

## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 3

RIN 2900-AN32

#### Stressor Determinations for Posttraumatic Stress Disorder

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule.

**SUMMARY:** The Department of Veterans Affairs (VA) is amending its adjudication regulations governing service connection for posttraumatic stress disorder (PTSD) by liberalizing in some cases the evidentiary standard for establishing the required in-service stressor. This amendment eliminates the requirement for corroborating that the claimed in-service stressor occurred if a stressor claimed by a veteran is related to the veteran's fear of hostile military or terrorist activity and a VA psychiatrist or psychologist, or a psychiatrist or psychologist with whom VA has contracted, confirms that the claimed stressor is adequate to support a diagnosis of PTSD and that the veteran's symptoms are related to the claimed stressor, provided that the claimed stressor is consistent with the places, types, and circumstances of the veteran's service.

This amendment takes into consideration the current scientific research studies relating PTSD to exposure to hostile military and terrorist actions. The amendment acknowledges the inherently stressful nature of the places, types, and circumstances of service in which fear of hostile military or terrorist activities is ongoing. With this amendment, the evidentiary standard of establishing an in-service stressor will be reduced in these cases. The amendment will facilitate the timely processing of PTSD claims by simplifying the development and research procedures that apply to these claims.

**DATES:** *Effective Date:* This final rule is effective July 12, 2010.

*Applicability Date:* This final rule applies to an application for service connection for PTSD that:

- Is received by VA on or after July 12, 2010;
- Was received by VA before July 12, 2010 but has not been decided by a VA regional office as of that date;
- Is appealed to the Board of Veterans' Appeals (Board) on or after July 12, 2010;
- Was appealed to the Board before July 12, 2010 but has not been decided by the Board as of that date; or

- Is pending before VA on or after July 12, 2010 because the Court of Appeals for Veterans Claims (Veterans Court) vacated a Board decision on the application and remanded it for readjudication.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:** On August 24, 2009, VA published in the **Federal Register** (74 FR 42617) a proposal to modify the evidentiary standards for establishing an in-service stressor when a veteran files a claim for service connection for PTSD. We proposed to add a new paragraph (3) to 38 CFR 3.304(f) to state that, if a stressor claimed by a veteran is related to the veteran's fear of hostile military or terrorist activity and a VA psychiatrist or psychologist or contract equivalent confirms that the claimed stressor is adequate to support a diagnosis of PTSD and that the veteran's symptoms are related to the claimed stressor, in the absence of clear and convincing evidence to the contrary, and provided the claimed stressor is consistent with the places, types, and circumstances of the veteran's service, the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor. This evidentiary liberalization is consistent with the American Psychiatric Association's (APA) Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (1994) (DSM-IV) criteria for a PTSD diagnosis, as explained in the notice of proposed rulemaking. The rule further re-designates former paragraph (f)(3) as (f)(4), governing PTSD claims from former prisoners of war, and re-designates paragraph (f)(4) as (f)(5), governing PTSD claims based on in-service personal assault or military sexual trauma (MST).

Interested persons were invited to submit written comments on or before October 23, 2009. We received 126 comments on the proposed rule. VA received comments from veterans service organizations, including The American Legion, National Organization of Veterans' Advocates, Disabled American Veterans, Veterans for Common Sense, Paralyzed Veterans of America, and The Wounded Warrior Project; from public interest groups, including the Los Angeles Inner City Law Center and National Research Center for Women and Families; from

government agencies, such as the New York City Department of Health and Mental Hygiene and the State of New York Division of Veterans Affairs; and from individuals. VA also received comments from members of the Subcommittee on Disability Assistance and Memorial Affairs of the House of Representatives Committee on Veterans' Affairs and other persons who participated in a roundtable discussion of the proposed rule, as well as from members of Congress.

We also received numerous comments from veterans and surviving spouses regarding their individual claims for veterans benefits. We do not respond to these comments in this notice as they are beyond the scope of this rulemaking.

#### Presumption of Service Connection Based on Receipt of Certain Pay

Some commenters suggested that VA revise the rule to create a presumption of service connection for PTSD based upon receipt of imminent-danger or hostile-fire pay. We make no change based on these comments because they are beyond the scope of the rule, which is limited to providing a reduced evidentiary standard for establishing occurrence of the stressor based upon a particular type of stressor.

#### Fear of Hostile Military or Terrorist Activity

Some commenters suggested that the rule should be revised to reduce the evidentiary standard for veterans who had certain Military Occupational Specialties (MOS). A MOS may be considered as evidence of exposure to a stressor, including hostile military or terrorist activity. *See* Veterans Benefits Administration (VBA) Adjudication Procedures Manual Rewrite M21-1MR (Manual M21-1MR), Part IV, subpart ii, ch. 1, sec. D, para. 13.k. However, a particular MOS does not necessarily establish such an exposure. *See Dizoglio v. Brown*, 9 Vet. App. 163, 166 (1996). Therefore, we make no changes based on these comments.

Some commenters interpreted the proposed rule as limited to fear of hostile or terrorist activity while serving in a combat zone, and others suggested that the rule should be revised to provide a reduced evidentiary standard on the basis of service in a combat zone. One commenter asked whether the rule applies to veterans who served on a submarine. The rule has no geographic requirement and is not limited to service in a combat zone or on land. Rather, it applies to all persons who served in active military, naval, or air service, as defined in 38 U.S.C. 101(24), and were discharged or released from

such service under conditions other than dishonorable.

One commenter stated the term “stressor” is ambiguous and may lead one to believe that the rule applies only if a veteran can identify a single specific event instead of hostile military or terrorist activity generally. One commenter suggested that the rule should apply as well to a series of events or the totality of circumstances of deployment to a combat zone. Another commenter questioned the meaning of the phrase “consistent with the . . . circumstances of service” and doubted whether an examiner would ever find that a traumatic event experienced by a veteran who had an MOS of cook is consistent with the circumstances of the veteran’s service. Another commenter inquired about whether the examiner would be responsible for determining whether the stressor is consistent with the veteran’s service.

VA believes that the language in the proposed rule is not ambiguous. As stated in the rule, “‘fear of hostile military or terrorist activity’ means that a veteran experienced, witnessed, or was confronted with an event *or circumstance*.” (Emphasis added). The term “circumstance” means “a condition, fact, or event accompanying, conditioning, or determining another: an essential or inevitable concomitant.” *Webster’s Ninth New Collegiate Dictionary*, 242 (1990). Therefore, the rule provides that a veteran’s “fear” need not emanate from a single event or be consistent with the veteran’s MOS but rather the fear may result from conditions to which the veteran was exposed during service. The requirement that a claimed stressor be consistent with the places, types, and circumstances of the veteran’s service originates in the statute that authorizes this regulation, 38 U.S.C. 1154(a), which requires VA to duly consider the places, types and circumstances of the veteran’s service. In addition, consistent with section 1154(a), VA regulations provide that consistency with the places, types, and circumstances of service is shown by the veteran’s service records, the official history of each organization in which the veteran served, medical records, and all pertinent medical and lay evidence. 38 CFR 3.303(a). Finally, VA adjudicators, not examining psychiatrists and psychologists, will decide whether the claimed stressor is consistent with the veteran’s service.

