

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T08–1064 to read as follows:

§ 165.T08–1064 Safety zone; Ohio River, MM 326.5 through MM 327.5, Ironton, OH.

(a) *Location.* The following area is a safety zone: All waters of the Ohio River from mile marker (MM) 326.5 through MM 327.5.

(b) *Enforcement period.* This rule will be enforced 10 a.m. through 3 p.m. on December 4, 2017, unless the demolition is postponed because of adverse weather, in which case this rule will be enforced from 10 a.m. to 3 p.m. on December 5, 2017, December 11–15, 2017, and December 18–22, 2017.

(c) *Definitions.* As used in this section, *designated representative* means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port (COTP) Sector Ohio Valley in the enforcement of the safety zone.

(d) *Regulations.* (1) Under the general safety zone regulations in subpart C of this part, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the COTP or a designated representative.

(2) To seek permission to enter, contact the COTP or designated representative via radio on channel 16.

(3) All persons and vessels shall comply with the instruction of the COTP and designated on-scene personnel.

(e) *Information broadcasts.* The COTP or a designated representative will inform the Public through Broadcast Notices to Mariners, Local Notices to Mariners, and/or Safety Marine Information Broadcasts as appropriate of the enforcement period for each safety zone as well as any changes in the planned and published dates and times of enforcement.

Dated: December 4, 2017.

M.B. Zamperini,

Captain, U.S. Coast Guard, Captain of the Port, Sector Ohio Valley.

[FR Doc. 2017–26476 Filed 12–7–17; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900–AP48

Extra-Schedular Evaluations for Individual Disabilities

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) amends its adjudication regulation pertaining to extra-schedular consideration of a service-connected disability in exceptional compensation cases. This rule clarifies that an extra-schedular evaluation is to be applied to an individual service-connected disability when the disability is so exceptional or unusual that it makes application of the regular rating schedule impractical. An extra-schedular evaluation may not be based on the combined effect of more than one service-connected disability. For the reasons set forth in the proposed rule and in this final rule, VA is adopting the proposed rule as final, with two changes, as explained below.

DATES:

Effective Date: This rule is effective January 8, 2018.

Applicability Date: The provisions of this final rule shall apply to all applications for benefits that are received by VA on or after January 8, 2018 or that are pending before VA, the United States Court of Appeals for Veterans Claims, or the United States Court of Appeals for the Federal Circuit (Federal Circuit) on January 8, 2018.

FOR FURTHER INFORMATION CONTACT:

Nora Jimison, Policy Analyst, Regulations Staff (211D), Compensation Service, Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 461–9700. (This is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION: On April 20, 2016, VA published in the **Federal Register** (81 FR 23228) a proposed rule to amend its regulation at 38 CFR 3.321(b)(1) in order to clarify its longstanding interpretation that the regulation provides an extra-schedular evaluation for a single service-connected disability, and not for the combined effect of two or more service-connected disabilities. Section 501 of title 38, United States Code, provides VA with the authority to interpret its own regulations under its general rulemaking authority. *Menegassi v. Shinseki*, 638 F.3d 1379, 1382 (Fed. Cir. 2011). VA had already proposed to clarify section 3.321(b)(1) as part of a regulation rewrite project in 2013; however, a subsequent decision by the Federal Circuit held that section 3.321(b)(1) required VA to consider the combined effects of two or more service-connected disabilities when determining extra-schedular evaluations. *Johnson v. McDonald*, 762 F.3d 1362, 1365–66 (Fed. Cir. 2014), *rev'g* 26 Vet. App. 237 (2013). This decision conflicts with VA's longstanding interpretation of section 3.321(b)(1), and VA therefore decided to amend the regulation in a separate rulemaking to clarify its interpretation of the regulation.

Interested persons were invited to submit comments to the proposed rule on or before June 20, 2016, and 11 comments were received. Those comments have been organized according to topic in the discussion below.

