

regulations. However, all of these processes include steps at which we consider whether your impairment(s) meets or medically equals one of our listings.

#### *What are the listings?*

The listings are examples of impairments that we consider severe enough to prevent you as an adult from doing any gainful activity. If you are a child seeking SSI payments under title XVI of the Act, the listings describe impairments that we consider severe enough to result in marked and severe functional limitations. Although the listings are contained only in appendix 1 to subpart P of part 404 of our regulations, we incorporate them by reference in the SSI program in § 416.925 of our regulations and apply them to claims under both title II and title XVI of the Act.

#### *How do we use the listings?*

The listings are in two parts. There are listings for adults (part A) and for children (part B). If you are an individual age 18 or over, we apply the listings in part A when we assess your claim, and we never use the listings in part B.

If you are an individual under age 18, we first use the criteria in part B of the listings. Part B contains criteria that apply only to individuals who are under age 18. If the criteria in part B do not apply, we may use the criteria in part A when those criteria give appropriate consideration to the effects of the impairment(s) in children. (See §§ 404.1525 and 416.925.)

If your impairment(s) does not meet any listing, we will also consider whether it medically equals any listing; that is, whether it is as medically severe as an impairment in the listings. (See §§ 404.1526 and 416.926.)

#### *What if you do not have an impairment(s) that meets or medically equals a listing?*

We use the listings only to decide that you are disabled or that you are still disabled. We will not deny your claim or decide that you no longer qualify for benefits because your impairment(s) does not meet or medically equal a listing. If you have a severe impairment(s) that does not meet or medically equal any listing, we may still find you disabled based on other rules in the sequential evaluation process. Likewise, we will not decide that your disability has ended only because your impairment(s) no longer meets or medically equals a listing.

### List of Subjects

#### *20 CFR Part 404*

Administrative practice and procedure, Blind, Disability benefits, Old-Age, Survivors and Disability Insurance, Reporting and recordkeeping requirements, Social Security.

#### *20 CFR Part 416*

Administrative practice and procedure, Aged, Blind, Disability benefits, Public assistance programs, Reporting and recordkeeping requirements, Supplemental Security Income (SSI).

Dated: March 20, 2008.

**Michael J. Astrue,**

*Commissioner of Social Security.*

[FR Doc. E8-8111 Filed 4-15-08; 8:45 am]

**BILLING CODE 4191-02-P**

### DEPARTMENT OF VETERANS AFFAIRS

#### **38 CFR Part 3**

#### **RIN 2900-AM74**

#### **Definition of Service in the Republic of Vietnam**

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of Veterans Affairs (VA) proposes to amend its adjudication regulations regarding the definition of service in the Republic of Vietnam. We state that service in the Republic of Vietnam for the purposes of applying the presumption of exposure to herbicide agents includes service on land and on inland waterways in Vietnam. The amendments clarify existing regulatory provisions and ensure the proper administration of VA policy.

**DATES:** Comments must be received by VA on or before June 16, 2008.

**ADDRESSES:** Written comments may be submitted through <http://www.Regulations.gov>; by mail or hand-delivery to the Director, Regulations Management (OOREG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. (This is not a toll-free number.) Comments should indicate that they are submitted in response to “RIN 2900-AM74-Definition of Service in the Republic of Vietnam.” Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m. Monday through

Friday (except holidays). Please call (202) 461-4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at <http://www.Regulations.gov>.

#### **FOR FURTHER INFORMATION CONTACT:**

Rhonda F. Ford, Chief, Regulations Staff (211D), Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461-9739. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** This rulemaking is necessitated by the recent decision rendered by the U. S. Court of Appeals for Veterans Claims (CAVC) in *Haas v. Nicholson*, 20 Vet. App. 257 (2006).