One commenter stated that the term “confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others” implies that a veteran must experience an event that

is close and highly lethal. As stated above, there is no geographic requirement for the regulation. However, the stressor must be consistent with the places, types, and circumstances of the veteran’s service. 38 U.S.C. 1154. In addition, an event does not have to be lethal. As provided in the rule, the traumatic event can involve actual or threatened serious injury, as well as death, or a threat to the physical integrity of the veteran or others.

One commenter stated that the list of examples in the definition of “fear of hostile military or terrorist activity” is incomplete and would “likely result in [VA] rejecting as adequate stressors such events as injuring or killing of civilians.” Another commenter suggested adding language to clarify that an event or circumstance does not have to include one of the situations listed in the definition, e.g., “an actual or potential improvised explosive device; \* \* \* incoming artillery, rocket, or mortar fire; grenade.” A list of examples cannot reasonably include every conceivable event or circumstance that would qualify as hostile military or terrorist activity under the rule. Nevertheless, we disagree that this “incompleteness” would likely result in VA rejecting events such as the injuring or killing of civilians. The definition of “fear of hostile military or terrorist activity” is not limited to any particular class of individuals. Involvement of “actual or threatened death or serious injury, or a threat to the physical integrity of the veteran *or others*,” which is not limited to military personnel, is all that is required to qualify as “an event or circumstance” within the meaning of the rule. Therefore, if a veteran experienced, witnessed, or was confronted with an event involving actual or threatened death, serious injury, or a threat to the physical integrity of civilians, the event would qualify as a stressor. Also, by using the modifying phrase “such as,” VA intends to present a list of examples to illustrate what qualifies as an event or circumstance, not a defining restriction. See *Donovan v. Anheuser-Busch, Inc.*, 666 F.2d 315, 327 (8th Cir. 1981).

A commenter suggested that the definition of “fear of hostile military or terrorist activity” be extended to include domestic as well as foreign activity. The regulation is not limited to events or circumstances perpetrated by a foreign enemy. Therefore, VA makes no change based on the comment.

Some commenters said that VA should define when a stressor would be considered consistent with the places, types, and circumstances of the

veteran’s service. One commenter asked whether a veteran’s claimed fear of hostile military activity during service in South Korea after the Korean Conflict ended or in the continental United States after September 11, 2001, would be consistent with the places, types, and circumstances of such service. Another commenter suggested that the rule should explain the types of evidence needed to establish consistency with the places, types, and circumstances of service.

The question of consistency is a matter involving application of 38 U.S.C. 1154(a) and 38 CFR 3.303(a) to the myriad of facts presented by individual claims. We note, however, that inclusion of the conjunction “and” in the statute and regulation means that a stressor must be consistent with all three of the enumerated criteria. *Watson v. Dep’t of the Navy*, 262 F.3d 1292, 1299 (Fed. Cir. 2001). Finally, the statute and regulation indicate that VA is to consider the places, types, and circumstances of service as shown by service records, the official history of each organization in which the veteran served, the veteran’s medical records, and all pertinent medical and lay evidence. Some commenters suggested that the rule be broadened to provide a reduced evidentiary standard based solely on deployment to a war zone or fear of such deployment, rather than on fear of hostile military or terrorist activity. One commenter suggested that such a rule is supported by the Institute of Medicine (IOM), *Gulf War & Health, Vol. 6: Physiologic, Psychologic, and Psychosocial Effects of Deployment-Related Stress*, 319 (2008) (IOM Report), which states:

The epidemiologic literature on deployed vs[.] nondeployed veterans yielded sufficient evidence of an association between deployment to a war zone and psychiatric disorders, including [PTSD], other anxiety disorders, and depression; alcohol abuse; accidental death and suicide in the first few years after return from deployment; and marital and family conflict, including interpersonal violence.

We do not adopt this suggestion because many of the hardships related to deployment, such as uncertainty about the length of a tour of duty and lack of companionship or family contact, do not satisfy the DSM-IV requirements for a PTSD diagnosis, i.e., experiencing, witnessing, or confronting an event involving actual or threatened death or serious injury or threat to the physical integrity of self or others. IOM Report at 35–38; DSM-IV at 427. We have instead focused the rule on factors associated with deployment that comport with the DSM-IV definition of PTSD.

Some commenters inquired whether the rule would cover a service member who experienced fear of hostile military or terrorist activity after learning about the experiences of others with such activity but before being deployed to a war zone. It is not our intention that the new evidentiary standard apply in such a situation, and we do not interpret the rule to cover that situation. Such a claim would be adjudicated under the generally applicable standard set forth in the introductory text of 38 CFR 3.304(f). The IOM Committee “defin[ed] deployment-related stress as deployment to a war zone” and “considered that military personnel deployed to a war zone, even if direct combat was not experienced, have the potential for exposure to deployment-related stressors that might elicit a stress response.” IOM Report at 13. Consistent with these findings, the rule is intended to apply only when the veteran’s service is proximate in time and place to the traumatic event to which the veteran has responded with intense fear, helplessness, or horror. This is consistent with current provisions of 38 CFR 3.304(f) that do not require corroborating evidence of occurrence of a stressor if a veteran was diagnosed with PTSD in service, engaged in combat with the enemy, or was a prisoner of war, *i.e.*, circumstances of service in which it is undisputed that the veteran was personally exposed to a stress-inducing event, making it unnecessary to obtain supporting documentation. *See* Proposed Rule, 57 FR 34536 (Aug. 5, 1992) (not requiring corroborating evidence that a stressor occurred if evidence establishes that the veteran engaged in combat or is a former prisoner of war). A non-deployed veteran who learns that others were subject to a hostile military or terrorist activity in a war zone cannot be said to have “experienced, witnessed, or [been] confronted with an event or circumstance” within the contemplation of the new regulation. In such cases, the claimed stressor (the hostile military or terrorist activity) would not be consistent with the places, types, and circumstances of the veteran’s service when the activity occurred or the veteran learned that others were subjected to such activity.

#### Coverage of Other Stressors

VA also received comments suggesting that the rule should cover stressors such as MST, abuse by military personnel of subordinate military personnel, harassment, suicide of a fellow service member, witnessing a military vehicle accident in the United States, a fellow soldier’s or sailor’s post-

service suicide, and social, political, and economic discrimination. One commenter suggested that VA should promulgate a similar rule to assist those with physical injuries due to hostile military or terrorist activity. These comments are outside the scope of this rule. Therefore, we make no change based on them. However, regarding MST, we note as well that 38 CFR 3.304(f)(5) (before this rulemaking codified at 38 CFR 3.304(f)(4)) permits evidence other than a veteran’s service records to corroborate the occurrence of an in-service personal assault and prohibits VA from denying a claim for service connection for PTSD based on in-service personal assault without first advising the claimant that evidence from sources other than a veteran’s service records may prove the stressor occurred.

