

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of \$100 million; (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local governmental agencies or geographic regions; and (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of \$100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 936

Intergovernmental relations, Surface mining, Underground mining.

Dated: November 30, 2001.

Charles E. Sandberg,

Acting Regional Director, Mid-Continent Regional Coordinating Center.

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DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 20

RIN 2900-AL11

Board of Veterans' Appeals Rules of Practice: Claim for Death Benefits by Survivor

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Department of Veterans Affairs' (VA) Rules of Practice at the Board of Veterans' Appeals (Board) to

clarify that the general rule that the Board is not bound by prior dispositions during the veteran's lifetime of issues involved in the survivor's claim does not include claims for "enhanced" Dependency and Indemnity Compensation (DIC). This amendment is necessary to eliminate confusion between the Board's current rule and another rule relating to DIC for survivors of certain veterans rated totally disabled at the time of death.

DATES: Comments must be received on or before January 22, 2002.

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; or fax comments to (202) 273-9289; or e-mail comments to OGCRegulations@mail.va.gov.

Comments should indicate that they are submitted in response to "RIN 2900-AL11." All comments received will be available for public inspection in the Office of Regulations Management, Room 1158, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays).

FOR FURTHER INFORMATION CONTACT:

Steven L. Keller, Senior Deputy Vice Chairman, Board of Veterans' Appeals, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 (202-565-5978).

SUPPLEMENTARY INFORMATION: The Board of Veterans' Appeals (Board) is an administrative body that decides appeals from denials of claims for veterans' benefits.

The purpose of this document is to comply with the order of the U.S. Court of Appeals for the Federal Circuit in *National Organization of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs*, Nos. 00-7095, 00-7096, 00-7098 (Fed. Cir. Aug. 16, 2001) ("NOVA"). That case was a petition challenging VA's January 2000 final rule which amended 38 CFR 3.22, relating to dependency and indemnity compensation (DIC) benefits for survivors of certain veterans rated totally disabled at the time of death. See 65 FR 3388 (Jan. 21, 2000).

While the NOVA court explicitly declined to invalidate the rule, NOVA, slip op. at 42, it did note that there was an apparent conflict between the new rule and 38 CFR 20.1106. The court concluded that those two rules stated conflicting interpretations of two virtually identical statutes. The statutes, 38 U.S.C. 1311(a)(2) and 1318, both provide benefits to the survivor of a veteran who was at the time of death "in receipt of or entitled to receive"

compensation for a service-connected disability that was continuously rated totally disabling for a specified number of years prior to death. The regulation in 38 CFR 3.22 interprets the phrase "entitled to receive" in 38 U.S.C. 1318 to mean that the VA had awarded the veteran a total disability rating for the specified period during his or her lifetime, but for some reason the veteran did not receive payment based on that rating, or that the veteran would have had a total disability rating for that period if not for a clear and unmistakable error by VA during the veteran's lifetime. The NOVA court concluded that 38 CFR 20.1106 interprets the same language in 38 U.S.C. 1311(a)(2) to require a posthumous determination of the veteran's "entitlement" to compensation without regard to whether VA rating decisions during the veteran's lifetime established such entitlement. Having concluded that VA established conflicting interpretations of the identical language in these two statutes, the NOVA court ordered VA to conduct an expedited rulemaking to either explain the basis for the differing interpretations or to revise one of its regulations to remove any inconsistency. NOVA, slip op. at 43.

As explained in this notice, VA has not interpreted 38 U.S.C. 1318, and 38 U.S.C. 1311 in inconsistent ways. Nevertheless, to eliminate the potential ambiguity identified in the NOVA decision, we are amending 38 CFR 20.1106 to clarify that, as with decisions under 38 U.S.C. 1318, decisions under 38 U.S.C. 1311(a)(2) will be decided taking into consideration prior dispositions made during the veteran's lifetime of issues involved in the survivor's claim. The effect of this change is to make VA's position clear that entitlement to benefits under either 38 U.S.C. 1318 or 38 U.S.C. 1311 must be based on the determinations made during the veteran's lifetime, or challenges to such decisions on the basis of clear and unmistakable error, rather than on de novo posthumous determinations as to whether the veteran hypothetically could have been entitled to certain benefits if he or she had applied for them during his or her lifetime.