I. Separation of Powers

A commenter stated that VA's rulemaking to overturn *Johnson* is a violation of the constitutional doctrines of separation of powers and due process. We disagree. “A court's prior judicial construction of a statute trumps an agency construction . . . if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.” *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). The Federal Circuit, however, held in *Johnson* that the language of prior 38 CFR 3.321(b)(1), not a statute, was “unambiguous” and “consistent with language of [38 U.S.C.] § 1155 authorizing the regulation.” 762 F.3d at 1365–66. Where a court decision is based on interpretation of an agency regulation, the agency may undertake rulemaking to revise the regulation to change or clarify the intended meaning of the regulation. *See National Org.*

Veterans' Advocates, Inc. v. Secretary of Veterans Affairs, 260 F.3d 1365, 1374 (Fed. Cir. 2001). Section 1155 of title 38, United States Code, authorizes VA to "adopt and apply a schedule of ratings of reductions in earning capacity from specific injuries or combination of injuries . . . based, as far as practicable, upon the average impairments of earning capacity . . . in civil occupations." The statute does not mention an extra-schedular evaluation, but rather leaves it to VA's discretion to determine when it is not practicable to assign a rating based upon loss in average earning capacity, and 38 CFR 3.321(b)(1) explains when VA will do so. We therefore do not believe that amendment of the regulation violates separation of powers or due process.

II. Conflict With 38 U.S.C. 1155

Four commenters stated that amended section 3.321(b)(1) contradicts 38 U.S.C. 1155. One commenter stated that, by limiting an extra-schedular evaluation to an individual rating, an adjudicator is barred from considering a veteran's average earning impairment resulting from a veteran's "injuries" and instead must look to the impairment of each injury. Another commenter stated that the amended rule would render the term "combination of injuries" in section 1155 superfluous. A third commenter stated that the regulation is inconsistent with the plain language of the statute because it applies to a single disability and as a result, the rule will have no controlling weight. The fourth commenter stated that the regulation should compensate for "average impairments of earning capacity" as provided in section 1155 rather than "actual impairment of earning capacity" as provided in amended section 3.321(b)(1).

The rule does not contradict or misinterpret 38 U.S.C. 1155. As explained above, section 1155 authorizes VA to "adopt and apply a schedule of ratings of reductions in earning capacity from specific injuries or combination of injuries. The ratings shall be based, as far as practicable, upon the average impairments of earning capacity . . . in civil occupations." VA has specified how its rating schedule will be applied to determine average impairments in earning capacity due to combinations of injuries. Under the table in 38 CFR 4.25, the ratings for each disability which are based upon the average earning impairment are combined and a rating is assigned for the combined effect of the disabilities. Thus, the terms "injuries" and "combination of injuries" in section 1155 are not

rendered superfluous as a result of revised section 3.321(b)(1). Further, section 1155 states that "ratings shall be based, as far as practicable, upon the average impairments of earning capacity." VA's rule provides for discretion in cases where the schedule is inadequate to compensate for average impairment of earning capacity. Therefore, the regulation is not inconsistent with the statute.

We disagree with the comment that section 3.321(b)(1) must compensate for impairment of "average earning capacity." Rather, as the commenter acknowledges, an extra-schedular evaluation is intended for "the exceptional case where the schedular evaluation," which is based on average earning capacity, "is inadequate." Section 1155 states that the rating schedule is to be "based, as far as practicable, upon the average impairments of earning capacity." By its terms, the statute leaves to VA's discretion situations where use of a schedule based on average impairments is not practical or feasible. Pursuant to this authority, VA has promulgated section 3.321(b)(1) allowing for an extra-schedular evaluation in cases in which application of the regular schedular standards is impractical because the veteran's disability is so exceptional or unusual due to such related factors as marked interference with employment or frequent periods of hospitalization. In clarifying its longstanding policy in the amended regulation, VA will continue to look to the evidence to determine whether the veteran's service-connected disability causes factors such as marked interference with employment or frequent periods of hospitalization, rather than limiting a veteran to a schedular rating based upon average impairment of earning capacity.

Another commenter stated that the regulation is inconsistent with the congressionally mandated statutory scheme, which is pro-veteran. As explained above, by its terms, 38 U.S.C. 1155 leaves to VA's discretion situations where use of a schedule based on average impairments is not practicable or feasible, *i.e.*, where applying such a schedule would not result in a rating reflective of the true measure of disability. Because 38 CFR 3.321(b)(1) allows for an extra-schedular evaluation in cases where the disability is "so exceptional or unusual due to such related factors as marked interference with employment or frequent periods of hospitalization" as to render impractical the application of the regular schedular standards, we believe that the rule is consistent with title 38, United States Code, and is pro-veteran.