#### Post-Combat Stress Disorder

A number of commenters suggested that use of the term PTSD is socially stigmatizing, is embarrassing to combat veterans, and may cause veterans to forego needed professional treatment. One commenter suggested that VA re-categorize PTSD rated as 70 percent or more disabling as post-combat stress disorder to diminish the stigma associated with a diagnosis of PTSD, encourage veterans to seek treatment, and prevent possible suicide. As explained in 38 CFR 4.130, the nomenclature in the VA schedule of ratings for mental disorders is based upon the DSM-IV, and 38 CFR 4.125 requires that a diagnosis of a mental disorder conform to the DSM-IV in order to substantiate a claim. Because the DSM-IV does not include post-combat stress disorder as a diagnosis, we make no change based on these comments.

#### Opposition to Liberalizing Evidentiary Standard

VA received written comments objecting to the liberalizing evidentiary standard for PTSD claims based on fear of hostile military or terrorist activity. Several commenters alleged that the rule implies that all a veteran must do to be granted service connection is communicate that he or she experienced “fear” to corroborate a stressor, will invite frivolous or fraudulent claims against the Federal Government, is offensive to heroic combat veterans of current and past wartime periods, and will delay adjudication of their claims. One commenter suggested that VA should re-evaluate veterans diagnosed with PTSD.

The reduced evidentiary standard provided by the rule is not applicable

solely because a veteran reports that he or she experienced fear. Under the rule, VA will not rely on a veteran’s lay testimony alone to establish occurrence of the stressor unless the following requirements are satisfied. First, the veteran must have experienced, witnessed, or have been confronted by an event or circumstance that involved actual or threatened death or serious injury, or a threat to the physical integrity of the veteran or others, and the veteran’s response to the event or circumstance must have involved a psychological or psycho-physiological state of fear, helplessness, or horror. Second, a VA psychiatrist or psychologist, or a psychiatrist or psychologist with whom VA has contracted, must confirm that the claimed stressor is adequate to support a diagnosis of PTSD and that the veteran’s symptoms are related to the claimed stressor. Third, there must be in the record no clear and convincing evidence to the contrary, and fourth, the claimed stressor must be consistent with the places, types, and circumstances of the veteran’s service. Because all of these requirements must be met for the veteran’s lay testimony alone to establish the occurrence of the claimed stressor, we believe the likelihood of fraud to be minimal. Finally, 38 CFR 3.327(a) requires a reexamination whenever VA determines there is a need to verify either the continued existence or the current severity of a disability.

This rule is not intended to discount the heroic efforts of combat veterans, but rather is VA’s response to scientific studies related to PTSD and military troop deployment. As noted in the proposed rule:

Combat is one of the most potent stressors that a person can experience, but as military conflicts have evolved to include more guerilla warfare and insurgent activities, restricting the definition of deployment-related stressors to combat may fail to acknowledge other potent stressors experienced by military personnel in a war zone or in the aftermath of combat. Those stressors include constant vigilance against unexpected attack, the absence of a defined front line, the difficulty of distinguishing enemy combatants from civilians, the ubiquity of improvised explosive devices, caring for the badly injured or dying, duty on the graves registration service, and being responsible for the treatment of prisoners of war.

Proposed Rule, 74 FR at 42618 (quoting IOM Report at 2). Finally, we believe that this rule will improve the timeliness of the adjudication of claims of all veterans by eliminating the need to search for corroborating evidence in certain cases. For these reasons, we

make no change based on these comments.

#### DSM-IV Definition of PTSD

Some commenters stated that the proposed rule is inconsistent with DSM-IV, which does not require “a psychological or psycho-physiological state of fear, helplessness, or horror” to a traumatic event. Another commenter stated that VA is prohibited from using terms in the regulation that do not appear in DSM-IV.

The commenters are incorrect. In order to satisfy the DSM-IV diagnostic criteria for PTSD, a person’s response to a traumatic event must involve “intense fear, helplessness, or horror.” DSM-IV at 428. In addition, the traumatic event must be persistently reexperienced in one or more of several ways, including “intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event” and “physiologic reactivity on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event,” all of which involve intense psychological stress or psycho-physiological response. *Id.* In any event, nothing prohibits VA from using in this regulation a term that does not appear in the DSM-IV. As indicated above, the nomenclature employed by VA in the schedule for rating mental disorders “is based upon the [DSM-IV].” 38 CFR 4.130. This rule, however, does not concern the evaluation of mental disorders. It liberalizes the evidentiary standard for corroboration of a stressor in certain cases. Using a term that does not appear in the DSM-IV is well within VA’s authority to prescribe exactly which cases may benefit from the liberalized evidentiary standard.

A commenter expressed concern that the rule is limited to “fear of hostile or terrorist activity” and asked whether a veteran would be entitled to the reduced evidentiary standard if the veteran manifested flashbacks and nightmares long after service. Both this rule and flashbacks and nightmares are related to the diagnostic criteria for PTSD, but they relate to distinct criteria. The rule relates to the criterion of a person’s exposure to a traumatic event and the person’s response to that event. *See* DSM-IV at 427–428. Flashbacks and nightmares relate to the criterion of the person’s re-experiencing of the traumatic event. DSM-IV at 428.

Another commenter asserted that the requirement in the rule that the stressor must be consistent with the places, types, and circumstances of a veteran’s service renders the rule narrower than the DSM-IV definition of PTSD and that

the requirement that the stressor relate to a veteran’s fear of hostile military or terrorist activity narrows the DSM-IV definition of PTSD.

As indicated above, in replying to a comment about the meaning of the phrase “consistent with the \* \* \* circumstances of service,” under 38 U.S.C. 1154(a), VA must duly consider the places, types, and circumstances of a veteran’s service as shown by the veteran’s service record, the official history of each organization in which such veteran served, the veteran’s medical records, and all pertinent medical and lay evidence. Such consideration is a general requirement that applies to any service connection claim, not just claims for service connection of PTSD. Because section 1154 is the authority for this rule, we incorporate the statutory requirement into the rule.

Because the requirement that a claimed stressor relate to a veteran’s fear of hostile military or terrorist activity has no effect on the diagnostic criteria for PTSD, the requirement does not narrow the DSM-IV definition of PTSD. The effect of the rule is to relax the evidentiary standard for establishing the occurrence of an in-service stressor for certain veterans, and the rule is limited to cases in which the claimed stressor is related to the veteran’s fear of hostile military or terrorist activity for the reasons given in the notice of proposed rulemaking. Proposed Rule, 74 FR at 42618 (explaining that the rule is consistent with scientific studies related to PTSD and military troop deployment). The rule focuses on the procedure for establishing service connection for PTSD, not the criteria for establishing a legitimate diagnosis. Therefore, there is no inconsistency with the medical community at large, and we make no change based on the comment. In addition, the rule defines “fear of hostile military or terrorist activity” as “involv[ing] a psychological or psycho-physiological state of fear, helplessness, or horror.”