Background on Dependency and Indemnity Compensation

Since 1957, survivors of a veteran who died in service or as a result of a service-connected disability have been entitled to a monthly benefit called "Dependency and Indemnity Compensation" (DIC). 38 U.S.C. 1310(a), 1311.

DIC and Survivors of Veterans Who Die Other Than as a Result of Service

Until 1978, DIC was payable only if the veteran died in service or as a result of service. In 1978, Pub. L. No. 95-479, 92 Stat. 1564 (1978), amended title 38, United States Code to pay the same benefit as if the veteran had died of a service-connected disability to survivors of a veteran (1) whose death was not caused by service-connected disability, but (2) who, at the time of death, "was in receipt of (or but for the receipt of retired or retirement pay was entitled to receive)" compensation for a service-connected disability rated 100 percent disabling for 10 years immediately preceding death, or for a period of at least 5 years extending from date of discharge from service until date of death. That provision was codified in 38 U.S.C. 410(b)(1). In 1979, VA issued 38 CFR 3.22 to implement the statute. 44 FR 22716-22718 (Apr. 17, 1979).

In a 1981 opinion, VA's General Counsel concluded that 38 U.S.C. 410(b)(1) did not permit a DIC award to the survivors of a veteran who was not actually in receipt of compensation for a total disability for a full 10 years prior to death, but who would have been in receipt of such benefits if not for error by VA in a decision rendered during the veteran's lifetime. Op. G.C. 2-81 (Mar. 24, 1981).

In response to that opinion, Congress enacted Public Law 97-306, 96 Stat. 1429 (1982), which revised 38 U.S.C. 410(b)(1), to amend the phrase "was in receipt of" to "was in receipt of or entitled to receive * * *" (emphasis added). The legislative history states that the purpose of this amendment was "to provide that the requirement that the veteran have been in receipt of compensation for a service-connected disability rated as total for a period of 10 years prior to death (or for 5 years continuously from the date of discharge) is met if the veteran would have been in receipt of such compensation for such period but for a clear and unmistakable error regarding the award of a total disability rating." Explanatory Statement of Compromise Agreement, 128 Cong. Rec. H7777 (1982), reprinted in 1982 U.S.C.C.A.N. 3012, 3013. Accordingly, the amended statute, now codified at 38 U.S.C. 1318(b), authorizes payment of DIC in cases where the veteran "was in receipt of or entitled to receive (or but for the receipt of retired or retirement pay was entitled to receive)" compensation for a service-connected disability rated totally disabling for 10 years immediately preceding death or a period of 5 years from the date of discharge.

In 1983, VA revised 38 CFR 3.22 to state that DIC would be payable under 38 U.S.C. 410(b)(1) (now 38 U.S.C. 1318(b)) when the veteran "was in receipt of or for any reason (including receipt of military retired or retirement pay or correction of a rating after the veteran's death based on clear and unmistakable error) was not in receipt of but would have been entitled to receive compensation at the time of death" for service-connected disability rated totally disabling for 10 years prior to death or 5 years continuously from date of discharge to date of death. 48 FR 41160, 41161 (Sep. 14, 1983).

Payment Under DIC; "Enhanced Benefit"

DIC provides a monthly cash benefit to survivors. Until 1993, surviving spouses received a monthly benefit based on the veteran's pay grade while on active duty.

In the "Dependency and Indemnity Compensation Reform Act of 1992," Pub. L. No. 102-568, Title I, § 102 (Oct. 29, 1992), 106 Stat. 4321, 4322, Congress made substantial changes to the DIC program. The primary change was to the payment system. For deaths occurring subsequent to January 1, 1993, all surviving spouses are paid at the same rate. In addition, the Act provided an "enhancement" to the benefits paid to some surviving spouses: If the veteran was in receipt of or was entitled to receive compensation for a service-connected disability rated totally disabling for a continuous period of at least eight years immediately preceding death, the surviving spouse receives an additional monthly benefit, currently \$197 per month. 38 U.S.C. 1311(a)(2); 66 FR 28598 (May 23, 2001) (adjusted rate).

In 1993, VA issued a regulation at 38 CFR 3.5(e) to implement 38 U.S.C. 1311(a)(2). That regulation states that the additional DIC amount will be paid "in the case of the death of a veteran who at the time of death was in receipt of or was entitled to receive (or but for the receipt of retired pay or retirement pay was entitled to receive) compensation for a service-connected disability that was evaluated as totally disabling for a continuous period of at least eight years immediately preceding death."