As explained in the notice of proposed rulemaking, 81 FR at 23230, VA has limited extra-schedular consideration to individual disabilities in part due to the substantial difficulty that would accompany efforts to apply such consideration to the combined effects of multiple disabilities in a logical and consistent manner. A determination as to whether existing rating-schedule provisions are inadequate to evaluate a particular claimant's disability requires comparison of the manifestations of the claimant's disability with the types of manifestations listed in the applicable rating schedule provisions. Ratings for combinations of disabilities are determined by application of a standard formula in 38 CFR 4.25, and there are thus no provisions in the rating schedule describing impairments that would be associated with a particular combination of disabilities. Accordingly, VA adjudicators would have no objective standard for determining whether a particular combined rating is adequate or inadequate. Requiring adjudicators to consider the adequacy of combined ratings would lead to inconsistent and highly subjective determinations, and would likely cause delays in the adjudication of claims. These effects would in some respects be detrimental to claimants and to the effective operation of VA's claims-adjudication system.

III. VA's Interpretation of Prior Version of 38 CFR 3.321(b)(1)

One commenter disputed VA's statement in the notice of proposed rulemaking that the Department has long interpreted 38 CFR 3.321(b)(1) to provide an extra-schedular evaluation for only one service-connected disability. The commenter cited to the dissenting opinion in the Veterans Court's *Johnson* decision, 26 Vet. App. at 257–58, regarding the regulatory language over time. 81 FR 23278.

We respectfully disagree with the analysis of VA's interpretation of the regulation over time. As we stated in the notice of proposed rulemaking, VA, since 1936, has interpreted section 3.321(b)(1) to provide for an extra-schedular evaluation for each service-connected disability for which the schedular evaluation is inadequate based upon the regulatory criteria. The original rule which was promulgated in 1930, R & PR 1307(B), required that a recommendation from a field office alleging that the rating schedule provides inadequate or excessive ratings in an individual case include a statement of findings regarding the

extent to which a veteran's actual reduction in earning capacity "is due to the service-connected disability." The regulation includes only the single version of the word "disability." The 1936 version of the rule, R & PR 1142, required a submitting agency to provide a recommendation "concerning service connection and evaluation of every disability, under . . . the applicable schedules as interpreted by the submitting agency." This sentence was deleted from the regulation in 1954, but was incorporated in the Department of Veterans Benefits Administration Manual 8–5 Revised, para. 47.j. (Jan. 6, 1958), to provide instruction for cases referred under VA Regulation 1142. The word "every" means "[a]ll of a whole collection or aggregate number, *considered separately, one by one*; each, considered as a unitary part of an aggregate number." Every, Ballentine's Law Dictionary (emphasis added). Thus, for 28 years following promulgation of R & PR 1307(B) and (C), the VA predecessor regulations to 38 CFR 3.321(b)(1) and the Manual provided for an extra-schedular evaluation based upon the effects of a "disability," not disabilities.

The Federal Circuit has previously recognized that VA's interpretation of section 3.321(b)(1) is found in the VBA Manual. *Thun v. Shinseki*, 572 F.3d 1366, 1369 (Fed. Cir. 2009). As explained above, the 1958 Manual M8–5 Revised, para. 47.j., instructed that every claims folder forwarded for extra-schedular consideration "will include a definite recommendation from the submitting agency concerning evaluation of *every disability* under the schedule as interpreted by the submitting agency with the diagnostic code." In 1992, VBA revised the VBA Manual by adding the word "individual" before the word "disability(ies)" in paragraph 3.09, Submission For Extra-Schedular Consideration. M21–1, Part VI, para. 3.09 (Mar. 17, 1992), which required preparation of a memorandum to be submitted to Central Office "whenever the schedular evaluations are considered to be inadequate for an individual disability(ies)." Thus, we believe that there is ample support for the statement that VA has long-interpreted section 3.321(b)(1) and its predecessors as providing for an extra-schedular evaluation for a single service-connected disability that was not adequately compensated under the rating schedule.

IV. Coverage of Single Disability Under Amended Section 3.321(b)(1)

Two commenters pointed out that section 3.321(b)(1) is intended "[t]o accord justice," and that the proposed rule is unjust and inequitable because it ignores the cumulative effects of multiple conditions on a veteran's earning capacity. *See Johnson*, 762 F.3d at 1366. Another commenter stated that proposed section 3.321(b)(1) ignores the fact that a veteran may have multiple service-connected disabilities that combine to limit the veteran's ability to work or that combine to generate an actual condition worse than that contemplated by the disability schedule.

