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Presidential Documents

Title 3—

The President

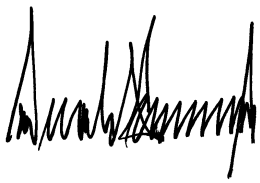
Notice of January 16, 2019

Continuation of the National Emergency With Respect to Terrorists Who Threaten To Disrupt the Middle East Peace Process

On January 23, 1995, by Executive Order 12947, the President declared a national emergency pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) to deal with the unusual and extraordinary threat to the national security, foreign policy, and economy of the United States caused by grave acts of violence committed by foreign terrorists that disrupt the Middle East peace process. On August 20, 1998, by Executive Order 13099, the President modified the Annex to Executive Order 12947 to identify four additional persons who threaten to disrupt the Middle East peace process. On February 16, 2005, by Executive Order 13372, the President clarified the steps taken in Executive Order 12947.

These terrorist activities continue to threaten the Middle East peace process and pose an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States. For this reason, the national emergency declared on January 23, 1995, and the measures adopted to deal with that emergency must continue in effect beyond January 23, 2019. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year the national emergency declared in Executive Order 12947 with respect to foreign terrorists who threaten to disrupt the Middle East peace process.

This notice shall be published in the *Federal Register* and transmitted to the Congress.



THE WHITE HOUSE,
January 16, 2019.

[FR Doc. 2019–00079
Filed 1–17–19; 8:45 am]
Billing code 3295–F9–P

Rules and Regulations

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This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2018–1066; Product Identifier 2018–NM–176–AD; Amendment 39–19540; AD 2019–01–01]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for The Boeing Company Model 787–8 airplanes powered by Rolls-Royce plc (RR) Trent 1000–A (including –A/01 and –A/01A), Trent 1000–AE (including –AE/01A), Trent 1000–C (including –C/01 and –C/01A), Trent 1000–CE (including –CE/01A), Trent 1000–D (including –D/01 and –D/01A), Trent 1000–E (including –E/01 and –E/01A), Trent 1000–G (including –G/01 and –G/01A), and Trent 1000–H (including –H/01 and H/01A) turbofan engines. This AD requires revising the airplane flight manual (AFM) to limit extended operations (ETOPS). This AD was prompted by a report from the engine manufacturer indicating that after an engine failure, prolonged operation at high thrust settings on the remaining engine during an ETOPS diversion may result in failure of the remaining engine before the diversion can be safely completed. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective February 4, 2019.

We must receive comments on this AD by March 4, 2019.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

You may examine the AD docket on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2018–1066; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the regulatory evaluation, any comments received, and other information. The street address for Docket Operations (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Rebel Nichols, Aerospace Engineer, Propulsion Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3556; email: *Rebel.Nichols@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued AD 2018–09–05, Amendment 39–19261 (83 FR 18208, April 26, 2018) (''AD 2018–09–05''), to address an unsafe condition identified on Boeing Model 787–8 and 787–9 airplanes powered by RR Trent 1000 Package C engines. The Package C engines are RR Trent 1000–A2, Trent 1000–AE2, Trent 1000–C2, Trent 1000–CE2, Trent 1000–D2, Trent 1000–E2, Trent 1000–G2, Trent 1000–H2, Trent 1000–J2, Trent 1000–K2, and Trent 1000–L2 turbofan engines. AD 2018–09–05 was prompted by a report from the engine manufacturer that intermediate pressure compressor (IPC) stage 2 blades have a resonant frequency that is excited by the airflow conditions existing in the engine during operation at high thrust settings under certain temperature and altitude conditions.

We determined that the resultant blade vibration can result in cumulative fatigue damage that can cause blade failure and consequent engine in-flight shutdown. In the event of a single engine in-flight shutdown during the cruise phase of flight, thrust on the remaining engine is normally increased to maximum continuous thrust (MCT). During a diversion following a single engine shutdown under an ETOPS flight, the remaining engine may operate at MCT for a prolonged period, during which the IPC stage 2 blades would be exposed to the resonant frequency condition. Therefore, an ETOPS diversion will put the remaining engine at an operating condition that would significantly increase the likelihood of failure of the remaining engine. In addition, if the remaining engine already had cracked IPC stage 2 blades, the likelihood of the remaining engine failing before a diversion can be safely completed will further increase.