One commenter stated that fear of hostile military or terrorist activity may not be sufficient to give rise to a diagnosis of PTSD in accordance with DSM-IV absent occurrence of an actual event. We agree that the occurrence of an actual event or circumstance is necessary. In fact, as the commenter noted, the first DSM-IV diagnostic criterion for PTSD is exposure to a traumatic event. DSM-IV at 427. The rule does not permit diagnosis of PTSD in the absence of exposure to a traumatic event or circumstance. The rule lists several examples of events or circumstances that could give rise to the

requisite fear. The rule eliminates the need for corroborating evidence of the event if the requirements of the rule are met.

Another commenter asserted that the Global Assessment of Functioning (GAF) score has limited use and should be replaced. Axis V of the DSM-IV multiaxial diagnosis system measures the overall severity of psychiatric disturbance based on the GAF Scale, which rates an individual’s social, occupational, and psychological functioning. VA regulations do not require a GAF score for purposes of determining whether PTSD is service connected, although the score may be required or requested by the Veterans Court, the Board, or a rating specialist for purposes of assessing the extent of disability after service connection has been established. This comment is therefore beyond the scope of this rulemaking.

#### Psychiatrist or Psychologist Employed by VA or With Whom VA Has Contracted

The majority of comments that VA received expressed disagreement with the requirement that the evidentiary standard for establishing occurrence of the stressor will be liberalized only if “a VA psychiatrist or psychologist, or a psychiatrist or psychologist with whom VA has contracted, confirms that the claimed stressor is adequate to support a diagnosis of [PTSD] and that the veteran’s symptoms are related to the claimed stressor.” We have grouped these comments together by subject matter and address them below.

#### Consistency With 38 U.S.C. 5125

Some commenters asserted that the rule is contrary to 38 U.S.C. 5125, which one commenter contended means that VA must accept the opinion of a private physician if the opinion is adequate for rating purposes. In support of this contention, the commenter relied upon the heading of section 5125, “Acceptance of reports of private physician examinations.”

Section 5125 provides that, “[f]or purposes of establishing any claim for benefits under chapter 11 or 15 of [title 38], a report of a medical examination administered by a private physician that is provided by a claimant in support of a claim for benefits \* \* \* may be accepted without a requirement for confirmation by an examination by a physician employed by the Veterans Health Administration [(VHA)] if the report is sufficiently complete to be adequate for the purpose of adjudicating such claim.” (Emphasis added). Generally, use of the word “may”

suggests that a provision is permissive, not mandatory. *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 346 (2005). See 60 FR 27409 (May 24, 1995) (final rule amending 38 CFR 3.326 to reflect section 5125's authorization of private physician's examination reports if adequate for rating purposes). The meaning of section 5125 is plain, and therefore, the heading of the section cannot be used to limit its meaning. *Bhd. of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 528–29 (1947). Thus, VA is not required to accept the report of a private physician as sufficient for rating a claim in all circumstances.

### Alternative Qualifications for Psychiatrists and Psychologists

Commenters wrote that VA should accept the opinion of any psychiatrist or psychologist who evaluates the claimed condition based on the DSM–IV protocol or VA's protocol for PTSD examinations or who is certified by the APA. Several commenters asserted that private physicians provide more comprehensive and/or better examinations. Other commenters alleged that VA examiners refuse to diagnose PTSD and that their examinations are inconsistent and do not comply with DSM–IV. Also, one commenter contended that no confirmatory evidence from a VA psychiatrist or psychologist should be required because these examiners are often biased against claimants and likely to diagnose a mental disorder other than PTSD.

We decline to expand the rule to include the opinion of any psychiatrist or psychologist whose diagnosis conforms to DSM–IV or VA's protocol or who is certified by the APA because we believe that VA or contract examiners are uniquely qualified for the following reasons.

#### *VA Examiners Are Trained To Provide Forensic Opinions Necessary To Decide PTSD Claims*

By making 38 U.S.C. 5125 discretionary rather than mandatory, Congress clearly recognized that there may be circumstances in which VA would require a confirmatory medical opinion. The situation described in this rule is such a circumstance because it eliminates the requirement of credible supporting evidence of the occurrence of an alleged non-combat stressor under 38 CFR 3.304(f) in the situation described. Because the rule permits the proof of an in-service stressor based on the claimant's lay statement alone, VA believes that it is reasonable to limit this liberalization to medical opinions from

practitioners who it knows are well-skilled and well-equipped to provide such forensic evidence, rather than broaden the rule to include opinions from private physicians.

VA's need for such forensic evidence is particularly important in the case of a claim for service connection for a mental disorder.

When the DSM–IV categories, criteria, and textual descriptions are employed for forensic purposes, there are significant risks that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis. \* \* \*

Nonclinical decision makers should also be cautioned that a diagnosis does not carry any necessary implications regarding the causes of the individual's mental disorder or its associated impairments.

DSM–IV at xxiii; see VHA Directive 2008–005 (Jan. 29, 2008). Consistent with the DSM–IV, VA has limited the mental health professionals who are qualified to perform initial Compensation and Pension (C&P) examinations for mental disorders to highly trained professionals. See VBA Fast Letter 06–03 (Mar. 15, 2006).

A C&P examination for PTSD is particularly complex because an examiner must: (1) Make complex judgments about potential malingering in the context of an administrative evaluation that will have obvious financial implications for a veteran;

(2) Comprehensively diagnose all comorbid mental disorders and apportion disability to various disorders in veterans who increasingly have co-occurring mental disorders; and

(3) Render an informed opinion about the effects of PTSD on social and occupational functioning, requiring a careful and often time-consuming review of a veteran's history.

*Department of Veterans Affairs, Best Practice Manual for Posttraumatic Stress Disorder (PTSD) Compensation and Pension Examinations (Best Practice Manual) 21–22, <http://www.avapl.org/pub/PTSD%20Manual%20final%206.pdf>.*

#### *VA Examiners Are Well-Trained in How To Perform PTSD Examinations*

VA provides extensive guidance to VHA examiners about how to perform C&P examinations and gives specific guidance about PTSD examinations. *Id.* at 13–22; *C&P Service Clinician's Guide (Clinician's Guide)*, ch. 14 (Mar. 2002), <http://www.warms.vba.va.gov/21guides.html>.

#### *VA Certifies VA Examiners and Reviews the Quality of Examinations by VA and Contract Examiners*

In addition, all PTSD C&P evaluations are performed by qualified examiners who utilize evidence-based instruments, as recommended in the Fiscal Year 2007 report of the VA Special Committee on PTSD. The Under Secretary for Health's Post-Traumatic Stress Disorder Special Committee: FY 2006 Annual Report, 9 (Jun. 5, 2007). In response to the Special Committee's recommendation, the Compensation and Pension Exam Program (CPEP), in conjunction with the Employee Education System and VHA/DoD Program Coordination Office, established a program requiring training and certification of all VHA clinicians who conduct C&P examinations, including Fee-for-Service Providers, which program includes special modules and tests for initial examinations for PTSD. VHA Directive 2008–005. In a May 2009 report to Congress, the Special Committee advised that the recommendation had been “met.”

The CPEP office also reviews the quality of examinations of claimants conducted by VHA clinicians, including PTSD examinations, and when CPEP identifies problems in the quality of examinations, steps are taken to improve the quality via CPEP-sponsored conferences and training.