Background on 38 CFR 20.1106

38 CFR 20.1106—"Rule 1106"—is a Rule of Practice at the Board of Veterans' Appeals. Essentially, it sets forth the rule that, in most cases, issues involved in a survivor's claim for death benefits will be decided without regard to any prior disposition of those issues

during the veteran's lifetime. Specifically, it provides as follows:

§ 20.1106 Rule 1106. Claim for death benefits by survivor—prior unfavorable decisions during veteran's lifetime.

Except with respect to benefits under the provisions of 38 U.S.C. 1318 and certain cases involving individuals whose Department of Veterans Affairs benefits have been forfeited for treason or for subversive activities under the provisions of 38 U.S.C. 6104 and 6105, issues involved in a survivor's claim for death benefits will be decided without regard to any prior disposition of those issues during the veteran's lifetime.

This particular version of the rule became effective in February 1992, 9 months prior to enactment of Pub. L. No. 102-568.

Rule 1106 was originally proposed in 1989. It was part of a large package of revisions to the Board's rules in the wake of enactment of the Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, Div. A, 102 Stat. 4105 (1988).

The predecessor to Rule 1106 was Rule 96 (38 CFR 19.196 (1991)). That rule provided as follows:

Issues involved in a survivor's claim for death benefits will be decided without regard to any prior disposition of those issues during the veteran's lifetime.

When the Board proposed rule 96 in 1980, it explained that the purpose was to "[a]llow the Board to review "de novo" service connection cause of death cases notwithstanding the fact that a final appellate decision had been rendered during the veteran's lifetime." 45 FR 56093 (1980). As indicated, the rule was intended to apply in cases where a DIC claim is dependent on a finding that the cause of death was service connected, the most common type of DIC claim. It was not intended to preclude consideration of decisions during the veteran's lifetime in cases where a DIC claim was dependent upon a showing that the veteran was entitled to receive compensation during his or her lifetime for a service-connected disability rated totally disabling for a specified pre-death period. However, it became apparent that the language of Rule 96 could be construed as covering such cases. Accordingly, in 1989, VA proposed to amend Rule 96 with current Rule 1106, explaining:

The old rule was inconsistent with 38 CFR 3.22(a)(2) which, in effect, requires that it be shown that there was clear and unmistakable error in prior rating decisions which failed to give a veteran a total rating for the required period of time in order to qualify for "410(b)" benefits. (Former 38 U.S.C. 410(b) is now 38 U.S.C. 418, see Section 1403 of Public Law 100-687.) 38 U.S.C. 3504(c) forbids the payment of benefits to any person after

September 1, 1959, based on the service of an individual before the date of a treasonous act if that individual's Department of Veterans Affairs benefits have been forfeited for treason. There is a similar prohibition in 38 U.S.C. 3505(a) pertaining to cases involving forfeiture for subversive activities. These provisions are now recognized. 54 FR 34334, 34338 (Aug. 18, 1989)

In February 1992, having received no comments on the proposed rule, VA published Rule 1106 as a final rule (57 FR 4088, 4103 (Feb 3, 1992)).

VA's Interpretation of 38 U.S.C. 1318

In *Wingo v. West*, 11 Vet. App. 307 (1998), the United States Court of Appeals for Veterans Claims (CAVC) interpreted 38 CFR 3.22(a) to permit a DIC award in a case where the veteran had never established entitlement to VA compensation for a service-connected total disability and had never filed a claim for such benefits which could have resulted in entitlement to compensation for the required period. The CAVC concluded that the language of § 3.22(a) would permit a DIC award where it is determined that the veteran "hypothetically" would have been entitled to a total disability rating for the required period if he or she had applied for compensation during his or her lifetime. 11 Vet. App. at 311.

