

risk to safety that might disproportionately affect children.

### Indian Tribal Governments

We anticipate that any proposed rule would not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would likely not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. However, we recognize that ANS may pose significant concerns for some tribal governments and are committed to working with tribes as we proceed with this rulemaking.

To help the Coast Guard establish regular and meaningful consultation and collaboration with Indian and Alaskan Native tribes, we published a notice in the **Federal Register** (66 FR 36361, July 11, 2001) requesting comments on how to best carry out the Order. We invite your comments on how any rule resulting from this ANPRM might impact tribal governments, even if that impact may not constitute a "tribal implication" under the Order, and how best to address the ANS concerns of the tribal governments.

### Energy Effects

We have not analyzed this ANPRM under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have not determined whether it is a "significant energy action" under that order because we do not know whether any resulting rule would be a "significant regulatory action" under Executive Order 12866. Once we determine the economic significance of any rule stemming from this ANPRM, we will determine whether a Statement of Energy Effects is required.

### Environment

The Coast Guard will consider the environmental impact of any proposed rule that results from this advance notice of proposed rulemaking. We will include either Environmental Assessment or Environmental Impact Statement in the docket for any such rulemaking as appropriate.

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Dated: August 27, 2001.

**Paul J. Pluta,**

*Rear Admiral, U.S. Coast Guard, Assistant Commandant for Marine Safety and Environmental Protection.*

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## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 3

#### RIN 2900-AH42

### Evidence for Accrued Benefits

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of Veterans Affairs (VA) is proposing to amend its

adjudication regulations dealing with accrued benefits, those benefits to which an individual was entitled under existing ratings or decisions, or those based on "evidence in the file at date of death" which were due and unpaid at the time the individual died. "Evidence in the file at date of death" would be interpreted as evidence in VA's possession on or before the date of the beneficiary's death, even if such evidence was not physically located in the VA claims folder on or before the date of death. Further, "evidence necessary to complete the application" for accrued benefits would be interpreted as information necessary to establish that the claimant is within the category of eligible persons and that circumstances exist which make the claimant the specific person entitled to the accrued benefits. These amendments would reflect our interpretation of the governing statute.

**DATES:** Comments must be received by VA on or before May 3, 2002.

**ADDRESSES:** Mail or hand deliver written comments to: Director, Office of Regulations Management (02D), Department of Veterans Affairs, Room 1154, 810 Vermont Ave., N.W., Washington, DC 20420; or fax comments to (202) 273-9289; or e-mail comments to [OGCRegulations@mail.va.gov](mailto:OGCRegulations@mail.va.gov). Comments should indicate that they are submitted in response to "RIN 2900-AH42." All comments will be made available for public inspection at the above address 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:** Randy A. McKeivitt, Consultant, Regulations Staff, Compensation and Pension Service (211A), Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Ave., N.W., Washington, DC 20420, (202) 273-7138.

**SUPPLEMENTARY INFORMATION:** 38 U.S.C. 5121(a) states that periodic monetary benefits under laws administered by the Secretary of Veterans Affairs to which an individual was entitled at death, either under existing ratings or decisions, or based on "evidence in the file at date of death," which are due and unpaid for a period not to exceed two years shall, upon death of that individual, be paid to a properly entitled claimant. This statutory provision lists the persons who are eligible to be paid accrued benefits, in order of preference in the case of a deceased veteran, and specifies the circumstances under which they will be

entitled. Section 5121(c) states that the application for accrued benefits must be filed within one year after the date of death, and that if a claimant's application is incomplete at the time it is originally submitted, the Secretary shall notify the claimant of the evidence necessary to complete the application.