The commenters mistakenly assume that VA may only "accord justice" if all service-connected disabilities are considered collectively for deciding entitlement to an extra-schedular evaluation. There is no dispute that 3.321(b)(1) accords justice by authorizing extra-schedular ratings based upon the effect of a service-connected disability upon an individual veteran rather than limiting the veteran to a schedular rating based upon average impairment of earning capacity. Also, the phrase "[t]o accord justice" is given context in section 3.321(b)(1) by the sentence that precedes it: "[r]atings shall be based, as far as practicable, upon the average impairments of earning capacity with the additional proviso that the Secretary shall from time to time readjust this schedule of ratings in accordance with experience." The rule thus authorizes VA to assign ratings beyond those provided in the schedule even in advance of any necessary revision to the rating schedule. Further, there is a policy reason for limiting an extra-schedular evaluation under section 3.321(b)(1) to a single service-connected disability. As explained above, VA believes that the rule is consistent with the regulatory scheme, under which there is a distinction between application of the schedular criteria relating to specific disabilities and the application of the formula in 38 CFR 4.25 for combining individual disability ratings.

A commenter inquired about whether a veteran would be entitled to an extra-schedular rating for each service-connected disability. A veteran would be entitled to an extra-schedular rating for each service-connected disability that satisfies the criteria in the rule, *i.e.*, (1) the schedular evaluation for the disability is inadequate; and (2) the disability is so exceptional or unusual due to related factors such as marked interference with employment or frequent periods of hospitalization.

V. Conflict Between Amended Section 3.321(b)(1) and Other VA Regulations

One commenter stated that the rule appears to conflict with 38 CFR 3.102, which provides that VA will "administer the law under a broad interpretation." We do not believe that there is a conflict because, rather than limit a veteran to a schedular rating that is "inadequate," 38 CFR 3.321(b)(1) provides for an extra-schedular evaluation to account for an "exceptional or unusual disability" involving "marked interference with employment or frequent periods of hospitalization."

One commenter wrote that the rule is inconsistent with VA's regulatory scheme for evaluating disabilities because it considers a disability in a vacuum, pointing to 38 CFR 4.10 regarding functional impairment and 38 CFR 3.383, which pertains to special consideration if a veteran has suffered loss of certain paired organs or extremities as a result of service-connected disabilities and non-service-connected disabilities.

The regulations cited by the commenter do not support the comment. Section 4.10 states that "[t]he basis of disability evaluations is the ability of the body as a whole . . . to function under the ordinary conditions of daily life including employment." The cited statement, however, falls within Subpart A of the Part 4 regulations, which provides "regulations prescribing the policies and procedures for conducting VA medical examinations," which are not considered a part of the rating schedule because "[t]he rating schedule consists only of those regulations that establish disabilities and set forth the terms under which compensation shall be provided." *Martinak v. Nicholson*, 21 Vet. App. 447, 451–52 (2007) (citing 38 U.S.C. 1155); *Vazquez-Flores v. Shinseki*, 580 F.3d 1270, 1280 (Fed. Cir. 2009). "Thus, . . . the effects of a disability on one's daily life . . . are not relevant to a disability rating made by a ratings specialist." *Vazquez-Flores*, 580 F.3d at 1280. While section 4.10 and related regulations make clear that fully descriptive medical examinations are needed to facilitate application of VA's rating schedule, they do not alter the operation of the rating schedule, which provides for disability ratings to be assigned for each separate disability under the applicable criteria of the rating schedule.

Section 3.383 of title 38, Code of Federal Regulations, implements 38 U.S.C. 1160, which provides that, in certain cases of paired organs or

extremities in which a veteran has a non-service-connected disability attributable to one organ or extremity and a service-connected disability associated with the other organ or extremity, VA must pay compensation as if the combination of disabilities were the result of service-connected disability. Thus, Congress has specified the manner of considering the combined effects of these disabilities. Section 3.321(b)(1), on the other hand, fills a gap in 38 U.S.C. 1155 providing the Secretary with authority to address instances in which the ratings for individual disabilities under the schedule are not practicable or feasible.

One commenter stated that VA's proposed regulation does not take into account veterans who do not qualify for consideration of entitlement to a rating of total disability based upon individual unemployability (TDIU) under 38 CFR 4.16(b). The commenter states that a veteran may be forced to drop out of the workforce and apply for TDIU as a result of extra-schedular evaluations based upon a single disability.