The issue associated with IPC blade vibration due to a resonant frequency as described above was determined to exist on Boeing Model 787–8 airplanes powered by RR Trent 1000 Package B engines. The Package B engines are RR Trent 1000–A (including –A/01 and –A/01A), Trent 1000–AE (including –AE/01A), Trent 1000–C (including –C/01 and –C/01A), Trent 1000–CE (including –CE/01A), Trent 1000–D (including –D/01 and –D/01A), Trent 1000–E (including –E/01 and –E/01A), Trent 1000–G (including –G/01 and –G/01A), and Trent 1000–H (including –H/01 and H/01A) turbofan engines. The engine manufacturer assessed available data and determined that the IPC blade vibration due to a resonant frequency for the Package B engines is less severe than that for the Package C engines, but it is still an unsafe condition that must be addressed by AD action on Boeing Model 787–8 airplanes powered by the RR Trent 1000 Package B engines during an ETOPS diversion.

The Package B engines have been certified for installation on Boeing Model 787–8 airplanes. Furthermore, Boeing Model 787–8 airplanes have been certified for intermixed engine installation, where a Package B engine is installed with a Package C or a Trent 1000–TEN engine, for certain thrust ratings. The RR Trent 1000–TEN engines have a numeral ''3'' at the end of the model number (*e.g.,* Trent 1000–

AE3). When a 787–8 airplane has an intermix engine configuration where a Package B engine is installed with a non-Package B engine, ETOPS limitations associated with the non-Package B engine also apply. In this case, the airplane must be operated in a manner that satisfies all applicable ETOPS limitations.

FAA's Determination

We are issuing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

AD Requirements

This AD requires revising the AFM to limit ETOPS.

Interim Action

This AD is interim action. The manufacturer is currently developing a modification that will address the unsafe condition identified in this AD. Once this modification is developed, approved, and available, we might consider additional rulemaking.

FAA's Justification and Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD without providing an opportunity for public comments prior to adoption. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because after an engine failure, prolonged operation at high thrust settings on the remaining engine during an ETOPS diversion may result in failure of the remaining engine before the diversion can be safely completed; unrecoverable thrust loss on both engines could lead to a forced landing. Additionally, there are currently no domestic operators of this product. We find good cause that notice and opportunity for prior public comment are impracticable and unnecessary. In addition, for the reasons stated above, we find that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety and was not preceded by notice and an opportunity for public comment. However, we invite you to send any written data, views, or arguments about this final rule. Send your comments to an address listed under the **ADDRESSES** section. Include the docket number FAA–2018–1066 and Product Identifier 2018–NM–176–AD at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this final rule. We will consider all comments received by the closing date and may amend this final rule because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this final rule.

Costs of Compliance

Currently, there are no affected U.S.-registered airplanes. If an affected airplane is imported and placed on the U.S. Register in the future, we provide the following cost estimates to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product
AFM revisions	1 work-hour × $85 per hour = $85	$0	$85

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

This AD is issued in accordance with authority delegated by the Executive Director, Aircraft Certification Service, as authorized by FAA Order 8000.51C. In accordance with that order, issuance of ADs is normally a function of the Compliance and Airworthiness Division, but during this transition period, the Executive Director has delegated the authority to issue ADs applicable to transport category airplanes and associated appliances to the Director of the System Oversight Division.

Regulatory Findings

This AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866,

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

(3) Will not affect intrastate aviation in Alaska, and

(4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

2019–01–01 The Boeing Company: Amendment 39–19540; Docket No. FAA–2018–1066; Product Identifier 2018–NM–176–AD.

(a) Effective Date

This AD is effective February 4, 2019.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 787–8 airplanes, certificated in any category, powered by Rolls-Royce plc (RR) Trent 1000–A (including –A/01 and –A/01A), Trent 1000–AE (including –AE/01A), Trent 1000–C (including –C/01 and –C/01A), Trent 1000–CE (including –CE/01A), Trent 1000–D (including –D/01 and –D/01A), Trent 1000–E (including –E/01 and –E/01A), Trent 1000–G (including –G/01 and –G/01A), and Trent 1000–H (including –H/01 and H/01A) turbofan engines.

(d) Subject

Air Transport Association (ATA) of America Code 71, Power plant.

