

DEPARTMENT OF VETERANS AFFAIRS**38 CFR Part 20**

RIN 2900-AK52

Board of Veterans' Appeals: Rules of Practice—Medical Opinions From the Veterans Health Administration**AGENCY:** Department of Veterans Affairs.**ACTION:** Final rule.

SUMMARY: This document adopts as a final rule, with one exception, the interim final rule that amended the Department of Veterans Affairs (VA) Appeals Regulation clarifying that the Board of Veterans' Appeals (Board) may obtain medical opinions from appropriate health care professionals in VA's Veterans Health Administration. The exception is inclusion of citation to statutory authority that was omitted from the interim rule and updating the previously cited statutory authority to reflect recent legislation.

DATES: *Effective Date:* This final rule is effective as of July 23, 2001.

FOR FURTHER INFORMATION CONTACT: Steven L. Keller, Senior Deputy Vice Chairman, Board of Veterans' Appeals (012), 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 denial of claims for veterans benefits.

On July 23, 2001, VA published an interim final rule with request for comments to clarify that under 38 CFR 20.901(a), the Board may obtain medical opinions from appropriate health care professionals within the Department's Veterans Health Administration (VHA) rather than solely from the Under Secretary for Health (formerly known as the Chief Medical Director) (66 FR 38158).

After publication of the interim final rule, it was brought to our attention that citation to the primary authority for this regulation, 38 U.S.C. 7109, was omitted from the regulatory text, and that the statute we had cited, 38 U.S.C. 5107(a), had been amended by the Veterans Claims Assistance Act of 2000 (VCAA), Public Law 106-475, 114 Stat. 2096. Therefore, the only change we have made is to change the authority citation to include section 7109 and to refer to the statute as amended by the VCAA. The substance and effect of the final regulation does not change.

We received comments from a veterans' service organization and an

association of veterans' advocates. Both groups opposed the interim final rule and urged VA to rescind the rule. The reasons for their opposition fell into five categories: (1) Alleged lack of statutory authority and conflict with 38 U.S.C. 7109; (2) alleged conflict with the VCAA; (3) alleged conflict with 38 CFR 4.2, Interpretation of examination reports; (4) alleged violation of due process; and (5) alleged defects that would result in the rule being implemented in an arbitrary and unfair fashion. We do not agree with these objections and will address them in turn.

1. Alleged Lack of Statutory Authority and Conflicts With 38 U.S.C. 7109

38 U.S.C. 7109 provides that when, in the judgment of the Board, an expert medical opinion (in addition to that available within the Department), is warranted by the medical complexity or controversy involved in an appealed case, the Board may secure an advisory medical opinion from one or more independent medical experts who are not employees of the Department.

We received comments asserting that VA lacks statutory authority for the rule and that section 7109 does not authorize the Board to obtain medical opinions from VHA. The commenters believe that the phrase "in addition to that available within the Department" means evidence already obtained by the agency of original jurisdiction (AOJ) and does not mean that the Board may request opinions from VHA. In the same vein, a commenter asserts that section 7109 "expressly prohibits the obtaining of medical opinions from VA employees."

We disagree. There is no legal basis to support the conclusion that the phrase "in addition to that available within the Department," limits the Board to obtaining medical opinions only from experts outside of VA. Rather, 38 U.S.C. 7109 acknowledges the Board's authority to request opinions from within the Department, when such opinions are deemed necessary. Indeed, the legislative history of current section 7109 clearly reflects such Congressional intent. In reporting the bill that eventually became section 7109 (it was redesignated from section 4009 in May 1991), the Senate Committee on Finance explained that the bill made no reference to the Board's authority to obtain an advisory opinion from the VA Chief Medical Director because "this is a matter within Agency discretion and ample authority for this practice now exists." S. Rep. No. 87-1844 (1962), reprinted at 1962 U.S.C.C.A.N. 2585, 2586.

In addition, Congressional approval of the practice of obtaining medical opinions through VHA is quite apparent in the legislative history accompanying the enactment of the Veterans Judicial Review Act, Pub. L. 100-687, Div. A, § 101, 102 Stat. 4105 (1988) (VJRA). In discussing changes made to section 7109, "[t]he Committees also note with approval the current practice of obtaining [medical expert] opinions through the Department of Medicine and Surgery [VHA's former name]." See 134 Cong. Rec. S16653 (1988), reprinted in 1988 U.S.C.C.A.N. 5834, 5842.

