amend our adjudication regulations by establishing provisions at 38 CFR 3.2600 to allow any claimants who have filed 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. The new provisions are based on the requirement in 38 U.S.C. 7105(d)(1) that, when a claimant files a Notice of Disagreement with the decision of an agency of original jurisdiction, the agency will "take such development or review action as it deems proper under the provisions of regulations not inconsistent with" title 38 of the United

States Code. This proposed amendment would improve VA's service to claimants by resolving disagreements more quickly and by improving claimants' and their representatives' access to the person responsible for making the decision.

We propose that the review be conducted by an Adjudication Officer, Veterans Service Center Manager, or Decision Review Officer (a new position within VA's Service Center), at VA's discretion. We believe these officials have the expertise to conduct such reviews. The review will be conducted by an individual who did not participate in the decision being reviewed. This requirement is similar to that for VA personnel conducting hearings under 38 CFR 3.103(c)(1). It will help ensure that reviews are truly *de novo*.

The reviewer may conduct whatever development he or she considers necessary to resolve disagreements concerning decisions with which the claimant has expressed disagreement 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). We believe that such procedures will allow the reviewer to resolve the claim fairly and promptly, and will afford the claimant an opportunity to present his or her case adequately.

These proposed provisions would apply only to decisions that both have not yet become final (by appellate decision or failure to timely appeal) and with which the claimant has disagreed. This is consistent with the provisions of 38 U.S.C. 7104(b), 7105(c) and 7105(d).

The review would be based on all the evidence of record and applicable law. Further, the review decision would have to 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. This would ensure that the reviewer provides a fresh look at the case and provides an appropriate record of the decisionmaking process.

Moreover, the reviewer would be authorized to grant a benefit sought in the claim, but would not be authorized to revise the decision in a manner that is less advantageous to the claimant than the decision under review. This will ensure that the claimant is not penalized for seeking a review. However, the reviewer would have the authority to reverse or revise any decision of the 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, even if disadvantageous to the claimant. All Service Center decisionmakers already have this authority (see 38 CFR 3.105(a)). This new delegation of authority would be consistent with 38 U.S.C. 5109A.

The proposal provides that, upon receipt of a Notice of Disagreement, VA would notify the claimant in writing of his or her right to a review. To obtain such a review, the claimant would have to request it within 60 days of the date VA mails the notice. Written notification would ensure that VA would have a record of its notification, and the 60-day period would provide sufficient time for the claimant to determine whether he or she wants this review.

The proposal also provides that a claimant may not have more than one of these reviews of the same decision and that this review would not limit the appellate rights of the claimant. We believe that one review is sufficient to resolve those claims that can be resolved before proceeding with appellate review.

Proposed § 3.2600 is one of several provisions to be set forth in a new subpart D containing "universal adjudication rules" that would apply to claims which are governed by part 3 of title 38. This includes claims for benefits such as compensation, pension, dependency and indemnity compensation, burial benefits, and special benefits listed at §§ 3.800 through 3.814. The "universal adjudication rules" would also apply to claims for eligibility determinations (such as character of military discharge, military duty status and dependency status), apportionment of benefits to dependents, and waiver of recovery of overpayments. Proposed new § 3.2100 specifies the scope of applicability of the provisions in subpart D.

We also propose to amend 38 CFR 3.105(b) (which concerns revision of decisions based on difference of opinion) to specify that a decision may be revised under § 3.2600 without being recommended to Central Office. This clarifies that the proposed review process created by § 3.2600 is not subject to the requirements of § 3.105(b).

#### 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 section 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 proposed 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 proposed 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.

#### Catalog of Federal Domestic Assistance Program Numbers

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: December 21, 1999.

**Togo D. West, Jr.,**

*Secretary of Veterans Affairs.*

For the reasons set forth in the preamble, 38 CFR part 3 is proposed to be 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.

2. 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.”

3. A new Subpart D is added to read as follows:

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

##### General

Sec.

3.2100 Subpart D’s Scope of Applicability

##### Revisions

3.2600. Review of benefit claims decisions.

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

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

##### General

#### § 3.2100 Subpart D’s Scope of Applicability.

Unless otherwise specified, the provisions of this subpart apply only to claims governed by part 3 of this title.

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

##### 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) VA will 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 within 60 days of the date VA mails the notice. A claimant may not have more than one review under this section of the same decision. This review does not limit the appellate rights of a claimant.

(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)).

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

[FR Doc. 00–3870 Filed 2–17–00; 8:45 am]

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