VBA provides contract examiners with information regarding the requirements of C&P examinations, and the quality of examinations provided by VA contractors is reviewed quarterly by a physician and nurse employed by VBA.

#### *VA and Contract Examiners Are Often Better Informed About the Veteran.*

In addition, VA psychiatrists and psychologists and contract examiners are often better informed about a veteran being examined than private practitioners are. When VBA requests a mental-disorder examination, including an examination for PTSD, it sends the claims folder to the examiner for the examiner's review. Manual M21–1 MR, Part III, subpart iv, ch. 3, sec. A, para. 1.e. The C&P examination worksheet for an initial evaluation for PTSD requires review of the veteran's claims file. The worksheet states, “A diagnosis of PTSD cannot be adequately documented or ruled out without obtaining a detailed military history and reviewing the claims folder.” *Clinician's Guide* at 207. A private psychiatrist or psychologist would not have access to such documentation before opining about whether a claimed stressor is adequate

to support a PTSD diagnosis and whether the veteran's symptoms are related to the claimed stressor.

*VA Examiners Perform More Examinations, Thereby Ensuring Consistency in Evaluations.*

Finally, VA believes that the requirement in the rule for a confirmatory opinion from a VA psychiatrist or psychologist, or a psychiatrist or psychologist with whom VA has contracted, will "ensure standardization and consistency of mental health evaluations and reporting of these evaluations." Proposed Rule, 74 FR at 42618. VHA performs over 700,000 C&P examinations annually, VHA Directive 2008-005, at 1, and contract physicians provide approximately 120,000 C&P examinations annually. As explained above, CPEP reviews VHA examination reports, and VBA reviews the reports of contract examiners. The review of these reports helps to guarantee the quality and consistency of PTSD examinations. However, VA has no control over the quality of examinations performed by private healthcare providers. Because VA is willing to liberalize the evidentiary standard for proving a stressor only in cases on which it can depend on the quality of the medical opinion, we decline to accept the opinion of any psychiatrist or psychologist as suggested.

With regard to the assertion that private physicians provide more comprehensive and/or better examinations, we believe that the protocol for initial VA examinations for PTSD, to which all VA and contract examiners must adhere, ensures comprehensive examinations addressing all aspects of a veteran's medical, social, and psychological history and the veteran's current mental status. *Clinician's Guide* at 206-12. We therefore make no change based on this comment.

We are unaware of VA examiners who refuse to diagnose PTSD, are biased against claimants, or are likely to diagnose a mental disorder other than PTSD, as other commenters alleged. In fact, a VBA review revealed that, when C&P examinations were conducted, PTSD was diagnosed in 77% of initial claims. *Best Practice Manual* at 1, 5, 57. We believe that the CPEP and VBA reviews of VA and contract examinations ensure consistency in examinations, and if CPEP assessments identify problems, steps are taken to improve quality and consistency, such as CPEP-sponsored training or recommendations to revise examination templates and/or worksheets. Also, if a

VA examination does not comply with DSM-IV, as the commenter alleges, the examination is returned to the examiner for substantiation, as required by 38 CFR 4.125(a). We therefore make no changes to the regulation based on these comments.

**VA Social Workers, Counselors, and Former Clinicians**

Some commenters urged VA to accept confirmatory opinions from VA social workers, counselors, therapists, and former psychiatrists and psychologists. One commenter contended that consistency in examinations by such providers is guaranteed by VHA Handbook 1160.01, Uniform Mental Health Services in VA Medical Centers and Clinics, [http://www1.va.gov/emshg/docs/VHA\\_CEMP\\_Uniform\\_Mental\\_Health\\_Services\\_Hndb\\_1160\\_01\\_61108.pdf](http://www1.va.gov/emshg/docs/VHA_CEMP_Uniform_Mental_Health_Services_Hndb_1160_01_61108.pdf), and VA Handbook 5005/23, Part II, Appendix G39, providing the requirements for appointment as a VHA social worker. As explained above, a C&P examination is forensic evidence for purposes of determining whether a veteran is entitled to disability compensation for PTSD and, if so, how much. This rule requires the medical opinion of a VA psychiatrist or psychologist, or a contract psychiatrist or psychologist, because VA can rely on the consistency and quality of examinations conducted by such individuals. These handbooks, on the other hand, pertain to care of VA patients, not C&P examinations, and to the appointment of personnel. They do not ensure the degree of training, information, and experience necessary to ensure quality and consistency in examinations.

With regard to former VA psychiatrists and psychologists, some former clinicians may not have been CPEP-certified depending upon when they were employed by VA. In addition, their examinations would not be subject to ongoing CPEP review, nor would they have access to a veteran's claims file to conduct the review required by the PTSD examination protocol. Therefore, VA would be unable to ensure standardization, consistency, and quality of their examinations. For that reason, we decline to permit their medical opinions to qualify for the evidentiary liberalization provided by this rule.

**Potential Conflict for VA Examiners**

Two commenters stated that the rule might present a conflict for a VA examiner who is required to act in the best interests of his or her patient. VBA Fast Letter 06-03 acknowledges that, "[t]o maintain the integrity of the

patient-provider relationship, it is preferable that a veteran's treating health care provider not perform the C&P examination," and advises that, when an adjudicator requests a mental-disorder examination or opinion, the adjudicator "specify that the veteran's treating health care provider should not perform the examination if possible." This should avert any conflict.

**Training and Availability of VA Psychiatrists and Psychologists**

A commenter expressed concern about the training and education of psychiatrists or psychologists employed by VA or with whom VA has contracted and stated that it may be necessary for these examiners to receive training in military history. Another commenter said that the rule would require veterans to visit doctors who may be unfamiliar with their medical and treatment histories and could unnecessarily cause veterans to relive past stressors in order to establish service connection for a disability for which they have already been diagnosed. The commenter also said that the rule would impose on veterans who live in rural states an unreasonable burden to travel long distances to obtain the requisite examination by a VA psychiatrist or psychologist or an examiner with whom VA has contracted.

VA examiners are well-trained in how to interact with veterans during a C&P examination. As explained above, the PTSD examination protocol requires examiners to review the veteran's claims file so that the examiner will be familiar with the veteran's medical and military history. See *Best Practice Manual* at 22. In addition, it is estimated that examiners should spend 20 minutes orienting the veteran to the interview, reviewing the veteran's military history, and conducting a trauma assessment. *Id.* The *Best Practice Manual* states at page 14 that

it is important to explain to the claimant that it is necessary to obtain a detailed description of one or more traumatic events related to military service, in order to complete the examination. Further, it is helpful to alert him or her to the fact that trauma assessment, though brief (about 15-20 minutes), may cause some distress. The veteran should be advised that trauma assessment is a mutual and collaborative process, and that he or she is not required to provide unnecessarily detailed answers to all questions, if it is too distressing to do so.