(e) Unsafe Condition

This AD was prompted by a report from the engine manufacturer indicating that after an engine failure, prolonged operation at high thrust settings on the remaining engine during an extended-operation (ETOPS) diversion may result in failure of the remaining engine before the diversion can be safely completed. We are issuing this AD to address unrecoverable thrust loss on both engines, which could lead to a forced landing.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Revision of Limitations Chapter in Airplane Flight Manual (AFM)

Within 7 days after the effective date of this AD, revise the Certificate Limitations chapter of the applicable Boeing AFM Engine Appendix by incorporating the information in figure 1 to paragraph (g) of this AD. This may be accomplished by inserting a copy of this AD into the AFM. When information identical to that in figure 1 to paragraph (g) of this AD has been included in the Certificate Limitations chapter of the general revisions of the AFM, the general revisions may be inserted into the AFM, and the copy of this AD may be removed from the AFM.

Note 1 to paragraph (g) of this AD: The Boeing AFM for the aircraft affected by this AD is required to be furnished with the aircraft, per 14 CFR 25.1581. Further, operators of the aircraft affected by this AD must operate in accordance with the limitations specified in the AFM, per 14 CFR 91.9.

BILLING CODE 4910–13–P

Figure 1 to paragraph (g) of this AD – *AFM Certificate Limitations*

Engine Appendix - Certificate Limitations (Required by AD 2019-01-01)

ETOPS

For 787-8 airplanes equipped with at least one Rolls Royce Trent 1000-A (including -A/01 and –A/01A), Trent 1000-AE (including –AE/01A), Trent 1000-C (including –C/01 and –C/01A), Trent 1000-CE (including –CE/01A), Trent 1000-D (including –D/01 and –D/01A), Trent 1000-E (including –E/01 and –E/01A), Trent 1000-G (including –G/01 and –G/01A), and Trent 1000-H (including –H/01 and -H/01A) engine that has greater than 1,000 total accumulated engine cycles on the intermediate pressure compressor (IPC) Rotor 1 or Rotor 2 blades

- since new or
- since the replacement of blades in accordance with the instructions of Part B or C in Rolls Royce Non Modification Service Bulletin Trent 1000 72-AK132 Original Issue or later authority-approved revision.

The following limitations apply:

- Planned maximum diversion time for single engine driftdown must not exceed 180 minutes, except that a planned maximum diversion time up to 207 minutes is allowed only under the provision of Title 14 Code of Federal Regulations, part 121, Appendix P, Section I, paragraph (h).

BILLING CODE 4910–13–C

(h) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (i) of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/ certificate holding district office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this

AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO Branch, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(i) Related Information

For more information about this AD, contact Rebel Nichols, Aerospace Engineer, Propulsion Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3556; email: *Rebel.Nichols@faa.gov.*

(j) Material Incorporated by Reference

None.

Issued in Des Moines, Washington, on January 11, 2019.

Jeffrey E. Duven,

Director, System Oversight Division, Aircraft Certification Service.

[FR Doc. 2019–00078 Filed 1–17–19; 8:45 am]

BILLING CODE 4910–13–P

Notices

Federal Register

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Friday, January 18, 2019

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2011–0108]

RIN 1601–ZA11

Identification of Foreign Countries Whose Nationals Are Eligible To Participate in the H–2A and H–2B Nonimmigrant Worker Programs

AGENCY: Office of the Secretary, DHS.

ACTION: Notice.

SUMMARY: Under Department of Homeland Security (DHS) regulations, U.S. Citizenship and Immigration Services (USCIS) may generally only approve petitions for H–2A and H–2B nonimmigrant status for nationals of countries [1] that the Secretary of Homeland Security, with the concurrence of the Secretary of State, has designated by notice published in the **Federal Register**. That notice must be renewed each year. This notice announces that the Secretary of Homeland Security, in consultation with the Secretary of State, is identifying 84 countries whose nationals are eligible to participate in the H–2A program and 81 countries whose nationals are eligible to participate in the H–2B program for the coming year.

DATES: This designations in this notice are effective from January 19, 2019, and shall be without effect after January 18, 2020.

FOR FURTHER INFORMATION CONTACT: Eric B. Johnson, Office of Strategy, Policy, and Plans, Department of Homeland Security, Washington, DC 20528, (202) 282–8652.