Section 3.321(b)(1) addresses a different issue than section 4.16(a) and (b) were written to address. Section 3.321(b)(1) provides an exception to reliance upon a particular rating contained in the rating schedule where the schedule is determined to be inadequate in a particular case and examines the rating issue from the perspective of the schedule in rating a veteran's disability and provides adjustments to the schedule based on the veteran's disability. Section 4.16, on the other hand, looks at the situation from the perspective of the unemployability of an individual veteran. Under section 4.16(a) and (b), the deciding official looks at the overall impairment of a veteran to determine whether the veteran is employable regardless of the particular disability rating or combination of disability ratings awarded. Thus, section 3.321(b)(1) focuses on the schedule's failure to address the effect of a veteran's particular disability and the latter focuses upon the veteran's overall employability. Amending section 3.321(b)(1) based on this comment would also render section 4.16 superfluous because section 3.321(b)(1) could be the basis for a 100 percent extra-schedular rating which would be equivalent to a TDIU rating.

Another commenter stated that the combined ratings table is inadequate to compensate for the vast array of potential interactions between multiple disabilities. The commenter disputed VA's statement in the notice of proposed rulemaking that there is no

mechanism for comparing the combined effects of multiple service-connected disabilities with the schedular criteria and contends, citing *Yancy v. McDonald*, 27 Vet. App. 484 (2016), that the Department can evaluate the combined effects of multiple disabilities and then compare those effects to the symptoms contemplated for individual disabilities.

The commenter misunderstands VA's statement. In *Johnson*, the Federal Circuit held that referral for an extra-schedular evaluation "may be based on the collective impact of the veteran's disabilities." 762 F.3d at 1365. In *Yancy*, 27 Vet. App. at 495, the Veterans Court stated that the first step when considering entitlement to an extra-schedular evaluation is to decide whether the schedular evaluations reasonably contemplate the veteran's symptomatology, including any symptoms resulting from the combined effects of multiple service-connected disabilities. However, as VA explained in the notice of proposed rulemaking, there are no provisions in the rating schedule describing impairments associated with a particular combination of disabilities. 81 FR 23230. VA does not merely aggregate symptoms of a veteran's service-connected disabilities. Rather, VA evaluates the combined effects of multiple service-connected disabilities by "consider[ing] . . . the efficiency of the individual as affected first by the most disabling condition, then by the less disabling condition, then by other less disabling conditions, if any, in the order of severity." 38 CFR 4.25. As a result, it is not possible for the Department to determine for purposes of 38 CFR 3.321(b)(1) whether the rating derived from application of section 4.25 is "inadequate" to compensate for the combined effects of these disabilities. 81 FR 23230.

If, in a particular case, evidence indicated that two or more service-connected disabilities combined to produce a symptom the claimant believed was not adequately addressed by the rating criteria for any of the individual disabilities at issue, the claimant could, under this rule, seek extra-schedular ratings for the individual conditions and VA would be required to evaluate the medical evidence in determining whether the rating schedule was adequate to evaluate each disabling condition, but would not be required to separately determine whether the combined rating resulting from 38 CFR 4.25 was adequate to evaluate the combined effects of the multiple disabilities.

VI. Decision Maker on Extra-Schedular Claims

A commenter stated that, to the extent that extraschedular evaluation of the combined effect of multiple disabilities may impose an additional burden on the Director of the Compensation Service, the decision should instead be made by regional offices (RO) and the Board of Veterans' Appeals. We agree that the ROs should make these fact-intensive decisions in the first instance, and we have therefore revised the rule by eliminating the phrase "upon field station submission" and the word "referred."

VII. Section 3.321(b)(1) Criteria for Extra-Schedular Evaluation

Three commenters criticized the proposed rule on the basis that it does not provide guidance about how to apply the proposed rule or to the Board about how to review the Director's finding.

