

Expense categories	Subcategories and conditions	Expense limits
Mental health care	Victim's (and, when victim is a minor, incompetent, incapacitated, or deceased, certain family members') mental health counseling costs.	Up to 12 months, but not to exceed \$5,000.
Property loss, repair, and replacement	Includes crime scene cleanup, and replacement of personal property (not including medical devices) that is lost, destroyed, or held as evidence.	Up to \$10,000 to cover repair or replacement, whichever is less.
Funeral and burial costs	Includes, without limitation, the cost of disposition of remains, preparation of the body and body tissue, refrigeration, transportation of remains, cremation, procurement of a final resting place, urns, markers, flowers and ornamentation, costs related to memorial services, and other reasonably associated activities.	Up to \$25,000.
Miscellaneous expenses	Includes, without limitation, temporary lodging up to 30 days, local transportation, telephone costs, etc.; with respect to emergency travel, two family members' transportation costs to country where incident occurred (or other location, as appropriate) to recover remains, care for victim, care for victim's dependents, accompany victim to receive medical care abroad, accompany victim back to U.S., and attend to victim's affairs in host country.	Up to \$15,000.

Subpart B—[Reserved]

Subpart C—[Reserved]

Subpart D—[Reserved]

Dated: August 28, 2006.

Regina B. Schofield,
Assistant Attorney General, Office of Justice Programs.

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DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900-AM15

New and Material Evidence

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the Department of Veterans Affairs (VA) rules regarding the reconsideration of decisions on claims for benefits based on newly discovered service records received after the initial decision on a claim. The revision will provide consistency in adjudication of certain types of claims.

DATES: *Effective Date:* This amendment is effective October 6, 2006.

FOR FURTHER INFORMATION CONTACT: Maya Ferrandino, Consultant, Regulations Staff (211D), Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Ave., NW., Washington DC 20420, (202) 273-7211.

SUPPLEMENTARY INFORMATION: On June 20, 2005, VA published in the **Federal**

Register (70 FR 35388) a proposal to revise VA's rules regarding the reconsideration of decisions on claims for benefits based on newly discovered service records received after the initial decision on a claim. Interested persons were invited to submit written comments on or before August 19, 2005. We received comments from the National Organization of Veterans' Advocates and three members of the public.

We are making two changes to 38 CFR 3.156(c)(2) based on internal agency reconsideration. First, we are revising the title of the Joint Services Records Research Center (JSRRC). In the proposed rulemaking, we stated the title as Center for Research of Unit Records (CRUR), which is incorrect. Instead, we will state the correct title in the regulation, which is Joint Services Records Research Center. Second, we are inserting the word "because" after "or" in the first sentence of § 3.156(c)(2) to improve readability. We are not altering the substantive content of the paragraph by making these changes.

One commenter stated that she supported this rulemaking and that clarification of the rules currently in § 3.156 is needed. We appreciate this comment and believe that this rulemaking will improve the clarity of that regulation.

One commenter stated that in the proposed rule, we use the phrase "whichever is later" in numerous places. The commenter stated that if we are clarifying retroactive effective dates, the term should be "former", as it would mean "before the date VA uses to base the effective date."

At § 3.156(c)(3), the proposed regulation states:

An award made based all or in part on the records identified by paragraph (c)(1) of this section is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later, or such other date as may be authorized by the provisions of this part applicable to the previously decided claim.

As stated in the proposed rulemaking, proposed § 3.156(c)(2) is derived from current 38 CFR 3.400(q), regarding effective dates for awards based on new and material evidence. Section 3.400, VA's regulation regarding effective dates, uses the terminology "date of receipt of the claim or the date entitlement arose, whichever is the later." This language is derived from 38 U.S.C. 5110, the authorizing statute for effective dates, which states that "the effective date of an award * * * shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor." The statute and the current regulation thus require that the effective date of the award be the later of the date of entitlement or the date VA received the application for the benefit. As such, the use of the term "later" in the proposed regulation is consistent with the statute and VA's long-standing terminology regarding effective dates. We believe the phrase "whichever is later" is well understood by claimants, their representatives, and VA staff. We therefore make no change based on this comment.

One commenter stated that VA should clearly define the phrases "effective on the date entitlement arose or the date VA received the previously denied claim, whichever is later," "or such other date", and "except as it may be affected by the filing date of the initial claim."