The Secretary believes that there is ample evidence of the Board's authority to obtain medical opinions from both inside and outside VA. Therefore, we make no changes based upon the foregoing comments.

2. Alleged Conflict With the VCAA

The VCAA requires the Secretary of Veterans Affairs to provide certain types of assistance in connection with a claim for benefits. One commenter argues that the amendment to 38 CFR 20.901(a) is *ultra vires* and conflicts with the VCAA in that it "creates de facto a super Regional Office" by allowing the Board to perform the RO's duty as codified by the VCAA. Both commenters assert that the amendment to 38 CFR 20.901(a) alters BVA's jurisdiction by allowing the Board to develop the record. They contend that this is an alteration that violates VA's obligations to assist the claimant and deprives claimants of one review on appeal. In this regard they assert that the VCAA requires "the Agency not the Board [to] fully and sympathetically develop the claim" and that while Congress gave the Board clear authority and responsibility in appellate matters "it gave the Board no authority to develop the record in routine matters." The VCAA changed nothing about 38 U.S.C. 7109(a), which expressly permits the Board to obtain medical opinions from outside VA and acknowledges its authority to obtain opinions from VHA. Section 7109(a) provides as follows:

When, in the judgment of the Board, expert medical opinion, in addition to that available within the Department, is warranted by the medical complexity or controversy involved in an appeal case, the Board may secure an advisory medical opinion from one or more independent medical experts who are not employees of the Department.

The phrase "in addition to that available within the Department" makes plain that the Board has discretion to use the source that it deems most appropriate. The Federal Circuit endorsed this analysis in *Disabled American Veterans v. Principi*, 327 F.3d

1339 (Fed. Cir. 2003), where it stated as follows:

[W]hen Congress intended to authorize the Board to obtain additional evidence without 'one review on appeal to the Secretary,' it knew how to do so. Congress has provided express statutory authority to permit the Board to obtain additional evidence, such as expert medical opinions in specific cases. *See, e.g.*, 38 U.S.C. 5107(a) (2000) (authorizing Board to obtain medical opinions from the VA's Under Secretary for Health (formerly the Chief Medical Director)); 38 U.S.C. 7109 (2000) (authorizing Board to obtain independent medical opinions from outside the VA); 38 CFR 20.901(a) (2002) (authorizing Board to obtain opinions from the Veterans Health Administration) * * *.

Disabled American Veterans v. Principi, 327 F.3d at 1347-48.

In addressing the impact and effect of the Federal Circuit's decision in *Disabled American Veterans*, the VA Office of the General Counsel issued a precedential opinion wherein it found that the Board is not prohibited from obtaining and considering evidence so long as a waiver is obtained. Otherwise, the matter has to be returned to the agency of original jurisdiction for initial consideration of the new evidence. VAOPGCPREC 1-2003 (May 21, 2003).

Moreover, in an earlier precedential opinion, the VA General Counsel determined that medical opinions from VHA belonged to a special class of evidence that the Board is allowed to consider without reference to the agency of original jurisdiction, provided that the claimant is given an opportunity to review and respond to such evidence before a decision is rendered. VAOPGCPREC 16-92 (July 24, 1992); *see also* 38 CFR 20.903(a) (1992).

The above-mentioned VA General Counsel opinions, along with the Federal Circuit's discussion of the Board's authority under 38 U.S.C. 7109 in *Disabled American Veterans v. Principi*, support the view that the Board has the authority to obtain medical opinions from medical professionals employed either inside or outside the Department.

Another comment asserts that 38 U.S.C. 5103A, which was created by the VCAA, delineates VA's general duty to assist and, in so doing, does not give the Board the authority to develop the record by obtaining a medical opinion. The commenter contends that 38 CFR 20.901(a) allows the Board to circumvent the duty-to-assist provisions that are set forth under section 5103A. We have reviewed the VCAA, to include section 5103A, and find there is nothing in the VCAA that would prevent the Board from obtaining medical opinions under 38 CFR 20.901(a).