The CAVC's interpretation of § 3.22(a) did not accurately reflect VA's intent in issuing that regulation. Section 1318 of the statute authorizes DIC where the veteran was "in receipt of or entitled to receive" compensation for total service-connected disability for a specified period preceding death. The statute does not authorize VA to award DIC benefits in cases where the veteran merely had hypothetical, as opposed to actual, entitlement to compensation. VA does not have authority to provide by regulation for payment of DIC in a manner not authorized by 38 U.S.C. 1318. Section 3.22(a) is an interpretive rule that was intended to explain the requirements of 38 U.S.C. 1318, and not to establish any substantive rights beyond those authorized by section 1318. However, since the language of § 3.22(a) apparently caused confusion regarding VA's interpretation of 38 U.S.C. 1318, VA revised § 3.22(a) to ensure that it clearly expresses VA's interpretation of section 1318. See 65 FR 3388 (Jan. 21, 2000).

Section 1318 authorizes payment of DIC in cases where the veteran was, at the time of death, "in receipt of or entitled to receive (or but for the receipt of retired or retirement pay was entitled to receive)" compensation for service-connected disability that "was continuously rated totally disabling for

a period of 10 or more years immediately preceding death" or was so rated for 5 years continuously from date of discharge to date of death. The phrase "in receipt of * * * compensation" unambiguously refers to cases where the veteran was, at the time of death, actually receiving compensation for service-connected disability rated totally disabling for the required period. VA concluded that the phrase "entitled to receive * * * compensation" is most reasonably interpreted as referring to cases where the veteran had established a legal right to receive compensation for the required period under the laws and regulations governing such entitlement, but was not actually receiving the compensation.

Under 38 U.S.C. 5101, "a specific claim in the form prescribed by the Secretary * * * must be filed in order for benefits to be paid or furnished to any individual under the laws administered by the Secretary." No person can have a right to receive compensation from VA in the absence of a properly filed claim. *Jones v. West*, 136 F.3d 1296, 1299-1300 (Fed. Cir.), cert. denied, 119 S. Ct. 90 (1998). Section 5110(a) of title 38, United States Code, provides that an award of compensation may not be made effective earlier than the date of the claimant's application, unless specifically provided otherwise by statute. Accordingly, a person cannot have a right to receive compensation from VA for any period prior to the date of an application for benefits except as expressly authorized by specific statutory provision.

Moreover, as set forth above, the legislative history of Public Law 97-306—which added the phrase "or entitled to receive" to what is now 38 U.S.C. 1318—clearly shows that Congress made the amendment to provide that DIC may be paid in cases where the veteran would have been in receipt of compensation for a total service-connected disability for the specified period prior to death if not for a clear and unmistakable error (CUE) by VA. A "clear and unmistakable error" is an error in a prior final VA decision which materially affected the outcome of the decision. See, e.g., *Disabled American Veterans v. Gober*, 234 F.3d 682, 695-97 (Fed. Cir. 2000), cert. denied sub nom. *Nat'l Org. of Veterans' Advocates v. Principi*, 121 S. Ct. 1605 (2001); *Bustos v. West*, 179 F.3d 1378, 1381 (Fed. Cir.), cert. denied 120 S. Ct. 405 (1999). Pursuant to law and regulation, a decision containing CUE may be revised retroactively, and entitlement to benefits may be established retroactively as if the error

had not occurred. 38 U.S.C. 5109A, 7111; 38 CFR 3.105(a), 38 CFR 20.1406(a).

A retroactive award predicated on a finding of CUE is, like all awards of VA benefits, subject to the requirement that the veteran have filed a claim for benefits under 38 U.S.C. 5101(a). Further, the period of the veteran's retroactive entitlement is governed by the effective-date provisions of 38 U.S.C. 5110, and generally may not be earlier than the date of the veteran's claim which resulted in the erroneous decision. In using the phrase "entitled to receive" to refer to the specific class of cases where the veteran's entitlement was established by correction of CUE, Congress plainly contemplated that determinations concerning the existence and duration of the veteran's entitlement to benefits would continue to be governed by the requirements of 38 U.S.C. 5101(a) and 5110.