Assessment of a personally relevant trauma proceeds only "after sufficient rapport has developed and some cursory details regarding the context of the trauma situation(s) have been gathered." *Id.*

VA recognizes that an accurate diagnosis of PTSD requires extended discussion of experiences that may have been extremely traumatic and that repression, denial, and general haziness of memories are often hurdles in obtaining an adequate military history. *Clinician's Guide* at 196–97. Examiners are therefore advised that “it is crucial that the examiner place emphasis on avoiding an authoritarian role, avoiding judgmental interventions, and establishing rapport through an initial focus on current life experiences or other discussion which encourages comfort in the interview.” *Id.* at 197. Based upon the training provided to these examiners, which we have explained above, we believe that they are well-prepared to examine veterans while minimizing the risk of causing veterans undue distress through reliving of their traumatic experiences.

As for the availability of examiners to provide the opinions required by the rule, VA intends to carefully monitor the need for examiners in various regions of the country and to make examiners available in response to demand. In fact, one reason for using contract examiners is to provide qualified examiners in places far from the closest VA medical facility.

#### **Private Practitioners Other Than Psychiatrists and Psychologists**

Some commenters suggested that VA expand the rule to include the opinion of a private licensed therapist, counselor, or social worker who has treated the claimant. To ensure that examiners are competent to provide findings and opinions that are valid and necessary for rating purposes, VBA determined that individuals who conduct C&P mental disorder examinations must have specific qualifications. VBA Fast Letter 06–03. Only mental health professionals with the following credentials are qualified to perform initial C&P mental disorder examinations: (1) Board-certified psychiatrists or board-“eligible” psychiatrists; (2) licensed doctorate-level psychologists; (3) doctorate-level mental health providers under the close supervision of a board-certified or board-eligible psychiatrist or licensed doctorate-level psychologist; (4) psychiatry residents under the close supervision of a board-certified or board-eligible psychiatrist or licensed doctorate-level psychologist; and (5) clinical or counseling psychologists completing a one-year internship or residency (for purposes of a doctorate-level degree) under the close supervision of a board-certified or board-eligible psychiatrist or licensed

doctorate-level psychologist. Because VA has no guarantee that a private licensed therapist, counselor, or social worker who has treated a veteran has the qualifications required for a C&P mental disorder examination, we decline to adopt the commenters’ suggestion.

#### **Consideration of Veteran’s Evidence**

Some commenters asserted that the requirement for a confirmatory opinion from a VA practitioner or contract examiner discriminates against veterans with PTSD or veterans whose claims are based on a particular type of stressor and potentially violates their right to equal protection under the law. Another commenter asserted that the rule violates due process by denying a claimant the ability to submit competent medical evidence from private mental health professionals to rebut the VA opinion. One commenter suggested that the rule should specifically provide for rebuttal of the VA examiner’s opinion with non-VA evidence. Also, commenters asserted that the rule would not permit a veteran to submit evidence from a private physician or psychologist or would require VA to reject such an opinion, thereby conflicting with VA’s obligation to consider all evidence of record, and would violate the benefit of the doubt rule. Another commenter asserted that, absent the opinion of a VA psychiatrist or psychologist confirming that the claimed stressor is adequate to support a PTSD diagnosis and that the veteran’s symptoms are related to the claimed stressor, VA adjudicators would not weigh or analyze the evidence. Other commenters asserted that the rule would violate 38 CFR 3.303(a) and 38 U.S.C. 5107(b).

These concerns are unfounded. Nothing in the rule precludes a claimant from submitting private medical evidence, permits VA to ignore any evidence that is submitted, or requires VA to reject an opinion from a private physician or psychologist. Statute and regulation require VA to consider all information and lay and medical evidence of record when deciding a claim for veterans benefits. 38 U.S.C. 5107(b); 38 CFR 3.303(a). Service connection for PTSD requires medical evidence diagnosing the disability, medical evidence establishing a link between the veteran’s current symptoms and an in-service stressor, and credible evidence corroborating occurrence of the stressor. 38 CFR 3.304. If a stressor claimed by a veteran is related to the veteran’s fear of hostile military or terrorist activity, the evidentiary standard for establishing occurrence of

the stressor can be reduced but only if a VA psychiatrist or psychologist, or a psychiatrist or psychologist with whom VA has contracted, confirms that the claimed stressor is adequate to support a PTSD diagnosis and that the veteran’s symptoms are related to the stressor. If such confirmation is made in accordance with the rule, VA will not require evidence corroborating occurrence of the claimed stressor. Failure to obtain such confirmation, however, does not necessarily result in denial of the claim. If such confirmation is not made in accordance with the rule, VA will assist the claimant in obtaining evidence to corroborate occurrence of the claimed stressor. VA will consider all evidence of record, including evidence submitted by the claimant, give the claimant the benefit of the doubt when the evidence is in equipoise, and determine whether the requirements for establishing service connection for PTSD under 38 CFR 3.304(f) have been satisfied, notwithstanding any failure to satisfy the requirements of new section 3.304(f)(3). 38 U.S.C. 5103A and 5107(b); 38 CFR 3.303(a) and 3.102.

#### **Competent Medical Evidence**

Some commenters asserted that the requirement for confirmatory evidence from a VA psychiatrist or psychologist conflicts with 38 CFR 3.159(a)(1), which defines “competent medical evidence” to include “evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions.”

There is no conflict because the definition in § 3.159(a)(1) concerns a matter different from the subject of this rule. This rule concerns whether “credible supporting evidence” will be required to establish the occurrence of a stressor in a claim for service connection of PTSD. Section 3.159(a)(1) defines the phrase “competent medical evidence” for purposes of explaining when VA will provide a medical examination or obtain a medical opinion in any service connection claim. *See* 38 U.S.C. 5103A(d)(2)(A) (VA “shall” provide medical examination or obtain medical opinion when several conditions are met, including that the record “contains competent medical evidence” that the claimant has a current disability or persistent or recurrent symptoms of disability); 38 CFR 3.159(c)(4)(i) (VA must provide a medical examination or obtain a medical opinion if several conditions are met, including that the information and evidence of record does not contain “sufficient competent medical evidence”

to decide the claim, but contains “competent lay or medical evidence” of a current diagnosed disability or persistent or recurrent symptoms of disability). Thus, the existence of “competent medical evidence” in the record does not preclude VA from obtaining a medical examination but rather mandates an examination if the other regulatory requirements are satisfied. For these reasons, we make no change to the rule based on these comments.

#### Treating Physician Rule

One commenter stated that the rule is in essence an “anti-treating physician” rule and that VA should adopt the “treating physician” rule used by the Social Security Administration. As explained above, the rule does not preclude a claimant from submitting and VA from considering evidence from the claimant’s treating physician, if the claim cannot be granted under the new section 3.304(f)(3) procedures. Also, as the U.S. Court of Appeals for the Federal Circuit has recognized, adoption of the treating physician rule may conflict with the benefit of the doubt rule and would conflict with 38 CFR 3.303(a), which requires that service connection determinations will be based on the entire evidence of record and due consideration of VA’s policy to administer the law under a broad and liberal interpretation, consistent with the facts of each case. *White v. Principi*, 243 F.3d 1378, 1381 (Fed. Cir. 2001); 38 U.S.C. 5107 and 7104(a); 38 CFR 3.102. We therefore do not adopt this suggestion.