In *Hayes v. Brown*, 4 Vet. App. 353, 360 (1993), the Court of Veterans Appeals (now the Court of Appeals for Veterans Claims) stated that "the regulatory framework that has been established to implement section 5121(a), (c) is confusing at best." The Court also found the provisions of VA's Adjudication Procedures Manual (M21-1) at Part IV, Chapter 27, and Part VI, Chapter 5, to be confusing with regard to what post-date-of-death evidence is acceptable, pointing out that to the extent these manual provisions affect what post-date-of-death evidence may be considered, they are substantive rules. The *Hayes* panel also pointed out an apparent statutory ambiguity, noting that while section 5121(a) permits only "evidence in file at the date of death," section 5121(c) seems to contradict, or at least qualify, that provision by stating, "[i]f a claimant's application is incomplete at the time it is originally submitted, the Secretary shall notify the claimant of the evidence necessary to complete the application."

We propose to rewrite 38 CFR 3.1000 to remove redundant language and to define both what constitutes "evidence in the file at the date of death" for purposes of section 5121(a) and what constitutes "evidence necessary to complete the application" for purposes of section 5121(c).

Before granting accrued benefits, VA must determine whether the deceased individual had established entitlement to a periodic monetary benefit that was due and unpaid on the date of death. Also, VA must determine (1) whether the application for accrued benefits provides sufficient information to establish that the claimant falls within the category of persons who may be eligible for accrued benefits, and (2) whether circumstances exist under which that person is entitled to the benefits that have accrued.

38 CFR 3.1000(c)(1) currently states that if a claimant's application is incomplete, the claimant will be notified of the evidence necessary to complete the application. We propose to add provisions to § 3.1000(c)(1) to reflect our interpretation of what constitutes "evidence necessary to complete the application" under 38 U.S.C. 5121(c). Such evidence would be information establishing that the claimant is within the category of

persons eligible for accrued benefits and that circumstances exist which make the claimant the specific person entitled to payment of all or any part of benefits which may have accrued. We believe that the proposed language would make it clear that the "evidence" in question is that information necessary to establish that the applicant for accrued benefits is the person eligible for and entitled to those benefits. Further, we believe that the proposed language would ensure that the "evidence necessary to complete the application" would not be confused with the "evidence in the file at date of death" referred to in 38 U.S.C. 5121(a), which concerns whether an individual was entitled to benefits at the date of his/her death based on "evidence in the file." This will also align the interpretation of this statute with that of 38 U.S.C. 5102, as amended by the Veterans Claims Assistance Act of 2000, Pub. L. 106-475. 38 CFR 3.1000(d)(4) purports to define "evidence in the file at date of death." Rather than defining that statutory term, this regulation currently states that in certain instances VA may accept identifying, corroborating or verifying information from the death certificate and evidence submitted with the claim for accrued benefits to support prima facie evidence already in the file. These current provisions do not define the term "evidence in the file."

A claimant who meets all eligibility requirements for a VA benefit is not entitled to that benefit (and there are no payments due) until he or she has filed a specific claim and VA received evidence establishing entitlement. Therefore, there can be no accrued benefits unless the deceased individual had filed a specific claim and VA had received sufficient evidence on or before the date of death to establish entitlement to a VA benefit. See *Jones v. West*, 136 F.3d 1296, 1299 (Fed. Cir. 1998) (in the absence of an existing rating or decision, decedent must have had a claim pending at the time of death). Therefore, we propose to define "evidence in the file at date of death" according to when the evidence was received, i.e., the evidence must have been in VA's possession on or before the date of death.

We propose to revise § 3.1000(d)(4) to define "evidence in the file at the date of death" as evidence in VA's possession on or before the date of the beneficiary's death, even if such evidence was not physically located in the VA claims folder on or before the date of death. We believe this definition accurately reflects the meaning of the statutory provisions of section 5121(a). This change would supersede the

current provisions at 38 CFR 3.1000(d)(4).

Accordingly, we propose to delete from M21-1 provisions that are inconsistent with our proposed definition. Those provisions state that certain classes of evidence not in file on the date of death will be considered to provide a basis for an award of accrued benefits and permit an award of accrued benefits to be based on inferences or prospective estimation drawn from information in file on the date of death. Those provisions are in M21-1, part IV, paragraphs 27.08b, c, d, e, and f.