In the *Haas* case, the CAVC addressed what it perceived to be ambiguity in VA’s regulatory definitions of the term “service in the Republic of Vietnam.” Mr. Haas, a veteran of the U.S. Navy, filed a claim for VA disability compensation based on diabetes that he alleged had resulted from “exposure to Agent Orange/radioactive materials” during his service in Vietnam. *Haas*, 20 Vet. App. at 260. VA denied his claim, concluding that 38 CFR 3.307(a)(6)(iii) does not provide a presumption of herbicide exposure to a Vietnam Era veteran who never set foot on land in the Republic of Vietnam and did not serve on its inland waterways. Additionally, VA interpreted the language in § 3.307(a)(6)(iii) that presumes herbicide exposure for veterans who had “service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in Vietnam” to require that “the ship must have come to port in the [Republic of Vietnam] and you disembarked.” *Haas*, 20 Vet. App. at 260 (quoting a letter from a VA regional office). Mr. Haas contended that “service in the Republic of Vietnam” as defined by 38 CFR 3.307(a)(6)(iii) must be read to include service in the offshore waters, regardless of whether the veteran set foot on land.

The issue in *Haas* was whether VA’s interpretation of “service in the Republic of Vietnam” in § 3.307(a)(6)(iii) is a permissible interpretation of that regulation and the authorizing statute, 38 U.S.C. 1116(f). The CAVC held that the statute is not clear on its face concerning whether the phrase “service in the Republic of Vietnam” refers only to service on land or encompasses some forms of offshore service. *Haas*, 20 Vet. App. at 265.

Therefore, VA may promulgate a regulatory definition of service in Vietnam. *See Haas*, 20 Vet. App. at 269 (“Given the ambiguity of the statute, VA is permitted to issue regulations in order to resolve the ambiguity.”). We note that to the extent that *Haas* was based in part on the CAVC’s interpretation of certain Manual M21–1 provisions, we have proposed to rescind those provisions, in a separate notice. 72 FR 66218 (Nov. 27, 2007).

*Section 1116(f) provides:*

For purposes of establishing service connection for a disability or death resulting from exposure to a herbicide agent, including a presumption of service-connection under this section, a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, shall be presumed to have been exposed during such service to an herbicide agent containing dioxin or 2,4 dichlorophenoxyacetic acid, and may be presumed to have been exposed during such service to any other chemical compound in an herbicide agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service.

The current definition of service in the Republic of Vietnam in § 3.307(a)(6)(iii) is as follows: “Service in the Republic of Vietnam includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam.” The CAVC perceived ambiguity in § 3.307(a)(6)(iii) as to whether the phrase “service in the Republic of Vietnam” includes service exclusively in the waters offshore, i.e., where the “conditions of service” did not involve “duty or visitation” in Vietnam. The perceived ambiguity arose in part from similar language in 38 CFR 3.313, which defines Service in Vietnam as “includ[ing] service in the waters offshore, or service in other locations if the conditions of service involved duty or visitation in Vietnam.” 38 CFR 3.313(a). The CAVC suggested that VA viewed § 3.307(a)(6)(iii) as interchangeable with § 3.313, concluding that there is no clear expression of a difference in the definition as it appears in the two distinct regulations, despite the inclusion of a comma in the § 3.313(a) definition and, more importantly, their very different regulatory histories and purposes. The CAVC also concluded that VA’s regulation was most reasonably construed to apply to offshore service because certain veterans who served offshore (i.e., those who served for long periods in close proximity to land areas where

herbicides were used) would have a risk of herbicide exposure comparable to certain veterans who served on land (i.e., those who served only briefly on land).

We now propose to amend § 3.307(a)(6)(iii) because the CAVC in *Haas* incorrectly conflated the definitions of “service in the Republic of Vietnam” in §§ 3.307(a)(6)(iii) and 3.313 and thereby interpreted § 3.307(a)(6)(iii) in a manner inconsistent with VA’s intent in issuing that regulation. By this rulemaking, VA intends to make clear that in § 3.307(a)(6)(iii), “service in the Republic of Vietnam,” for purposes of establishing presumptive service connection due to exposure to herbicide agents, applies to a veteran who served in the Republic of Vietnam only if that veteran was physically present on land in Vietnam, or on its inland waterways. The presumption does not apply to a veteran who served only on the waters offshore of Vietnam. We propose to amend § 3.307(a)(6)(iii) to state: “For the purposes of this section, ‘service in the Republic of Vietnam’ includes only service on land, or on an inland waterway, in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975.” The qualifying dates cited in the regulation are those specified by Congress in section 1116 for application of the presumption of exposure to herbicide agents. We believe these dates would also make clear that the rule refers to the country as defined during the relevant time period, as country boundaries may change over time due to political factors.