SUPPLEMENTARY INFORMATION:

Background: Generally, USCIS may approve H–2A and H–2B petitions for nationals of only those countries that the Secretary of Homeland Security, with the concurrence of the Secretary of State, has designated as participating countries. Such designation must be published as a notice in the **Federal Register** and expires after one year. In designating countries to include on the list, the Secretary of Homeland Security, with the concurrence of the Secretary of State, will take into account factors including, but not limited to: (1) The country's cooperation with respect to issuance of travel documents for citizens, subjects, nationals, and residents of that country who are subject to a final order of removal; (2) the number of final and unexecuted orders of removal against citizens, subjects, nationals, and residents of that country; (3) the number of orders of removal executed against citizens, subjects, nationals, and residents of that country; and (4) such other factors as may serve the U.S. interest. *See* 8 CFR 214.2(h)(5)(i)(F)(1)(i) and 8 CFR 214.2(h)(6)(i)(E)(1). Examples of factors serving the U.S. interest that could result in the exclusion of a country or the removal of a country from the list include, but are not limited to: Fraud, abuse, denial rates, overstay rates, human trafficking concerns, and other forms of non-compliance with the terms and conditions of the H–2 visa programs by nationals of that country.

USCIS, however, may allow a national from a country that is not on the list to be named as a beneficiary of an H–2A or H–2B petition based on a determination that such participation is in the U.S. interest. Determination of such U.S. interest will take into account factors, including but not limited to: (1) Evidence from the petitioner demonstrating that a worker with the required skills is not available either from among U.S. workers or from among foreign workers from a country currently on the list described in 8 CFR 214.2 (h)(5)(i)(F)(1)(i) (H–2A nonimmigrants) or 214.2(h)(6)(1)(E)(1) (H–2B nonimmigrants), as applicable; (2) evidence that the beneficiary has been admitted to the United States previously in H–2A or H–2B status; (3) the potential for abuse, fraud, or other harm to the integrity of the H–2A or H–2B visa program through the potential admission of a beneficiary from a country not currently on the list; and (4) such other factors as may serve the U.S. interest. *See* 8 CFR 214.2(h)(5)(i)(F)(1)(ii) and 8 CFR 214.2(h)(6)(i)(E)(2).

In December 2008, DHS published in the **Federal Register** two notices, ''Identification of Foreign Countries Whose Nationals Are Eligible to Participate in the H–2A Visa Program,'' and ''Identification of Foreign Countries Whose Nationals Are Eligible to Participate in the H–2B Visa Program,'' which designated 28 countries whose nationals were eligible to participate in the H–2A and H–2B programs. *See* 73 FR 77043 (Dec. 18, 2008); 73 FR 77729 (Dec. 19, 2008). The notices ceased to have effect on January 17, 2010, and January 18, 2010, respectively. *See* 8 CFR 214.2(h)(5)(i)(F)(2) and 8 CFR 214.2(h)(6)(i)(E)(3). In implementing these regulatory provisions, the Secretary of Homeland Security, with the concurrence of the Secretary of State, has published a series of notices on a regular basis. *See* 75 FR 2879 (Jan. 19, 2010) (adding 11 countries); 76 FR 2915 (Jan. 18, 2011) (removing 1 country and adding 15 countries); 77 FR 2558 (Jan. 18, 2012) (adding 5 countries); 78 FR 4154 (Jan. 18, 2013) (adding 1 country); 79 FR 3214 (Jan.17, 2014) (adding 4 countries); 79 FR 74735 (Dec. 16, 2014) (adding 5 countries); 80 FR 72079 (Nov. 18, 2015) (removing 1 country from the H–2B program and adding 16 countries); 81 FR 74468 (Oct. 26, 2016) (adding 1 country); 83 FR 2646 (Jan. 18, 2018) (removing 3 countries and adding 1 country).

Countries With Continued Eligibility

The Secretary of Homeland Security has determined, with the concurrence of the Secretary of State, that 81 countries previously designated in the January 18, 2018 notice continue to meet the regulatory standards for eligible countries and therefore should remain designated as countries whose nationals are eligible to participate in the H–2A program. Additionally, the Secretary of Homeland Security has determined,

[1] With respect to all references to ''country'' or ''countries'' in this document, it should be noted that the Taiwan Relations Act of 1979, Public Law 96–8, Section 4(b)(1), provides that ''[w]henever the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities, such terms shall include and such laws shall apply with respect to Taiwan.'' 22 U.S.C. 3303(b)(1). Accordingly, all references to ''country'' or ''countries'' in the regulations governing whether nationals of a country are eligible for H–2 program participation, 8 CFR 214.2(h)(5)(i)(F)(1)(i) and 8 CFR 214.2(h)(6)(i)(E)(1), are read to include Taiwan. This is consistent with the United States' one-China policy, under which the United States has maintained unofficial relations with Taiwan since 1979.

with the concurrence of the Secretary of State, that 79 countries previously designated in the January 18, 2018 notice continue to meet the regulatory standards for eligible countries and therefore should remain designated as countries whose nationals are eligible to participate in the H–2B program. These determinations take into account how the regulatory factors identified above apply to each of these countries.