This view is bolstered by the U.S. Court of Appeals for Veterans Claims (Veterans Court) in both *Winsett v. West*, 11 Vet App. 420, 426 (1998), *aff'd*, 217 F.3d 854 (Fed. Cir. 1999) (unpublished decision), *cert. denied*, 120 S. Ct. 1251 (2000), and *Perry v. Brown*, 9 Vet. App. 2, 6 (1996). In *Perry*, further evidentiary development was needed, and the court, citing 38 U.S.C. 5107(a) (before its amendment by the VCAA) and 7109, stated that "[t]he Board may seek to obtain that development itself through a VA [VHA] or non-VA [independent medical expert] opinion, or through a remand to the [regional office] for it to obtain an [independent medical expert] opinion, or to provide for a VA examination of the veteran." 9 Vet. App. at 6 (citations omitted). In *Winsett*, the Veterans Court expressly held that section 7109 does not preclude the Board from obtaining a medical opinion "not rendered by an independent source," 11 Vet. App. at 426, and noted both that "whether the Board chooses to refer a particular case for an independent medical opinion is entirely within its discretion" and that "[i]t is uncontested that the Board has the authority * * * to obtain an expert medical opinion irrespective of section 7109," *id.*

Thus, in light of the case law and the opinions from OGC, we reject the comment that 38 CFR part 1 901(a) conflicts with VA statutes governing development of claims, to include the VCAA, and we make no changes based upon this assertion.

3. Alleged Conflict With 38 CFR 4.2, Interpretation of Examination Reports

38 CFR 4.2 states, in pertinent part, that an examination report that does not contain sufficient detail to allow the rating board to evaluate a disability should be returned as inadequate. One commenter argues that § 20.901(a) subverts this process by allowing the Board to request an expert medical opinion rather than remanding the matter for additional development. The commenter asserts that, if a medical question is complex or controversial, the Board should remand the matter to the AOJ to obtain medical opinions.

A request for an opinion under § 20.901(a) does not circumvent the need to remand an appeal if an examination is inadequate. The decision to obtain an expert medical opinion under § 20.901(a) is made only after the Board has determined that the report of any examination is adequate. The request for a medical opinion is not a substitute for an adequate examination. It is, rather, a tool the Board is authorized to use to gain a better

understanding of a particularly complex or controversial medical issue, thereby enabling it to render an informed decision.

4. Alleged Violation of Due Process

The commenters argue that the rule violates due process rights because a claimant will not have notice of an opinion obtained under § 20.901(a) and an opportunity to respond. These comments are unfounded. Section 20.903(a) of title 38, Code of Federal Regulations, requires the Board, if it requests a medical opinion under § 20.901, to notify the appellant, to furnish a copy of any opinion obtained, and to allow 60 days for response, which may include submission of additional evidence or argument. In view of these due process guarantees, we make no change based on that comment.

5. Alleged Defects That Would Result in the Rule Being Implemented in an Arbitrary and Unfair Fashion

Pursuant to the amended § 20.901(a), the Board may obtain medical opinions from appropriate health care professionals within the VHA rather than solely from the Under Secretary for Health. One commenter argues that this improperly broadens the scope of the Board's authority to request VHA opinions. The change is said to be arbitrary and unfair to claimants because Board members are not in the position to know either what expertise exists in VHA or who the best expert is for a particular question. The commenter maintains that the selection of a physician qualified to render a medical opinion is a process that should be overseen by VHA management.

As we explained in the interim final rule, VHA Directive 2000-049 (December 13, 2000) allocates the responsibilities in this process between VHA and the Board. 66 FR at 38159. This directive, which is publicly available (<http://www.va.gov/publ/direc/health/direct/12000049.pdf>), allows the Board to elect a VA facility to generate a medical opinion. However, the Board must choose from a list of medical centers created and provided by VHA. Further, the ultimate selection of the physician asked to render the opinion is left to the Office of the Chief of Staff of that facility. In other words, the selection of the physician is a process that is in fact overseen by VHA management. Accordingly, we made no change based on this comment.

Administrative Procedure Act

This document, with the exception of a change to the authority citation,

adopts as a final rule an interim final rule that is already in effect. Accordingly, we have concluded under 5 U.S.C. 553 that there is good cause for dispensing with a delayed effective date because such procedure is impracticable, unnecessary, and contrary to the public interest.

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 final rule would have no such effect on State, local, or tribal governments, or the private sector.

Executive Order 12866

The Office of management and Budget has reviewed this document under Executive Order 12866.

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule 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. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this final rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Paperwork Reduction Act

The Secretary hereby certifies that this final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521).