#### Claimant’s Evidentiary Burden

One commenter stated that the rule would increase the evidentiary burden on a claimant by requiring a confirmatory opinion by a VA psychiatrist or psychologist and a finding that the stressor is consistent with the places, types, and circumstances of the veteran’s service.

Section 3.304(f) currently requires a medical-nexus opinion linking a veteran’s current symptoms and the claimed stressor. This rule merely provides a liberalized evidentiary standard in certain situations based on the opinion of a VA psychiatrist or psychologist. Further, the requirement for consistency is mandated by 38 U.S.C. 1154(a) and 38 CFR 3.303(a). Also, pursuant to 38 U.S.C. 5103A(a) and (c), VA has a duty to assist a claimant for disability compensation in obtaining evidence necessary to substantiate the claim. In particular, VA is required to provide an examination or obtain a medical opinion when

necessary to decide a claim for disability compensation. 38 U.S.C. 5103A(d). Section 5103A(d)(3) states that an examination or opinion is necessary if the record contains competent evidence of a current disability or persistent or recurrent symptoms, indicates that the disability or symptoms may be associated with the claimant’s active service, and does not contain sufficient medical evidence for VA to make a decision on the claim.

One commenter asked whether the rule requires that the occurrence of a stressor be corroborated by evidence of a veteran’s response to the stressor, such as behavioral changes as provided in former § 3.304(f)(4), or whether the veteran’s lay testimony will be accepted as sufficient proof of the stressor. If the requirements of the rule are met, VA may accept the veteran’s lay testimony as sufficient proof of the stressor. If, however, the requirements of the rule are not met, the record must contain corroborating evidence of the stressor. The rule does not require corroboration by evidence of the veteran’s response, but evidence of the veteran’s response is required for a legitimate diagnosis of PTSD resulting from exposure to the stressor. Furthermore, evidence of the veteran’s response may be used to prove the occurrence of the stressor. Before deciding whether the stressor has been corroborated, VA will examine all the evidence of record to determine whether it corroborates occurrence of the stressor. See 38 CFR 3.303(a). Also, Manual M21–1MR instructs adjudicators to review alternative sources of evidence that may corroborate a claimed in-service stressor, such as a veteran’s contemporaneous letters and diaries and performance reports. M21–1MR, Part III, subpart IV, ch. 4, sec. H, para. 29.i-k.

#### Relationship to Other Rules

One commenter stated that the rule could be viewed as restricting or superseding the beneficial rule codified at 38 CFR 3.304(f)(2), which states that a veteran’s lay testimony alone is sufficient to establish the occurrence of a claimed stressor if the veteran engaged in combat with the enemy and the claimed stressor is related to that combat. We make no change based on this comment because the new rule merely provides another avenue by which veterans seeking disability compensation for PTSD can establish service connection and does not restrict or supersede any existing VA rules intended to assist claimants. A qualifying veteran may still establish service connection under 38 CFR

3.304(f)(2) without regard to the new rule.

Another commenter asked whether corroborating evidence of a stressor would be required if a veteran is not a combat veteran or does not qualify for the reduced evidentiary standard under this rule. Section 3.304(f) relaxes the ordinary evidentiary standard in other situations also, such as PTSD diagnosed in service, a former prisoner of war as claimant, and a claim based on personal assault in service. However, in the absence of such circumstances, VA would not grant service connection for PTSD unless the record contains a medical diagnosis of PTSD, medical evidence of a nexus between current symptoms and the in-service stressor, and corroborating evidence of the occurrence of the stressor. 38 CFR 3.304(f).

#### Authority for Rule

One commenter also suggested that VA should provide a legal foundation for the regulation and suggests the Persian Gulf War Veterans Act of 1998, Public Law 105–277, Div. C, tit. XVI, sec. 1603, 112 Stat. 2681–742, 2681–745, and the Veterans Programs Enhancement Act of 1998, Public Law 105–368, sec. 105, 112 Stat. 3315, 3324, which authorized the 2008 IOM report.

As explained in the notice of proposed rulemaking, the authority for this rulemaking is 38 U.S.C. 501(a)(1), which authorizes the Secretary to promulgate regulations “with respect to the nature and extent of proof and evidence and the method of taking and furnishing them in order to establish the right to benefits under such laws,” and 38 U.S.C. 1154(a), which requires the Secretary to “include in the regulations pertaining to the service-connection of disabilities” provisions requiring “due consideration” of the places, types, and circumstances of a veteran’s service. Proposed Rule, 74 FR 42617. We make no change to the rule based on this comment because the public laws cited by the commenter do not authorize regulations regarding the nature and extent of proof and evidence necessary to establish service connection for PTSD.

#### Applicability Date

This final rule applies to an application for service connection for PTSD that is received by VA on or after the rule’s effective date, was received by VA before the rule’s effective date but has not been decided by a VA regional office as of that date, is appealed to the Board on or after the rule’s effective date, was appealed to the Board before the rule’s effective date but has not been

decided by the Board as of that date, or is pending before VA on or after the rule's effective date because the Veterans Court vacated a Board decision on the application and remanded it for readjudication.

Some commenters suggested that the rule should be applied retroactively to claims that were finally denied by VA before the effective date of the regulation. Another commenter suggested that the effective date of an award of benefits under the rule should be the earlier of the date of the veteran's claim or October 21, 1998, the date of enactment of the Persian Gulf War Veterans Act of 1998. We do not adopt these suggestions.

Congress has provided that, once a decision on a claim for veterans benefits becomes "final," "the claim will not thereafter be reopened or allowed, except as may otherwise be provided by regulations not inconsistent with [title 38, United States Code]." 38 U.S.C. 7105(c). There are only two exceptions to this statutory rule of finality. *Cook v. Principi*, 318 F.3d 1334, 1339 (Fed. Cir. 2002) (en banc). The Secretary must reopen a previously denied claim if new and material evidence is submitted, and a final VA decision is subject to revision based on clear and unmistakable error. 38 U.S.C. 5108, 5109A, and 7111. Whether a final decision involves clear and unmistakable error is determined under the law that was in effect when the decision was made. *Russell v. Principi*, 3 Vet. App. 310, 313–14 (1992) (en banc). This rule was not and will not have been in effect for a claim that was finally denied before the rule's effective date. Therefore, VA will not apply the rule to claims that were finally denied before the effective date of the rule unless new and material evidence is submitted.