Countries No Longer Designated as Eligible

The Secretary of Homeland Security has now determined, with the concurrence of the Secretary of State, that the following countries should no longer be designated as eligible countries because they no longer meet the regulatory standards identified above: Dominican Republic (H–2B only), Ethiopia, and the Philippines.

The Dominican Republic has a high H–2B visa overstay rate. In Fiscal Year (FY) 2017, DHS estimated that nearly 30 percent of H–2B visa holders from the Dominican Republic overstayed their period of authorized stay. DHS recognizes that some of these individuals may have ultimately returned to the Dominican Republic without incurring ineligibilities (*e.g.,* accrual of unlawful presence). However, this high H–2B visa overstay rate demonstrates an unacceptable potential for abuse, fraud, or other harm to the integrity of the H–2B visa program and thus continued eligibility for H–2B visas does not serve the U.S. interest. By comparison, in FY 2017, DHS estimated that less than 10 percent of H–2A visa holders from the Dominican Republic overstayed their period of authorized stay. Given this lower H–2A visa overstay rate, and absent additional derogatory information indicating a potential for fraud or abuse, DHS and DOS are not removing the Dominican Republic from the list of eligible countries for the H–2A program at this time.

Ethiopia has been designated as ''At Risk of Non-Compliance'' since 2016, according to the U.S. Immigration and Customs Enforcement (ICE) biannual assessment of the country's cooperation with respect to issuance of travel documents for citizens, subjects, nationals, and residents of that country who are subject to a final order of removal. DHS appreciates and recognizes Ethiopian efforts to improve cooperation, to include accepting repatriation charter flights and conducting interviews for travel documents as necessary. As such, DHS and Ethiopia are still working to fully implement a dependable and repeatable case management process for removals. When Ethiopia is longer considered ''At Risk of Non-Compliance,'' DHS and DOS would consider restoring Ethiopia to the list of H–2A and H–2B eligible countries.

The Philippines has a high H–2B overstay rate. In FY 2017, DHS estimated that nearly 40 percent of H–2B visa holders from the Philippines overstayed their period of authorized stay. Additionally, among all U.S. posts throughout the world, U.S. Embassy Manila issues the greatest number of T-derivative visas (T–2, T–3, T–4, T–5, T–6), which are reserved for certain family members of principal T–1 nonimmigrants (certain victims of a severe form of trafficking in persons). U.S. Embassy Manila issued approximately 40 percent of the total T-derivative visas issued worldwide from FY 2014–2016. A recent review of certain T–1 status recipients, whose spouses were issued T–2 visas during this same period, shows that approximately 60 percent were determined to have been trafficked to the United States on H–2B visas. DHS and DOS are concerned about the high volume of trafficking victims from the Philippines who were originally issued H–2B visas and the potential that continued H–2B visa issuance may encourage or serve as an avenue for future human trafficking from the Philippines. DHS and DOS also believe that these overstay and human trafficking concerns are severe enough to warrant removal from the H–2A visa program as well. This concern is informed by a four-fold increase in H–2A visa applications from nationals of the Philippines between FY 2015–2018. The Philippines' continued inclusion creates the potential for abuse, fraud, and other harm to the integrity of the H–2A or H–2B visa programs.

Accordingly, DHS has removed these three countries from the H–2A and/or H–2B eligibility lists for 2019, though their nationals may still be beneficiaries of approved H–2A and H–2B petitions upon the request of the petitioner if USCIS determines, as a matter of discretion and on a case-by-case basis, that it is in the U.S. interest for the individual to be a beneficiary of such petition. *See* 8 CFR 214.2(h)(5)(i)(F)(1)(ii) and 8 CFR 214.2(h)(6)(i)(E)(2). For example, USCIS may favorably consider a beneficiary of an H–2B petition who is not a national of a country included on the H–2B eligibility list as serving the national interest, depending on the totality of the circumstances, if the petition qualifies under section 1045 of the National Defense Authorization Act (NDAA) for FY 2019, Public Law 115–232. Other facts USCIS may consider include, among other things, whether a beneficiary has previously been admitted to the United States in H–2B status and complied with the terms of the program. However, a determination will be made according to all of the relevant factors and evidence in each individual circumstance.