As stated in our definition, we include only service on land and on inland waterways. For the following reasons, we believe that this definition comports with the legislative intent behind the enactment of the presumption of exposure, as well as the lengthy legislative and regulatory history of the presumption.

Congress first called for consideration of providing compensation for Vietnam veterans exposed to dioxin in the Veterans’ Dioxin and Radiation Exposure Compensation Standards Act, Public Law 98–542, 98 Stat. 2725, 2728 (1984) (“1984 Dioxin Act”). Section 5 of that statute directed VA to address claims for service connection based on dioxin exposure by issuing rules grounded in “sound scientific and medical evidence.” *Id.*

In 1985, VA promulgated 38 CFR 3.311a to implement the 1984 Dioxin Act. The rulemaking notice for § 3.311a noted that herbicides “were used during the Vietnam conflict to defoliate trees,

remove ground cover, and destroy crops,” and that many veterans “were deployed in or near locations where Agent Orange was sprayed.” 50 FR 15848, 15849 (1985). Under 38 CFR 3.311a(b) (1986), VA presumed that veterans who served in Vietnam during the Vietnam era were exposed to dioxin, eliminating the need to establish exposure as a matter of fact. The presumption of exposure extended to “service in the waters offshore and service in other locations, if the conditions of service involved duty or visitation in the Republic of Vietnam.” 38 CFR 3.311a(b) (1986) (emphasis added).

In February 1991, Congress enacted The Agent Orange Act of 1991 (“AOA”), Public Law No. 102–4, § 2, 105 Stat. 11, which created and codified 38 U.S.C. 1116. The AOA was understood as codifying existing regulatory presumptions for diseases that Congress believed were linked to Agent Orange exposure. *See, e.g.*, 137 Cong. Rec. S1267 (daily ed. Jan. 30, 1991) (statement of Sen. Daschle) (“[t]he bill will also codify the Secretary’s decisions granting presumptions of service connection for soft-tissue sarcoma and non-Hodgkins lymphoma, two rare cancers that have been frequently associated with exposure to components of Agent Orange”); 137 Cong. Rec. S1272 (daily ed. Jan. 30, 1991) (Statement of Sen. Simpson) (stating that “[t]he bill legislatively establishes presumptions of service connection for veterans exposed to agent orange for three conditions: chloracne, non-Hodgkin’s lymphoma, and soft-tissue sarcomas,” but recognizing that “[i]t is not at all imperative that we take this action legislatively” because “[t]hose presumptions have already been recognized and granted to veterans \* \* \* by the Secretary of Veterans Affairs”); 1991 U.S.C.C.A.N. 11 (signing statement by President Bush stating that the AOA “relies on science” and will “codify decisions previously made by my administration with respect to presumptions of service connection”). The AOA also codified the provision in VA’s regulation presuming herbicide exposure in veterans who served “in the republic of Vietnam” during the Vietnam era. Accordingly, it is reasonable to assume that Congress intended to codify VA’s interpretation of the presumption of exposure, or at least to reserve to VA the authority to maintain that interpretation. *See* 66 FR 23166 (May 8, 2001) (recognizing this legislative history and stating that subsequent legislation offered “no basis

to conclude that Congress intended to broaden that definition to include deep-water service”).

In September 1993, VA proposed to delete 38 CFR 3.311a and amend § 3.307(a) “so that it \* \* \* incorporates the definition of the term ‘service in the Republic of Vietnam’ from 38 CFR 3.311a.” 58 FR 50528, 50529 (1993).