The standards for awarding an extra-schedular award are set forth in section 3.321(b) and have been included in the regulation since 1961. See 38 CFR 3.321(B) (1961). Extraschedular consideration is a question of fact "assessing a veteran's unique disability picture and whether that picture results in an average impairment in earning capacity significant enough to warrant an extraschedular rating." *Kuppamala v. McDonald*, 27 Vet. App. 447, 454 (2015). Current VBA procedures require the RO to submit a memorandum to the Director that includes the evidence used for the review, including the medical evidence in detail for each service-connected disability. M21-1, Part III, Subpart iv, chapt. 6, § B, para. 4.d. and h. (July 25, 2017). The question for the VA decision maker is whether a veteran's disability is "exceptional or unusual" because the disability "marked[ly] interfere[s] with employment or [causes] frequent periods of hospitalization." The Board's review of the matter is de novo and requires consideration of all evidence and information pertaining to whether the degree and frequency of an individual's veteran's disability interferes with employment or causes frequent periods of hospitalization. *Kuppamala*, 27 Vet. App. at 458-59.

One commenter stated that, in *Kuppamala*, the Secretary admitted that there are no manageable standards for the assignment of an extraschedular rating. In fact, the Secretary argued in *Kuppamala* "there are no *judicially* manageable standards governing the Director's decision as to extraschedular ratings," which would make it

impossible for the Board to review the decision. *Id.* at 452 (emphasis added). The Veterans Court concluded, however, that 38 U.S.C. 1155 and 38 CFR 3.321(b)(1) provide a judicially manageable standard. *Id.* at 454.

Another commenter stated that VA does not explain how it is possible to “ensure fair and consistent application of rating standards” given that 38 CFR 3.321(b)(1) requires an initial finding that the “schedular evaluation is inadequate.” (Quoting 81 FR 23231). The rating standards to which VA referred relate to a determination about whether a veteran is entitled to an extra-schedular evaluation, and as explained in the notice of proposed rulemaking, VA believes that the Department is able to fairly and consistently apply rating standards if consideration under section 3.321(b)(1) is limited to whether a rating for an individual disability is adequate as opposed to deciding whether a combined rating based upon residual work efficiency is adequate to rate multiple service-connected disabilities.

One commenter stated that the definition of the term “disability” in amended section 3.321(b)(1) is unclear and that an extra-schedular evaluation should be available for disability arising from a common disease entity or etiology. The commenter states that, if a veteran has a knee disability that causes both limitation of motion and instability, both effects of the disability should be evaluated together for purposes of entitlement to an extra-schedular rating.

“Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used.” *Shell Oil Co. v. Iowa Dep’t of Revenue*, 488 U.S. 19, 25 n.6 (1988) (quoting *Nat’l Labor Relations Bd. v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941)). Section 3.321(b)(1) states that, “[t]o accord justice to the exceptional case where the schedular evaluation is inadequate to rate a single service-connected disability,” an extra-schedular evaluation may be approved. The requirement that VA consider the adequacy of the schedular evaluation means that the term “single service-connected disability” refers to the individual condition for which the schedular evaluation is inadequate, rather than the effects of a disability, each of which may be rated individually before receiving a combined rating.

Another commenter stated that the rule does not define “actual impairment in earning capacity” and posed a series of questions about how the term will be

defined, *e.g.*, whether a veteran must show loss of a certain amount of income as a result of the disability, and if so, how much of loss must the veteran suffer; whether inability to earn a higher level of income will suffice; and how will actual impairment in earning capacity be determined if a veteran is not employed. We have considered these comments and agree that an extra-schedular rating should be commensurate with the average rather than actual impairment of earning capacity due exclusively to the disability and we have revised the rule accordingly.

VIII. Comments Beyond Scope of Rulemaking

A commenter criticized the algorithm used to combine disabilities in 38 CFR 4.25. Another commenter remarked on the inadequacy of the rates in 38 U.S.C. 1114, but acknowledged that this comment is beyond the scope of the rulemaking. These comments are beyond the scope of the rulemaking, and we therefore make no change based on these comments.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the 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 effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines 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 this Executive Order.”

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined, and it has been determined not to be a significant regulatory action under Executive Order 12866. VA’s impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of this rulemaking and its impact analysis are available on VA’s Web site at <http://www.va.gov/orpm/>, by following the link for “VA Regulations Published From FY 2004 Through Fiscal Year to Date.”

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 will directly affect only individuals and will not directly affect small entities. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

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

Paperwork Reduction Act

This final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.109, Veterans Compensation for Service-Connected Disability.

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. Gina S. Farrisee, Deputy Chief of Staff, Department of Veterans Affairs, approved this document on November 13, 2017, for publication.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Veterans.

Dated: November 13, 2017.