We also propose to delete provisions in M21-1, part VI, paragraph 5.06, that are duplicative of governing statutes, inconsistent with our interpretation of those statutes, or superseded by these proposed regulatory amendments. Such provisions are contained in paragraph 5.06a, which describes general principles applicable to accrued benefits rating decisions.

M21-1, part VI, paragraph 5.06b, in the introductory text, purports to permit the acceptance of a claim for disability pension as an informal claim for disability compensation, and vice versa, only if a claim for accrued benefits is filed within 1 year of the date of receipt of the disability claim. This is inconsistent with 38 CFR 3.151(a), which permits VA to consider a claim for compensation to be a claim for pension and a claim for pension to be a claim for compensation without regard to any accrued benefits claim. Neither § 3.151(a) nor 38 U.S.C. 5101 limits acceptance of such claims only to where a claim for accrued benefits is received. Because the paragraph 5.06b introductory text is inconsistent with the regulations and statute, we propose to delete that introductory text.

M21-1, part VI, paragraph 5.06b(3), concerning payment of accrued benefits for the month of death, is duplicative of the regulations and of governing law. We propose to delete this paragraph as unnecessary.

M21-1, part VI, paragraphs 5.06c and d, are inconsistent with the proposed amendments, and we propose to delete them.

In accordance with the foregoing discussion, we would delete from M21-1, as inconsistent with our interpretation of our statutory authority, duplicative of governing laws, or superseded by these amendments, provisions in Part IV, paragraphs 27.08b, c, d, e, and f, and part VI, paragraphs 5.06a, b introductory text, b(3), c, and d, which relate to rating decisions, claims pending at death, payment for the month of death, consideration of evidence not in VA's

possession on the date of the beneficiary's death, the sufficiency of evidence in VA's possession on that date, and inferences or predictions from such evidence.

#### Paperwork Reduction Act

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

#### Unfunded Mandates

The Unfunded Mandates Reform Act requires, 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 in any given year. This rule would have no consequential effect on State, local or tribal governments.

#### Executive Order 12866

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

#### Regulatory Flexibility Act

The Secretary hereby certifies that this proposed 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. The amendment would not directly affect any small entities. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), the proposed amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

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

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

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

Approved: December 10, 2001.

**Anthony J. Principi,**  
*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. Section 3.1000 is amended by revising the section heading, paragraph (c)(1), and paragraph (d)(4) introductory text, to read as follows:

#### § 3.1000 Entitlement under 38 U.S.C. 5121 to benefits due and unpaid upon death of a beneficiary.

\* \* \* \* \*

(c) \* \* \*

(1) If an application for accrued benefits is incomplete because the claimant has not furnished information necessary to establish that he or she is within the category of eligible persons under the provisions of paragraphs (a)(1) through (a)(4) or paragraph (b) of this section and that circumstances exist which make the claimant the specific person entitled to payment of all or part of any benefits which may have accrued, VA shall notify the claimant:

(i) Of the type of information required to complete the application;

(ii) That VA will take no further action on the claim unless VA receives the required information; and

(iii) That if VA does not receive the required information within 1 year of the date of the original VA notification of information required, no benefits will be awarded on the basis of that application.

\* \* \* \* \*

(d) \* \* \*

(4) *Evidence in the file at date of death* means evidence in VA's possession on or before the date of the beneficiary's death, even if such evidence was not physically located in the VA claims folder on or before the date of death.

\* \* \* \* \*

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#### ENVIRONMENTAL PROTECTION AGENCY

##### 40 CFR Part 52

[IA 0127-1127; FRL-7151-6]

##### Approval and Promulgation of Implementation Plans; State of Iowa

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA proposes to approve the State Implementation Plan (SIP) revision submitted by the State of Iowa. This revision approves numerous rules adopted by the State in 1998, 1999, and 2001. This includes rules pertaining to