In 1996, based on new evidence concerning the deployment of troops and the use of herbicides, Congress amended the statutory definitions of the Vietnam era. See *Veterans’ Benefits Improvement Act*, Public Law No. 104–275, 110 Stat. 3322, 3342. In 38 U.S.C. 101(29), for general purposes, the definition was broadened to cover the period from February 28, 1961, to May 7, 1975. But Congress recognized that “[h]erbicides and defoliants were not in use throughout the ‘Vietnam era’ as that term would be newly defined” and “such materials were not introduced into the Republic of Vietnam until January 9, 1962. Therefore, \* \* \* for purposes of sections 1116 and 1710 of title 38, United States Code, provisions of law which specify benefits based on presumptive exposure to herbicides and defoliants, the term ‘Vietnam era’ [was] limited to the period between January 9, 1962, and May 7, 1975.” S. Rep. No. 104–371, at 21 (1996) (emphasis added). Thus, Congress found the deployment of herbicides relevant to the use of the term “service in the Republic of Vietnam” in § 1116 and, at that time, the deployment of herbicides and the definition of the term were both understood to include only service on land or on inland waterways.

Subsequent VA rulemakings stated with even greater clarity that a veteran who served only offshore is not entitled to the presumption of exposure. For example, a September 1997 rulemaking notice stated that 38 CFR 3.814(c)(1) incorporated the definition of “serv[ice] in the Republic of Vietnam” from § 3.307(a)(6)(iii) as excluding consideration of service in offshore waters. It explained: “Because herbicides were not applied in waters off the shore of Vietnam, limiting the scope of the term service in the Republic of Vietnam to persons whose service involved duty or visitation in the Republic of Vietnam limits the focus of the presumption of exposure to persons who may have been in areas where herbicides could have been encountered.” 62 FR 51274 (1997). See also 69 FR 44614, 44620 (July 27, 2004) (indicating that presumption did not extend to service in offshore waters).

As a factual matter, our legislative interpretation accords with what is known about the use of herbicides

during Vietnam. Although exposure data is largely absent, review of military records demonstrate that virtually all herbicide spraying in Vietnam, which was for the purpose of eliminating plant cover for the enemy, took place over land. See Stellman JM, Stellman SD, Christian R, Weber T, Tomasallo C, *The extent and patterns of usage of Agent Orange and other herbicides in Vietnam*, 422 *Nature* 681–687 (2003). Regarding inland waterways, Navy riverine patrols reported to have routinely used herbicides for clearance of inland waterways. See “Veterans and Agent Orange: Health Effects of Herbicides Used in Vietnam” (1993 National Academies of Science); “Characterizing Exposure of Veterans to Agent Orange and Other Herbicides Used in Vietnam: Final Report” (2003, National Academy Press). Blue water Navy service members and other personnel who operated off shore were away from herbicide spray flight paths, and therefore were not likely to have incurred a risk of exposure to herbicide agents comparable to those who served in foliated areas where herbicides were applied.

In connection with the *Haas* proceedings, questions were raised as to a 2002 study performed for Australia’s Queensland Health Scientific Services by their National Research Center for Environmental Toxicology titled, *Examination of the Potential Exposure of Royal Australian Navy Personnel to Polychlorinated Dibenzodioxins and Polychlorinated Dibenzofurans Via Drinking Water*. The study assumed that ocean water near estuarine sources could contain dioxin if dioxin had been used over land. It then noted that Australian Navy boats distilled water, obtained primarily from locations near such estuarine sources, to use as drinking water. Based on these factual predicates, the study found that the distillation process used by those boats did not remove dioxin when dioxin was added to salt water and the distillation process was performed in a laboratory, but, instead, the distillation concentrated the dioxin level in the water. This study was not peer reviewed or published and, to our knowledge, has never been cited in any subsequent reputable study of Agent Orange.

At the outset, we note that this recent study was not a part of our original rulemaking, or subsequent rulemakings, related to the definition of Vietnam service and therefore could not possibly have informed our definition of service in Vietnam under § 3.307. Moreover, VA scientists and experts have noted many problems with the study that caution against reliance on the study to change