Jeffrey Martin,

Impact Analyst, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs amends 38 CFR part 3 as set forth below:

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

- 1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

- 2. Amend § 3.321 by revising the heading of paragraph (b), and revising paragraph (b)(1), to read as follows:

§ 3.321 General rating considerations:

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(b) *Extra-schedular ratings in unusual cases*—(1) *Disability compensation.* Ratings shall be based, as far as practicable, upon the average impairments of earning capacity with the additional proviso that the Secretary shall from time to time readjust this schedule of ratings in accordance with experience. To accord justice to the exceptional case where the schedular evaluation is inadequate to rate a single service-connected disability, the Director of Compensation Service or his or her delegate is authorized to approve on the basis of the criteria set forth in this paragraph (b), an extra-schedular evaluation commensurate with the average impairment of earning capacity due exclusively to the disability. The governing norm in these exceptional cases is a finding by the Director of Compensation Service or delegatee that application of the regular schedular standards is impractical because the disability is so exceptional or unusual due to such related factors as marked interference with employment or frequent periods of hospitalization.

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[FR Doc. 2017-26523 Filed 12-7-17; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R05-OAR-2016-0058; FRL-9971-80—Region 5]

Air Plan Approval; Michigan; Regional Haze Progress Report; Withdrawal of Direct Final Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of direct final rule.

SUMMARY: Due to the receipt of an adverse comment, the Environmental Protection Agency (EPA) is withdrawing the October 18, 2017, direct final rule approving the Michigan regional haze progress report under the Clean Air Act (CAA) as a revision to the Michigan State Implementation Plan (SIP).

DATES: The direct final rule published at 82 FR 48435 on October 18, 2017, is withdrawn effective December 8, 2017.

FOR FURTHER INFORMATION CONTACT: Gilberto Alvarez, Environmental Scientist, Attainment Planning and Maintenance Section, Air Programs Branch (AR-18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886-6143, alvarez.gilberto@epa.gov.

SUPPLEMENTARY INFORMATION: In the direct final rule, EPA stated that if adverse comments were submitted by November 17, 2017, the rule would be withdrawn and not take effect. EPA received an adverse comment prior to the close of the comment period and, therefore, is withdrawing the direct final rule. EPA will address the comment in a subsequent final action based upon the proposed action also published on October 18, 2017 (82 FR 48473). EPA will not institute a second comment period on this action.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: November 17, 2017.

Robert A. Kaplan,

Acting Regional Administrator, Region 5.

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

- Accordingly, the amendment to 40 CFR 52.1170 published in the **Federal**

Register on October 18, 2017 (82 FR 48435), on page 48439 is withdrawn effective December 8, 2017.

[FR Doc. 2017-26409 Filed 12-7-17; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2014-0701; FRL-9971-70—Region 3]

Approval and Promulgation of Air Quality Implementation Plans; District of Columbia; Interstate Transport Requirements for the 2010 1-Hour Sulfur Dioxide Standard; Withdrawal of Direct Final Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of direct final rule.

SUMMARY: Due to receipt of adverse comment, the Environmental Protection Agency (EPA) is withdrawing the direct final rule to approve revisions to the District of Columbia state implementation plan (SIP) pertaining to the infrastructure requirement for interstate transport of pollution with respect to the 2010 1-hour sulfur dioxide (SO₂) national ambient air quality standards (NAAQS). In the direct final rule published on Wednesday, October 18, 2017 (82 FR 48439), EPA stated that if we received adverse comment by November 17, 2017, the rule would be withdrawn and not take effect. EPA subsequently received adverse comment. EPA will address the comments received in a subsequent final rulemaking action based upon the proposed action, also published on Wednesday, October 18, 2017 (82 FR 48472). EPA will not institute a second comment period on this action.

DATES: The direct final rule published at 82 FR 48439 on October 18, 2017 is withdrawn effective December 8, 2017.

FOR FURTHER INFORMATION CONTACT: Joseph Schulingkamp, (215) 814-2021, or by email at schulingkamp.joseph@epa.gov.

SUPPLEMENTARY INFORMATION: On July 17, 2014, the District of Columbia (the District) through the District Department of Energy and the Environment (DDOEE) submitted a SIP revision addressing the infrastructure requirements under section 110(a)(2) of the Clean Air Act (CAA) for the 2010 1-hour SO₂ NAAQS. In the direct final rule published on October 18, 2017 (82 FR 48439), EPA stated that if EPA