Countries Now Designated as Eligible

The Secretary of Homeland Security has also determined, with the concurrence of the Secretary of State, that the following three countries should be designated as eligible H–2A and/or H–2B countries because they are now meeting the standards set out in the regulation: Mozambique, Paraguay (H–2A only), and Samoa.

Mozambique does not present significant overstay or fraud concerns as evidenced by validation studies confirming a less than one percent overstay rate for travelers for business or tourism in the United States. Additionally, Mozambique has demonstrated that inclusion in the H–2A and H–2B visa programs serves the U.S. interest. Specifically, construction of necessary facilities in one of the largest untapped liquefied natural gas deposits in the world, located in the Rovuma basin in Northern Mozambique, will require an estimated 60,000 employees, including Mozambique nationals, some of whom will benefit from relevant work experience in the United States with American businesses seeking to construct some of these facilities. Establishing and maintaining a U.S. presence in the Rovuma basin is a foreign policy priority.

Paraguay has a low visa overstay rate and cooperates with the United States regarding the return of their nationals with final orders of removal. Additionally, Paraguay's Ministry of Agriculture has recently indicated its intent to manage a special program targeting young Paraguayans with agriculture-related education to obtain agricultural work experience in the United States and use this experience to improve their family farms upon their return to Paraguay. As evidence of its commitment, the Ministry of Agriculture has negotiated with a local bank to provide each H–2A recipient with a loan up to $10,000 for agricultural investment in their own farms. DHS anticipates that the incentives offered by the Ministry will help sustain the traditionally low overstay rates for Paraguayans and that adding Paragruay to the H–2A countries list in turn will serves the U.S. interest.

Samoa is no longer considered ''At Risk of Non-Compliance'' according to ICE's mid-year assessment of the country's cooperation with respect to issuance of travel documents for citizens, subjects, nationals, and residents of that country who are subject to a final order of removal. Since being removed from the H–2 list last year due to its previous ''At Risk of Non-Compliance'' designation, and as a direct result of its removal from the H–2A and H–2B programs, Samoa has demonstrated increased cooperation with the United States regarding the return of their nationals with final orders of removal. Samoa is now considered ''Cooperative'' by ICE. The Government of Samoa has assured the United States it will continue to cooperate. Samoa's improved cooperation with regard to removals is sufficient enough to no longer be considered ''At Risk of Non-Compliance'' and its continued cooperation with regard to removals serves the U.S. interest. Therefore, Samoa is being adding back onto the list of H–2A and H–2B eligible countries.

Designation of Countries Whose Nationals Are Eligible To Participate in the H–2A and H–2B Nonimmigrant Worker Programs

Pursuant to the authority provided to the Secretary of Homeland Security under sections 214(a)(1), 215(a)(1), and 241 of the Immigration and Nationality Act (8 U.S.C. 1184(a)(1), 1185(a)(1), and 1231), I am designating, with the concurrence of the Secretary of State, nationals from the following countries to be eligible to participate in the H–2A nonimmigrant worker program:

1. Andorra
2. Argentina
3. Australia
4. Austria
5. Barbados
6. Belgium
7. Brazil
8. Brunei
9. Bulgaria
10. Canada
11. Chile
12. Colombia
13. Costa Rica
14. Croatia
15. Czech Republic
16. Denmark
17. Dominican Republic
18. Ecuador
19. El Salvador
20. Estonia
21. Fiji
22. Finland
23. France
24. Germany
25. Greece
26. Grenada
27. Guatemala
28. Honduras
29. Hungary
30. Iceland
31. Ireland
32. Israel
33. Italy
34. Jamaica
35. Japan
36. Kiribati
37. Latvia
38. Liechtenstein
39. Lithuania
40. Luxembourg
41. Macedonia
42. Madagascar
43. Malta
44. Mexico
45. Moldova
46. Monaco
47. Mongolia
48. Montenegro
49. Mozambique
50. Nauru
51. The Netherlands
52. New Zealand
53. Nicaragua
54. Norway
55. Panama
56. Papua New Guinea
57. Paraguay
58. Peru
59. Poland
60. Portugal
61. Romania
62. Samoa
63. San Marino
64. Serbia
65. Singapore
66. Slovakia
67. Slovenia
68. Solomon Islands
69. South Africa
70. South Korea
71. Spain
72. St. Vincent and the Grenadines
73. Sweden
74. Switzerland
75. Taiwan
76. Thailand
77. Timor-Leste
78. Tonga
79. Turkey
80. Tuvalu
81. Ukraine
82. United Kingdom
83. Uruguay
84. Vanuatu