our long-held position regarding veterans who served off shore. First, as the authors of the Australian study themselves noted, there was substantial uncertainty in their assumptions regarding the concentration of dioxin that may have been present in estuarine waters during the Vietnam War. In particular, although distillation concentrated the dioxin level in the water, the concentrating effect was shown to be dependent upon the amount of sediment in the water, such that a large sediment level, consistent with estuarine waters, could significantly reduce the concentrating effect. Second, even with the concentrating effect found in the Australian study, the levels of exposure estimated in this study are not at all comparable to the exposures experienced by veterans who served on land where herbicides were applied. This is true even if we were to assume that a person drank only such distilled water and did so for an extended tour. Third, it is not clear that U.S. ships used distilled drinking water drawn from or near estuarine sources or, if they did, whether the distillation process was similar to that used by the Australian Navy. For these reasons, we do not intend to revise our long-held interpretation of “service in the Republic of Vietnam” based on this study. Although we are not extending the meaning of “service in Vietnam” in this rulemaking, because we do not believe that Congress intended that term to encompass areas that were not likely to have been exposed to sprayed herbicides, we will continue to assess any peer-reviewed studies brought to VA’s attention on this topic, including studies concerning the possibility of exposure through drinking water, groundwater runoff, airborne drift, and transportation. We will publish any determination extending the definition of service in the Republic of Vietnam if it is warranted by such studies.

To the extent there is ambiguity in the statutory reference to service in the Republic of Vietnam, we believe that language is most reasonably interpreted to refer to service within the land borders of the Republic of Vietnam. It is both intuitively obvious and well established that herbicides were commonly deployed in foliated land areas and would have been released seldom, if at all, over the open waters off the coast of Vietnam. The legislative and regulatory history indicates that the purpose of the presumption of exposure was to provide a remedy for persons who may have been exposed to herbicides because they were stationed

in areas where herbicides were used, but whose exposure could not actually be documented due to inadequate records concerning the movement of ground troops.

Because it is known that herbicides were used extensively on the ground in the Republic of Vietnam, and because there are inadequate records of ground-based troop movements, it is reasonable to presume that any veteran who served within the land borders of Vietnam was potentially exposed to herbicides, unless affirmative evidence establishes otherwise. There is no similar reason to presume that veterans who served solely in the waters offshore incurred a significant risk of herbicide exposure.

It is conceivable that some veterans of offshore service incurred exposure under some circumstances due, for example, to airborne drift, groundwater runoff, and the proximity of individual boats to the Vietnam coast. For purposes of the presumption of exposure, however, there is no apparent basis for concluding that any such risk was similar in kind or degree to the risk attending service within the land borders of the Republic of Vietnam. More significantly, because "offshore service" encompasses a wide range of service remote from land and thus from areas of actual herbicide use, there is no reason to believe that any risk of herbicide exposure would be similarly pervasive among veterans of offshore service as among veterans of service within the land borders of Vietnam.

In *Haas* the Veterans Court noted that "there are many ways to interpret the boundaries of a sovereign nation such as the former Republic of Vietnam" and stated that, based on established definitions of sovereign territory, the statutory phrase "in the Republic of Vietnam" could conceivably be construed to encompass waters extending to a distance of either 12 or 200 miles from the coast. *Haas*, 20 Vet. App. at 263–64. It is apparent that any risk of airborne or water-borne exposure due to herbicide spraying on land areas would be negligible for most of such distances, and we believe it is highly unlikely that Congress intended to adopt one of those measures rather than limiting the presumption to persons who served on land where herbicides were actually in use. Finally, we note that, to the extent there may be a risk of exposure through airborne drift or water runoff, that risk would exist across land borders Vietnam shares with other nations as well as to drift over open seas, yet Congress clearly did not intend the presumption to extend beyond the land borders of the Republic of Vietnam in those instances.

It is also relevant to note that VA's interpretation results in a logical and easily manageable presumption of exposure, whereas the alternate interpretation suggested in *Haas* would entail precisely the type of difficult policy and case-by-case determinations that presumptions are generally designed to avoid. As the Veterans Court noted in *Haas*, the category of "offshore service" may encompass persons who served hundreds of miles from Vietnam's coast. We believe it is implausible that Congress intended to encompass all offshore service, irrespective of whether there is any likelihood that such service involved the potential for exposure resulting from application of herbicides in the Republic of Vietnam. However, if Congress intended to presume herbicide exposure for veterans who served in offshore waters, but only to the extent there was some risk of herbicide exposure through airborne drift or water-borne runoff, it would be exceedingly difficult and highly speculative to define the class of persons to whom the presumption applies, in the absence of clear evidence defining the point at which the risk of exposure by such means ceases to exist. The legislative and regulatory history does not allude to any basis for making such determinations, which would be essential to application of the presumption under the interpretation set forth in *Haas*. The fact that it would be exceedingly difficult, if not impossible, to define the parameters of the presumption in any logical and meaningful way strongly suggests that Congress did not intend to encompass offshore service for purposes of the presumption of herbicide exposure.