These phrases, from proposed § 3.156(c)(3) and (4), all are based on language from VA's regulation regarding effective dates, § 3.400. In the proposed regulation, we are conforming the effective date provision to VA's existing regulations regarding effective dates. We believe these terms are well understood by claimants, their representatives, and VA staff. The meaning of the phrase "effective on the date entitlement arose or the date VA received the previously denied claim, whichever is later," is discussed above and we do not believe further clarification is needed as to that phrase.

As to the second phrase referenced by the commenter, proposed § 3.156(c)(3) would state that the effective date of an award based on newly discovered service department records is the date entitlement arose or the date VA received the previously decided claim, whichever is later, or "such other date as may be authorized by the provisions of this part applicable to the previously decided claim." Certain VA regulations authorize effective dates other than the date entitlement arose or the date VA received the claim. For example, if a claim for disability compensation was received within one year of separation from service, the effective date under 38 CFR 3.400(b)(2)(i) may be the day following separation from service. The reference to "such other date" merely indicates that VA will apply such effective-date provisions when they are controlling with respect to the previously decided claim.

As to the third phrase, proposed § 3.156(c)(4) states that, when an award is made based on new service department records, the disability rating assigned by VA for any past period will accord with the medical evidence of record "except insofar as [the rating] may be affected by the date of the initial claim." This limitation merely reflects the rule, discussed above, that the effective date of any award or rating may be affected by the date of the initial claim for benefits. Because we believe these three phrases are sufficiently clear, we make no change based on this comment.

This commenter additionally expressed concern with proposed paragraph (c)(2), which states that VA cannot reconsider a claim under paragraph (c)(1) based on records that "did not exist when VA decided the claim." The commenter asks how it is possible that records of a veteran could not exist, and seems to ask how it is possible that relevant records could be created after a claim has been denied. In proposed paragraph (c)(2), we are referring to records such as modified

discharges and corrected military records. The effective date of an award based on such evidence is controlled by 38 U.S.C. 5110(i) and is beyond the scope of this rule. Hence, proposed paragraph (c)(2) expressly states that the proposed regulation does not apply in such cases. Therefore, we make no change based on this comment.

One commenter addressed the provision in the proposed rule at § 3.156(c)(2), which states that the provisions of subsection (c)(1) will not apply when the claimant fails to provide sufficient information for VA to identify and obtain the records. The commenter stated that this language is contrary to VA's duty to assist under 38 U.S.C. 5103A(c)(1). The commenter asserted that this statute limits VA's duty to obtain some records unless the claimant has furnished information sufficient to locate the records, but contains no limitation on the duty of VA to obtain service medical records.

As an initial matter, we note that this rule does not purport to define the scope of VA's duty to assist claimants under section 5103A. Rather, the purpose of this rule is to clarify long-standing VA rules, issued pursuant to the Secretary's general authority under 38 U.S.C. 501(a), which authorize VA to award benefits retroactive to the date of a previously decided claim when newly discovered service department records are received. The scope of this rule is not intended to be coextensive with the scope of VA's duty to assist claimants. Section 5103A, as enacted in 2000 by the Veterans Claims Assistance Act of 2000 (VCAA), Public Law No. 106-475, requires VA to assist claimants in obtaining evidence to substantiate their claims, including service medical records. If VA fails to provide such assistance in any claim to which that law applies, a claimant may seek direct administrative or judicial review to ensure VA's compliance with section 5103A. This rule will not affect any individual's rights under section 5103A. The provisions of section 3.156(c), which predate by decades the enactment of the VCAA, do not prescribe rights or duties concerning VA assistance in developing evidence but, rather, prescribe standards for reopening previously denied claims and establishing the effective dates of awards in such reopened claims. Because this rule does not affect any claimant's rights under 38 U.S.C. 5103A, it does not conflict with section 5103A.

Further, we believe that newly discovered service medical records ordinarily would provide a basis for retroactive benefits in disability

compensation claims under this rule as proposed, if the provisions of the rule are otherwise met. Proposed § 3.156(c)(2) refers to circumstances in which the claimant failed to provide information sufficient for VA to identify and obtain the records at issue. When a claim for disability benefits is filed, VA seeks to obtain a complete copy of the veteran's service medical records from the service department. Accordingly, with respect to service medical records, a completed application form that sufficiently identifies the veteran's branch and dates of service will ordinarily be sufficient to enable VA to obtain the veteran's service medical records. If a newly discovered service department record is one that VA should have received at the time it obtained the veteran's service medical records, we believe it ordinarily would be within the scope of proposed § 3.156(c)(1). However, some types of service records would not commonly be associated with a veteran's service medical records even though they may reflect or otherwise relate to treatment or hospitalization during service. With respect to such records, we believe a determination must be made on a case-by-case basis as to whether the claimant provided VA with sufficient information to identify and obtain the record at the time of the prior claim. Therefore, we make no change based on this comment.