List of Subjects in 38 CFR Part 20

Administrative practice and procedure, Claims, Veterans.

Approved: February 2, 2004.

Anthony J. Principi,

Secretary of Veterans Affairs.

■ For the reasons set out in the preamble, the interim final rule amending 38 CFR part 20 which was published at 66 FR 38158 on July 23, 2001 is adopted as a final rule with the the following change:

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. In § 20.901, the authority citation at the end of paragraph (a) is revised to read as follows:

§ 20.901. Rule 901. Medical opinions and opinions of the General Counsel.

* * * * *

(Authority: 38 U.S.C. 5103A(d), 7109)

[FR Doc. 04–8564 Filed 4–14–04; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[DC052–7007, MD143–3102, VA129–5065; FRL–7645–1]

Approval and Promulgation of Air Quality Implementation Plans; District of Columbia, Maryland, Virginia; Post 1996 Rate-of-Progress Plans and One-Hour Ozone Attainment Demonstrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; notice of stay.

SUMMARY: The EPA is taking immediate final action to indefinitely stay, pending completion of judicial review, a conditional approval promulgated on April 17, 2003. On February 3, 2004, the United States Court of Appeals filed an opinion that vacated and remanded the April 17, 2003 final action insofar as it granted conditional approval, and denied a petition for review of other parts of the April 17, 2003 final rule. The Petitioner filed a timely petition for rehearing on an issue not related to the vacatur of the conditional approval. The intended effect of this action is to stay any potential application of the April 17, 2003 conditional approval until the date that the litigation concludes.

EFFECTIVE DATE: Effective April 15, 2004. 40 CFR 52.473, 52.1072(e) and 52.2450(b) are stayed indefinitely.

ADDRESSES: Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

FOR FURTHER INFORMATION CONTACT: Christopher Cripps, (215) 814–2179, or by e-mail at cripps.christopher@epa.gov.

SUPPLEMENTARY INFORMATION:

I. What Is the Background for This Action?

On April 17, 2003 (68 FR 19106), EPA published a final rulemaking granting

three conditional approvals of Metropolitan Washington, DC severe ozone nonattainment area (DC Area) State Implementation Plan (SIP) revisions submitted by the District of Columbia, the State of Maryland and the Commonwealth of Virginia (the States).¹ The April 17, 2003 final action conditionally approved those SIP revisions identified in Table 1 of the final rule contingent on each of the States submitting a revised SIP by April 17, 2004 to satisfy certain specifically enumerated conditions. These conditions were codified at 40 CFR 52.473 in the case of the District of Columbia; 40 CFR 52.1072(e) in the case of Maryland; and 40 CFR 52.2450(b) in the case of Virginia. See 68 FR at 19131–19133. In the final action EPA noted that if a State should fail to meet any condition for approval by April 17, 2004, that State's conditional approval would be treated as a disapproval pursuant to CAA section 110(k). See 68 FR 19106, April 17, 2003, as corrected by 68 FR 264958, May 16, 2003. Conversely, if the States were to fulfill the conditions by April 17, 2004, EPA would initiate rulemaking to convert the conditional approval to a full approval of the SIP.

The Sierra Club filed petitions for review of the April 17, 2003, final rule with the United States Courts of Appeals for the Fourth Circuit and District of Columbia Circuit. The cases were consolidated in the United States Court of Appeal for the District of Columbia Circuit (the Court). On February 3, 2004, the Court filed an opinion that vacated and remanded EPA's conditional approval action insofar as it granted conditional approval based on what the Court found to be defective commitment letters. The Court also denied the petition for review in all other respects. See *Sierra Club v. EPA*, 356 F.3d 296 (D.C. Cir. 2004).

On March 19, 2004, the Sierra Club filed a "Petition for Panel Rehearing" requesting the Court to reconsider one issue addressed in a footnote of the opinion. This issue is not related to vacatur of the conditional approval, and if the Court were to reverse its initial decision in EPA's favor, that reversal would not in any way affect the vacatur of the conditional approval.

II. What Is the Effect of the Petition for Rehearing?

If no petition for rehearing had been filed, the Federal Rules of Appellate Procedure direct the Court to have issued its "mandate" by March 26, 2004.

¹ Under Section 302(d) of the Clean Air Act the term "State" includes the District of Columbia.