We have found no indication that Congress intended a presumption covering offshore service. Rather, in providing a presumption of herbicide exposure based on service "in the Republic of Vietnam," we believe Congress reasonably intended to distinguish between areas where herbicides were actually applied and other areas, such as offshore areas, where herbicides were not used. That interpretation is reasonable because it comports with VA's long-standing interpretation of its own regulations, which Congress intended to codify in 38 U.S.C. 1116; because it comports with known facts regarding the use of herbicides in Vietnam; because it results in a rule that can easily be administered; and because the alternate interpretation suggested in *Haas* would be exceedingly difficult, if not impossible, to define and

apply in a meaningful, non-arbitrary manner.

The CAVC's observation that there may be similarity between certain persons who served offshore and certain persons who served on land does not provide a basis for a different interpretation. "The 'task of classifying persons for \* \* \* benefits \* \* \* inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line.'" *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (quoting *Mathews v. Diaz*, 426 U.S. 67, 83–84 (1976)). The same concern would exist for any rule interpreting the parameters of the presumption of exposure, whether it is limited to service on land or to service within some specified distance from land. For the reasons explained above, we believe it is far more reasonable to interpret the presumption as limited to service on land than to service at some arbitrary distance from land.

We also note that a veteran who does not meet the requirements of § 3.307(a)(6)(iii) for application of the presumption of service connection based on service in Vietnam may establish direct service connection under § 3.307(a)(6) and § 3.309(e) based on herbicide exposure if the veteran can establish that he or she was actually exposed to herbicides in service. Section 3.307(a)(6)(iii) only defines when the presumption of exposure to herbicide agents will apply. Additionally, as part of its duty to assist, VA will assist a claimant in obtaining any relevant evidence related to a claim for exposure to herbicide agents.

For consistency and to avoid possible similar ambiguities in the interpretation of the term, we propose to amend 38 CFR 3.814(c)(1) to clarify the meaning of "service in the Republic of Vietnam" in that regulation. Section 3.814 provides benefits for spina bifida to children of veterans who served in Vietnam, based on those veterans' presumed exposure to herbicide agents. Because currently the definition parallels the definition of service in Vietnam in § 3.307(a)(6)(iii), we propose to amend the definition to parallel the clarifications of that definition established by this rulemaking.

Additionally, 38 CFR 3.815 provides benefits for covered birth defects to children of women Vietnam veterans, based on those veterans' service in Vietnam. Section 3.815 was added to VA's adjudication regulations largely based on a study of women Vietnam veterans and women non-Vietnam veterans. See 67 FR 200 (Jan. 2, 2002) (discussing *Pregnancy Outcomes*