The effective date of benefits awarded pursuant to this rule will be assigned in accordance with the facts found but will not be earlier than the date of claim. 38 U.S.C. 5110(a). Although 38 U.S.C. 5110(g) and 38 CFR 3.114(a) authorize in some circumstances an effective date of benefits before the date of claim, those provisions are applicable to "administrative issue[s]" that liberalize the basis for benefit entitlement. VAOPGCPREC 11–99, para. 10 (liberalizing issue is one which effects substantive change in regulation and creates a new basis for entitlement to a benefit); S. Rep. No. 87–2042, at 2, 4, 6 (1962) (enactment of former sec. 3010(g) (currently sec. 5110(g)) intended to eliminate, when feasible, VA practice of requiring "specific application for the new benefit" whenever new regulation was promulgated); H.R. Rep. No. 87–

2123, at 2, 4, 6 (1962) (same). This regulation, however, governs procedural matters rather than creating a new basis for entitlement to service connection for PTSD because it merely relaxes under certain circumstances the evidentiary standard for establishing occurrence of a stressor. As a result, 38 U.S.C. 5110(a), rather than 38 U.S.C. 5110(g), is applicable to awards under this rule. Although VAOPGCPREC 7–92 held that provisions in the VBA Adjudication Procedures Administration Manual M21–1 relieving former prisoners of war and combat veterans of the burden of producing evidence to substantiate that they experienced a stressful event are substantive rules, the opinion concerns the dichotomy between substantive and interpretive rules for purposes of determining whether notice-and-comment rulemaking is required pursuant to 5 U.S.C. 553, a dichotomy that is not relevant for purposes of determining whether section 5110(g) applies.

Another commenter asked whether the rule would constitute new evidence for purposes of reopening a finally denied claim for service connection for PTSD. The change in the evidentiary standard for establishing occurrence of an in-service stressor would not constitute a basis on which to reopen a finally denied claim for service connection for PTSD because it is procedural in nature and does not effect a substantive change in the law governing service connection for disabilities. *Routen v. West*, 142 F.3d 1434, 1442 (Fed. Cir. 1998).

Another commenter stated that surviving spouses should be entitled to receive the accrued benefits due their spouses under the rule. Section 5121(a) of title 38, United States Code, authorizes an award to certain survivors of a beneficiary of periodic monetary benefits to which the beneficiary was "entitled at death under existing ratings or decisions, or those based on evidence in the file at date of death \* \* \* and due and unpaid." Eligible survivors of a veteran who had filed a claim for compensation for PTSD during his or her lifetime could therefore file a claim for accrued benefits alleging that the veteran was entitled to service connection for PTSD under the rule based on evidence in the file at the date of the veteran's death, provided that the claim for accrued benefits (if not the deceased veteran's claim) was received by VA on or after July 12, 2010 or was pending before VA on that date, at either a regional office or the Board. In addition, under 38 U.S.C. 5121A, if a claimant dies on or after October 10, 2008, while a claim for veterans benefits

or an appeal of a decision with respect to such a claim is pending, a living person who would be eligible to receive accrued benefits due the claimant under section 5121(a) may, not later than one year after the date of the claimant's death, file a request to be substituted as the claimant for the purposes of processing the claim to completion. This rule would apply to a claim for service connection for PTSD in which an eligible survivor is substituted under section 5121A, provided that the veteran's application was received by VA on or after July 12, 2010 or was pending before VA on that date, at either a regional office or the Board of Veterans' Appeals.

#### Cost of Regulation

A commenter asked if VA has estimated the cost of the regulation. VA has determined that the rule will not have an annual effect on the economy of \$100 million or more. Proposed Rule, 74 FR at 42619.

#### Implementation Recommendations

One commenter suggested that VA: (1) Work closely with the DoD to obtain reliable information to corroborate veterans' deployment and medical conditions; (2) mount an aggressive outreach campaign about the new regulation; (3) educate veterans and the public about PTSD; (4) monitor claims received and adjudicated under this regulation to evaluate its impact; and (5) promulgate regulations to cover claims for service connection for anxiety disorders, depression, and suicide based on deployment to a war zone. We make no change based on these comments as they are beyond the scope of this rulemaking.

#### Revision of Other VA Regulations

Some commenters recommended that VA revise the rating schedule for mental disorders. We make no change based on these comments, which are beyond the scope of this rulemaking, which deals with service connection for PTSD, not evaluating it after service connection has been established.

#### Inclusion of Rule in Part 5

Some commenters requested that the final rule be included in new part 5 of title 38, Code of Federal Regulations. This rule will be included in the part-5 notice of proposed rulemaking dealing with service-connection determinations.

#### 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. This final rule would not 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.

### Paperwork Reduction Act

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

### 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 Executive Order classifies a “significant regulatory action,” requiring review by the Office of Management and Budget (OMB), 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 final 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 will 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 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 rule are 64.109, Veterans Compensation for Service-Connected Disability and 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death.

### Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, approved this document on May 6, 2010, for publication.

### List of Subjects in 38 CFR Part 3

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

Dated: July 7, 2010.

**Robert C. McFetridge,**

*Director, Regulation Policy and Management.*

■ For the reasons set out in the preamble, VA amends 38 CFR part 3 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. Amend § 3.304 as follows.

■ a. Revise the introductory text of paragraph (f).

■ b. Redesignate paragraphs (f)(3) and (f)(4) as paragraphs (f)(4) and (f)(5), respectively.

■ c. Add new paragraph (f)(3).

The revision and addition read as follows:

#### § 3.304 Direct service connection; wartime and peacetime.

\* \* \* \* \*

(f) *Posttraumatic stress disorder.* Service connection for posttraumatic stress disorder requires medical

evidence diagnosing the condition in accordance with § 4.125(a) of this chapter; a link, established by medical evidence, between current symptoms and an in-service stressor; and credible supporting evidence that the claimed in-service stressor occurred. The following provisions apply to claims for service connection of posttraumatic stress disorder diagnosed during service or based on the specified type of claimed stressor:

\* \* \* \* \*

(3) If a stressor claimed by a veteran is related to the veteran’s fear of hostile military or terrorist activity and a VA psychiatrist or psychologist, or a psychiatrist or psychologist with whom VA has contracted, confirms that the claimed stressor is adequate to support a diagnosis of posttraumatic stress disorder and that the veteran’s symptoms are related to the claimed stressor, in the absence of clear and convincing evidence to the contrary, and provided the claimed stressor is consistent with the places, types, and circumstances of the veteran’s service, the veteran’s lay testimony alone may establish the occurrence of the claimed in-service stressor. For purposes of this paragraph, “fear of hostile military or terrorist activity” means that a veteran experienced, witnessed, or was confronted with an event or circumstance that involved actual or threatened death or serious injury, or a threat to the physical integrity of the veteran or others, such as from an actual or potential improvised explosive device; vehicle-imbedded explosive device; incoming artillery, rocket, or mortar fire; grenade; small arms fire, including suspected sniper fire; or attack upon friendly military aircraft, and the veteran’s response to the event or circumstance involved a psychological or psycho-physiological state of fear, helplessness, or horror.

\* \* \* \* \*

[FR Doc. 2010–16885 Filed 7–9–10; 8:45 am]

BILLING CODE 8320–01–P

### ENVIRONMENTAL PROTECTION AGENCY

#### 40 CFR Parts 355 and 370

[EPA–HQ–SFUND–1998–0002; FRL–9168–7]

#### Emergency Planning and Community Right-to-Know Act; Guidance on Reporting Options for Sections 311 and 312 and Interpretations

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

**ACTION:** Guidance and interpretations.