A commenter discussed that when a claimant is denied benefits for a disability, and then files a new claim based on a post-service change in diagnosis, and that claim is granted, the effective date should be the date of the original claim. This comment is outside the scope of the proposed regulation. The proposed regulation addresses new service medical records, while the comment addresses a new diagnosis in post-service records. Therefore, we make no change based on this comment.

VA appreciates the comments submitted in response to the proposed rule. Based on the rationale stated in the proposed rule and in this document, the proposed rule is adopted with the changes noted.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501-3521).

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. The reason for

this certification is that this amendment would not directly affect any small entities. 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.

Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Order classifies a rule as a significant regulatory action requiring review by the Office of Management and Budget if it meets any one of a number of specified conditions, including: having an annual effect on the economy of \$100 million or more, creating a serious inconsistency or interfering with an action of another agency, materially altering the budgetary impact of entitlements or the rights of entitlement recipients, or raising novel legal or policy issues. VA has examined the economic, legal, and policy implications of this final rule and has concluded that it is a significant regulatory action 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 issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any year. This final rule would have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance Numbers and Titles

The Catalog of Federal Domestic Assistance program numbers and titles for this proposal are 64.100, Automobiles and Adaptive Equipment for Certain Disabled Veterans and Members of the Armed Forces; 64.101, Burial Expenses Allowance for Veterans; 64.102, Compensation for Service-Connected Deaths for Veterans' Dependents; 64.104, Pension for Non-Service-Connected Disability for Veterans; 64.105, Pension to Veterans Surviving Spouses, and Children; 64.106, Specially Adapted Housing for Disabled Veterans; 64.109, Veterans Compensation for Service-Connected

Disability; and 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death.

List of Subjects in 38 CFR Part 3

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

Approved: May 26, 2006.

Gordon H. Mansfield,
Deputy Secretary of Veterans Affairs.

■ For the reasons set out in the preamble, 38 CFR part 3 is amended as set forth below:

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 3.156 is amended by:

- a. Adding a paragraph heading to paragraph (a).
- b. Adding a paragraph heading to paragraph (b).
- c. Revising paragraph (c).

The additions and revision read as follows:

§ 3.156 New and material evidence.

(a) *General.* * * *

(b) *Pending claim.* * * *

(c) *Service department records.* (1) Notwithstanding any other section in this part, at any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim, notwithstanding paragraph (a) of this section. Such records include, but are not limited to:

- (i) Service records that are related to a claimed in-service event, injury, or disease, regardless of whether such records mention the veteran by name, as long as the other requirements of paragraph (c) of this section are met;
- (ii) Additional service records forwarded by the Department of Defense or the service department to VA any time after VA's original request for service records; and
- (iii) Declassified records that could not have been obtained because the records were classified when VA decided the claim.

(2) Paragraph (c)(1) of this section does not apply to records that VA could

not have obtained when it decided the claim because the records did not exist when VA decided the claim, or because the claimant failed to provide sufficient information for VA to identify and obtain the records from the respective service department, the Joint Services Records Research Center, or from any other official source.

(3) An award made based all or in part on the records identified by paragraph (c)(1) of this section is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later, or such other date as may be authorized by the provisions of this part applicable to the previously decided claim.

(4) A retroactive evaluation of disability resulting from disease or injury subsequently service connected on the basis of the new evidence from the service department must be supported adequately by medical evidence. Where such records clearly support the assignment of a specific rating over a part or the entire period of time involved, a retroactive evaluation will be assigned accordingly, except as it may be affected by the filing date of the original claim.

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

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■ 3. Section 3.400 is amended by:

- a. Revising the heading of paragraph (q).
- b. Removing paragraph (q)(1) heading.
- c. Redesignating paragraph (q)(1)(i) as new paragraph (q)(1).
- d. Removing paragraph (q)(2).
- e. Redesignating paragraph (q)(1)(ii) as new paragraph (q)(2).

The revision reads as follows:

§ 3.400 General.

* * * * *

(q) New and material evidence (§ 3.156) other than service department records. * * *

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DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 4

RIN 2900-AL26

Schedule for Rating Disabilities; Guidelines for Application of Evaluation Criteria for Certain Respiratory and Cardiovascular Conditions; Evaluation of Hypertension With Heart Disease

AGENCY: Department of Veterans Affairs.