*Among U.S. Women Vietnam Veterans*, Kang, *et al.*, 38 Amer. J. Indus. Med. 447 (2000)). The study compared women Vietnam veterans, defined as women whose permanent tour of duty included service in Vietnam between July 4, 1965, through March 28, 1973, to women non-Vietnam veterans, defined as women assigned to a military unit in the United States during that time and whose tour of duty did not include service in Vietnam. According to the study, women Vietnam veterans experienced a higher prevalence of birth defects among their children than women veterans who did not serve in Vietnam. The study did not assess a specific cause for the difference in adverse pregnancy outcomes, but identified many potential risk factors for abnormal reproductive outcomes in women Vietnam veterans, including, in addition to herbicide exposure, risk factors associated with military hospital nursing conditions in Vietnam (all women Vietnam veterans in the study were nurses), such as physical stress and exposure to waste anesthetic gases and ethyleneoxide. The study did not expressly state whether it considered any women who served solely on ships off the coast of Vietnam, but the focus on risk factors such as herbicide exposure and hospital service strongly suggests that the study focused on land-based service. Although not all of the additional risk factors described in the study, such as psychological stress, were exclusive to women who served on land in Vietnam, it appears that the study only considered such women. As such, the benefits provided in § 3.815 were not based solely on herbicide exposure, but were based solely on service on land. For that reason, the rule specifically defined “service in the Republic of Vietnam” consistent with the definition provided in § 3.307(a)(6)(iii), and intended only to include veterans who served on land. (In fact, in defining an individual eligible for consideration under the rule, the rule specifically refers to “the date on which the veteran first entered the Republic of Vietnam.” 38 CFR 3.815(c)(2).) For this reason, and for consistency, we will additionally revise the definition of service in the Republic of Vietnam in § 3.815(c)(1) to parallel the definitions in §§ 3.307 and 3.814. As such, benefits under § 3.815 will be provided to women who served on land or in inland waters, but not offshore. The definition of service in the Republic of Vietnam in § 3.815(c)(1) as revised differs from the definitions in §§ 3.307 and 3.814 in that the dates for service in Vietnam in § 3.815 are controlled by

Congress’ definition of service in Vietnam for the purposes of the authorizing statute for that regulation, 38 U.S.C. 1831.

The definition of “service in the Republic of Vietnam” as stated in §§ 3.307(a)(6)(iii), 3.814(c)(1), and 3.815(c)(1) is only intended to be used for those sections, as those are the only sections that address VA benefits based on service in Vietnam and the potential exposure to herbicide agents therein. To ensure this, we will add the statement “For the purposes of this section” to the beginning of the definitions in §§ 3.307(a)(6)(iii), 3.814(c)(1), and 3.815(c)(1). For the same reason, we propose to amend 38 CFR 3.313 to specify that the definition of “service in Vietnam” therein applies to that section only. In addition, we propose to amend the title of § 3.313 to read, “Presumption of service connection for non-Hodgkin’s lymphoma based on service in Vietnam.” The definition of “Service in Vietnam” in § 3.313(a) will remain unchanged. We are not making any substantive change to the regulation by these revisions. The intent of the term “Service in Vietnam” in § 3.313 is completely different from that which was intended in § 3.307(a)(6)(iii). *See* 55 FR 25339 (June 21, 1990). The title change additionally reflects specifically what the regulation addresses.

Section 3.313 was added based on the results of a study of the association of selected cancers with service in the U.S. military in Vietnam by the Centers for Disease Control (CDC). The CDC study found that Vietnam veterans have roughly a 50 percent increased risk of developing non-Hodgkin’s Lymphoma after service in Vietnam. A similar increased risk was not seen among veterans who served in other locations during the Vietnam Era. The Secretary thereupon made a determination that there is a relationship between Vietnam service and non-Hodgkin’s Lymphoma. Unlike § 3.307(a)(6)(iii), § 3.313 is not linked to herbicide exposure, merely service in Vietnam.

#### **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 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. This rule does not affect any small entities. Only VA beneficiaries could be directly affected.

Therefore, pursuant to 5 U.S.C. 605(b), this rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

#### **Executive Order 12866—Regulatory Planning and Review**

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 Executive Order classifies a “significant regulatory action,” requiring review by the Office of Management and Budget (OMB) unless OMB waives such review, as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

The economic, interagency, budgetary, legal, and policy implications of this rule have been examined and it has been determined to be a significant regulatory action under the Executive Order because it is likely to result in a rule that may raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

#### **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 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 rulemaking are 64.102, Compensation for Service-Connected Deaths for Veterans' Dependents; 64.109, Veterans Compensation for Service-Connected Disability; 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death; 64.127, Monthly Allowance for Children of Vietnam Veterans Born with Spina Bifida; and 64.128, Vocational Training and Rehabilitation for Vietnam Veterans' Children with Spina Bifida or Other Covered Birth Defects.

### List of Subjects in 38 CFR Part 3

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

Approved: January 8, 2008.