The legislative history also suggests that final decisions concerning a veteran's disability rating and effective date would be binding for purposes of determinations under 38 U.S.C. 1318(b) unless there was CUE in such decisions. Sections 7104(b) and 7105(c) of title 38, United States Code provide that determinations of the Board of Veterans' Appeals and VA regional offices, respectively, are final unless a timely appeal is filed. Such final decisions may be revised only on the basis of CUE. By clearly stating its intent that DIC benefits may be awarded if there was CUE in a prior final decision which prevented the veteran from receiving total disability compensation for the specified period, Congress plainly contemplated that the prior final decision would continue to be binding in the absence of CUE. The extensive discussion of CUE in the legislative history would have been unnecessary and illogical if Congress had intended VA to ignore any final VA decisions during the veteran's lifetime. Accordingly, if a regional office or the Board had rendered a final decision that the veteran was not entitled to a total rating for at least 10 years immediately preceding death (or at least 5 years from date of discharge to date of death), such decision would preclude VA from reaching a contrary conclusion in adjudicating a claim for DIC under 38 U.S.C. 1318(b).

In view of Congress' clear intent, VA has concluded that determinations concerning the existence and duration of the veteran's entitlement to compensation for a service-connected disability rated totally disabling are governed by the generally-applicable provisions of 38 U.S.C. 5101(a), 5110,

7104(b), and 7105(c), governing claim-filing requirements, effective dates of entitlement, and the finality of regional-office and Board decisions. Congress' stated purpose to authorize DIC in cases where clear and unmistakable error was the only obstacle to the veteran's receipt of total disability compensation for the required period fits logically within this well-established statutory scheme.

In contrast, interpreting 38 U.S.C. 1318(b) to permit DIC awards where the veteran "hypothetically" could have been entitled to benefits would create a substantially broader rule which would be inconsistent with the general statutory requirements governing a veteran's entitlement to compensation. VA has found no indication in section 1318(b) or its legislative history that Congress intended VA to ignore those established statutory requirements in making determinations regarding the veteran's entitlement to compensation for purposes of section 1318(b). To the contrary, Congress indicated that the purpose of the phrase "or entitled to receive" was to authorize DIC awards in a specific class of cases where the veteran's entitlement is established under those generally-applicable statutory requirements.

The language of 38 U.S.C. 1318(b) is consistent with Congress' stated purpose. Section 1318(b) authorizes payment of DIC in cases where the veteran was entitled to receive compensation for a service-connected disability that "was continuously rated totally disabling for a period of 10 or more years immediately preceding death." The requirement that the disability have been "continuously rated" totally disabling for the specified period is most reasonably construed as referring to ratings which had actually been assigned by VA for the duration of that period in accordance with the established statutory requirements governing claims, ratings, and effective dates. A contrary interpretation would render the term "rated" wholly unnecessary, for Congress could simply have provided that DIC would be payable based on a posthumous determination that the veteran had a service-connected disability that "was continuously * * * totally disabling for a period of 10 or more years immediately preceding death." In cases where a rating is assigned retroactively through correction of CUE, the statutory requirements for a continuous rating and entitlement at death are satisfied, as a matter of law, because Congress has mandated that decisions correcting CUE shall have the same effect as if they had been issued on the date of the erroneous decision.

For the foregoing reasons, we conclude that the meaning of section 1318 is clear from its language, history, and context. Accordingly, given the absence of ambiguity in the statute and in view of Congress' clear intent, there is no "interpretive doubt * * * to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

This interpretation of 38 U.S.C. 1318(b) is consistent with VA's prior interpretation of that provision. In a 1990 precedent opinion which is binding on all VA officials and employees, the VA General Counsel examined the language and history of section 1318(b) (previously section 410(b)), and concluded that the legislative history clearly indicated that Congress intended to authorize DIC in cases where the veteran had a total service-connected disability rating for the specified period, or would have had such a rating but for clear and unmistakable error by VA. The General Counsel concluded further that VA could not award DIC in cases where the veteran did not have a total service-connected rating for the specified period and there was no clear and unmistakable error which could have provided a basis for retroactively assigning such a rating. VAOPGCPREC 68-90, 55 FR 43255 (Oct. 26, 1990).

Definition of "Entitled to Receive"

In order to clarify the requirements of 38 U.S.C. 1318, VA revised 38 CFR 3.22 to expressly define the statutory term "entitled to receive." VA defined that term to refer to each specific circumstance where a veteran could have had a service-connected disability rated totally disabling by VA but may not have been receiving VA compensation for such disability at the time of death. The revised regulation provides seven circumstances:

- (1) VA was paying the compensation to the veteran's dependents;
- (2) VA was withholding the compensation under authority of 38 U.S.C. 5314 to offset an indebtedness of the veteran;
- (3) The veteran had applied for compensation but had not received total disability compensation due solely to clear and unmistakable error in a VA decision concerning the issue of service connection, disability evaluation, or effective date;
- (4) The veteran had not waived retired or retirement pay in order to receive compensation;
- (5) VA was withholding payments under the provisions of 10 U.S.C. 1174(h)(2);
- (6) VA was withholding payments because the veteran's whereabouts was

unknown, but the veteran was otherwise entitled to continued payments based on a total service-connected disability rating; or

(7) VA was withholding payments under 38 U.S.C. 5308 but determines that benefits were payable under 38 U.S.C. 5309. 38 CFR 3.22(b) (2000).