**Gordon H. Mansfield,**

*Deputy Secretary of Veterans Affairs.*

For the reasons set out in the preamble, VA proposes to amend 38 CFR part 3 as follows:

### PART 3—ADJUDICATION

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. Amend § 3.307(a)(6)(iii) by revising the last sentence to read as follows:

**§ 3.307 Presumptive service connection for chronic, tropical or prisoner-of-war related disease, or disease associated with exposure to certain herbicide agents; wartime and service on or after January 1, 1947.**

(a) \* \* \*

(6) \* \* \*

(iii) \* \* \* For the purposes of this section, “service in the Republic of Vietnam” includes only service on land, or on an inland waterway, in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975.

3. Amend § 3.313 by revising the section heading and adding at the beginning of the first sentence of paragraph (a) “For purposes of this section,” to read as follows:

**§ 3.313 Presumption of service connection for non-Hodgkin's lymphoma based on service in Vietnam.**

(a) \* \* \* For the purposes of this section, \* \* \*

\* \* \* \* \*

4. Amend 3.814(c)(1) by revising the last sentence to read as follows:

**§ 3.814 Monetary allowance under 38 U.S.C. chapter 18 for an individual suffering from spina bifida whose biological father or mother is or was a Vietnam veteran.**

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \* For the purposes of this section, “service in the Republic of Vietnam” includes only service on land, or on an inland waterway, in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975.

\* \* \* \* \*

5. Amend 3.815(c)(1) by revising the last sentence to read as follows:

**§ 3.815 Monetary allowance under 38 U.S.C. chapter 18 for an individual with disability from covered birth defects whose biological mother is or was a Vietnam veteran; identification of covered birth defects.**

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \* For the purposes of this section, “service in the Republic of Vietnam” includes only service on land, or on an inland waterway, in the Republic of Vietnam during the period beginning on February 28, 1961, and ending on May 7, 1975.

\* \* \* \* \*

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### DEPARTMENT OF VETERANS AFFAIRS

#### 38 CFR Parts 3 and 20

RIN 2900-AM77

#### Board of Veterans' Appeals: Expedited Claims Adjudication Initiative—Pilot Program

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of Veterans Affairs (VA) proposes to launch an initiative for accelerated claims and appeals processing at four VA facilities, based on volunteer participation by eligible claimants. The purposes of this proposed initiative are to provide a model to streamline the VA claims adjudication and appeals process systemwide and to obtain resolution of individual claims and appeals at the earliest time possible in order to provide final decisions to veterans and their families with regard to their claims for benefits. If this initiative is successful at the four trial sites, the data obtained from this initiative may provide a basis for expanding some, or all, of the program nationwide, and ultimately

help accelerate the processing of all claims and appeals.

**DATES:** Comments must be received by VA on or before June 16, 2008.

**ADDRESSES:** Written comments may be submitted through <http://www.Regulations.gov>; by mail or hand-delivery to the Director, Regulations Management (00REG), Department of Veterans Affairs, 810 Vermont Avenue, NW., Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. (This is not a toll-free number.)

Comments should indicate that they are submitted in response to “2900-AM77—Expedited Claims Adjudication Initiative—Pilot Program.” Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m. Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at <http://www.Regulations.gov>.

#### 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. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** Within the Department of Veterans Affairs is a Veterans Benefits Administration (VBA or Administration) whose primary function is the administration of nonmedical VA benefits programs that provide assistance to veterans and their dependents and survivors. 38 U.S.C. 7701(a). VBA is under the Under Secretary for Benefits, who is directly responsible to the Secretary for the operations of the Administration. 38 U.S.C. 7701(b). VBA's adjudication rules are found at 38 CFR part 3. The Board of Veterans' Appeals (BVA or Board) is an administrative body within VA that decides appeals from decisions of Agencies of Original Jurisdiction (AOJs) of claims for veterans' benefits, as well as occasional cases of original jurisdiction. The Board is under the administrative control and supervision of a Chairman who is directly responsible to the Secretary. 38 U.S.C. 7101(a). The Board's Appeals Regulations are found at 38 CFR part 19, and its Rules of Practice are found at 38 CFR part 20.

The VA claims adjudication and appeals process is designed with many