VA's Interpretation of 38 U.S.C. 1311(a)(2)

Section 1311(a)(2) was enacted in 1992. In view of the nearly identical language in 38 U.S.C. 1311(a)(2) and the earlier-enacted 38 U.S.C. 1318, and the similar purpose of the two statutes, VA believes those statutes should be interpreted in the same manner. The *NOVA* court reached the same conclusion, noting that the well-established rule that identical words used in different parts of a statute are intended to have the same meaning "applies with equal force where, as here, the words at issue are used in two different sections of a complex statutory scheme and those two sections serve the same purpose, namely, the award of DIC benefits to survivors." Slip op. at 23-24.

The legislative history of section 1311(a)(2) makes clear it was modeled on section 1318 and intended to have the same meaning. H.R. Rep. 753, 102d Cong. 17 (1992) (discussing application of sections 1311(a)(2) and 1318).

The legislative history further supports the conclusion that section 1311(a)(2), like section 1318, was intended to require that the veteran's entitlement to total disability ratings be based on ratings during the veteran's lifetime, rather than posthumous determinations regarding the veteran's "hypothetical" entitlement to benefits. The joint explanatory statement on the compromise agreement resulting in section 1311(a)(2) explained that it was intended to provide an additional amount of compensation for survivors of veterans who were "rated totally disabled while married to the surviving spouse." 138 Cong. Rec. 17376 (1992).

In 1993, VA issued a regulation to implement 38 U.S.C. 1311(a)(2). That regulation, codified at 38 CFR 3.5(e), states that the additional DIC amount will be paid "in the case of the death of a veteran who at the time of death was in receipt of or was entitled to receive (or but for the receipt of retired pay or retirement pay was entitled to receive) compensation for a service-connected disability that was evaluated as totally disabling for a continuous period of at least eight years immediately preceding death."

For the reasons stated above with respect to 38 U.S.C. 1318, VA has consistently construed 38 U.S.C.

1311(a)(2) and 38 CFR 3.5(e) as requiring that the veteran's entitlement to total disability compensation be established by ratings during the veteran's lifetime or by CUE challenge to a decision or decisions rendered during the veteran's lifetime. Because this construction comports with the language, legislative history, and principles of construction discussed above, VA will continue to interpret both 38 U.S.C. 1311(a)(2) and 38 U.S.C. 1318 in this manner.

The NOVA Case: Revision of Rule 1106

The *NOVA* court concluded that VA has interpreted 38 U.S.C. 1318 and 38 U.S.C. 1311(a)(2) differently because the rule in 38 CFR 20.1106 concerning disregard of decisions during the veteran's lifetime contains an exception for section 1318 but not for section 1311(a)(2). As explained above, VA has consistently interpreted 38 U.S.C. 1311(a)(2) and 1318 in the same manner. The cited inconsistency between 38 CFR 3.22(a) and Rule 1106 is a function of time, not of VA's interpretation of the two statutes at issue in the *NOVA* case.

Despite the court's characterization of Rule 1106 as the "implementing" regulation for 38 U.S.C. 1311, *NOVA*, slip op. at 9–10; 37, the fact is that Rule 1106 was proposed three and one-half years before, and published as final 9 months before, the amendments to 38 U.S.C. 1311 were enacted. Simply put, Rule 1106 was not, and could not have been, drafted with the enhanced DIC benefits of 38 U.S.C. 1311(a)(2) in mind. VA implemented 38 U.S.C. 1311(a)(2) in a different regulation, 38 CFR 3.5(e), published in April 1993, after enactment of Pub. L. No. 102–568, 58 FR 25561 (Apr. 27, 1993).

Rule 1106 was intended to apply to claims for DIC where the veteran's death is service connected. It was never intended to preclude consideration of decisions during the veteran's lifetime in cases where the veteran's death is not service connected and, therefore, a survivor's entitlement to DIC is dependent upon a showing that the veteran was entitled to receive compensation during his or her lifetime for a service-connected disability rated totally disabling for a specified pre-death period. In view of the purpose of Rule 1106 and the clear requirements of 38 U.S.C. 1311(a)(2) and 38 CFR 3.5(e), VA has not interpreted Rule 1106 to preclude reliance on decisions during the veteran's lifetime in determining entitlement to enhanced DIC benefits.

VA has interpreted 38 CFR 3.22 and 38 CFR 20.1106 to preclude "hypothetical" determinations of

eligibility for nonservice-connected DIC under 38 U.S.C. 1318, an explicit exclusion in Rule 1106 recognized by the Federal Circuit in *Hix*, 225 F.2d at 1380. In the same way, under Rule 1106, we interpreted the exact same language—"in receipt of or entitled to receive"—in 38 U.S.C. 1311(a)(2) to preclude hypothetical determinations of eligibility for the enhanced DIC benefit. In *Hix*, the court declined to defer to VA's interpretation because Rule 1106 mentions 38 U.S.C. 1318, but does not mention 38 U.S.C. 1311(a)(2). As indicated above, the reason for this omission is that Rule 1106 became final 9 months before the current 38 U.S.C. 1311(a)(2) was enacted. There is, frankly, no basis for concluding that VA meant to exclude a statute that did not yet exist. Although we recognize that further revision of Rule 1106 to include express reference to 38 U.S.C. 1311(a)(2) will help clarify VA's position, this revision does not reflect any change in VA's interpretation of the governing statutes.

Nevertheless, because of the apparent confusion, and in accordance with the court's order in *NOVA*, we propose to amend 38 CFR 20.1106 to add a specific exception for 38 U.S.C. 1311(a)(2). In our view, the statutory language does not support paying either DIC or enhanced DIC benefits where the veteran never made a claim for total disability benefits in his or her lifetime, or where a survivor cannot show clear and unmistakable error in decisions made during the veteran's lifetime.

Comment Period

We are providing a comment period of 30 days for this proposed rule. In its August 16, 2001, order in the *NOVA* case, the Federal Circuit directed VA to issue its final rules on this matter within 120 days after the date of issuance of the court's mandate in that case. The Federal Circuit further ordered VA to stay all proceedings on claims for DIC under 38 U.S.C. 1318 until such final rules are issued. Although the Federal Circuit indicated that VA may request an extension of time, if necessary, we believe that the Court intended that VA would make every effort to issue final rules within the specified 120-day period. A shortened comment period of 30 days is necessary to help us meet the objective of the Court. Further, we believe that prompt completion of the rulemaking process is necessary to ensure that the court-ordered stay of proceedings does not result in prolonged delays in pending claims that may be affected by this rule.

Executive Order 12866

This document has been reviewed by the Office of Management and Budget 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).

Regulatory Flexibility Act

The Secretary hereby certifies that 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, inasmuch as this rule applies to individual claimants for veterans' benefits and does not affect such entities. Therefore, pursuant to 5 U.S.C. 605(b), this proposed rule is exempt from the initial and final regulatory flexibility analyses requirement of sections 603 and 604.

There is no Catalog of Federal Domestic Assistance number for this proposed rule.

List of Subjects in 38 CFR Part 20

Administrative practice and procedure, Claims, Veterans.

Approved: November 26, 2001.

Anthony J. Principi,
Secretary of Veterans Affairs.

For the reasons set out in the preamble, VA proposes amending 38 CFR part 20 as follows:

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

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

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

2. Section 20.1106 is revised to read as follows:

§ 20.1106 Rule 1106. Claim for death benefits by survivor-prior unfavorable decisions during veteran's lifetime.

Except with respect to benefits under the provisions of 38 U.S.C. 1311(a)(2), 1318, and certain cases involving individuals whose Department of Veterans Affairs benefits have been forfeited for treason or for subversive activities under the provisions of 38 U.S.C. 6104 and 6105, issues involved in a survivor's claim for death benefits will be decided without regard to any prior disposition of those issues during the veteran's lifetime.

Authority: 38 U.S.C. 7104(b).

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