Pursuant to the authority provided to the Secretary of Homeland Security under sections 214(a)(1), 215(a)(1), and 241 of the Immigration and Nationality Act (8 U.S.C. 1184(a)(1), 1185(a)(1), and 1231), I am designating, with the concurrence of the Secretary of State, nationals from the following countries to be eligible to participate in the H–2B nonimmigrant worker program:

1. Andorra
2. Argentina
3. Australia
4. Austria
5. Barbados
6. Belgium
7. Brazil
8. Brunei
9. Bulgaria
10. Canada
11. Chile
12. Colombia
13. Costa Rica
14. Croatia
15. Czech Republic
16. Denmark
17. Ecuador
18. El Salvador
19. Estonia
20. Fiji
21. Finland
22. France
23. Germany
24. Greece
25. Grenada
26. Guatemala
27. Honduras
28. Hungary
29. Iceland
30. Ireland
31. Israel
32. Italy
33. Jamaica
34. Japan
35. Kiribati
36. Latvia
37. Lichtenstein
38. Lithuania
39. Luxembourg
40. Macedonia
41. Madagascar
42. Malta
43. Mexico
44. Monaco
45. Mongolia
46. Montenegro
47. Mozambique
48. Nauru
49. The Netherlands
50. New Zealand
51. Nicaragua
52. Norway
53. Panama
54. Papua New Guinea
55. Peru
56. Poland
57. Portugal
58. Romania
59. Samoa
60. San Marino
61. Serbia
62. Singapore
63. Slovakia
64. Slovenia
65. Solomon Islands
66. South Africa
67. South Korea
68. Spain
69. St. Vincent and the Grenadines

70. Sweden
71. Switzerland
72. Taiwan
73. Thailand
74. Timor-Leste
75. Tonga
76. Turkey
77. Tuvalu
78. Ukraine
79. United Kingdom
80. Uruguay
81. Vanuatu

This notice does not affect the status of aliens who currently hold valid H–2A or H–2B nonimmigrant status. Persons currently holding such status, however, will be affected by this notice should they seek an extension of stay in H–2 classification, or a change of status from one H–2 status to another. Similarly, persons holding nonimmigrant status other than H–2 status are not affected by this notice unless they seek a change of status to H–2 status.

Nothing in this notice limits the authority of the Secretary of Homeland Security or her designee or any other federal agency to invoke against any foreign country or its nationals any other remedy, penalty, or enforcement action available by law.

Kirstjen M. Nielsen,

Secretary.

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Part II

Department of Veterans Affairs

38 CFR Parts 3, 8, 14, et al.

VA Claims and Appeals Modernization; Final Rule

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Parts 3, 8, 14, 19, 20, and 21

RIN 2900–AQ26

VA Claims and Appeals Modernization

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) amends its claims adjudication, appeals, and Rules of Practice of the Board of Veterans' Appeals (Board) regulations. In addition, this rule revises VA's regulations with respect to accreditation of attorneys, agents, and Veterans Service Organization (VSO) representatives; the standards of conduct for persons practicing before VA; and the rules governing fees for representation. This rulemaking implements the Veterans Appeals Improvement and Modernization Act of 2017 (AMA), which amended the procedures applicable to administrative review and appeal of VA decisions on claims for benefits, creating a new, modernized review system. Unless otherwise specified in this final rule, VA amends its regulations applicable to all claims processed under the new review system, which generally applies where an initial VA decision on a claim is provided on or after the effective date or where a claimant has elected to opt into the new review system under established procedures. For the reasons set forth in the proposed rule and in this final rule, VA is adopting the proposed rule as final, with minor changes, as explained below.

DATES: This final rule is effective February 19, 2019.

FOR FURTHER INFORMATION CONTACT: Veterans Benefits Administration information, parts 3, 8, and 21: Jennifer Williams, Senior Management and Program Analyst, Appeals Management Office, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 530–9124 (this is not a toll-free number). Regulation of legal representatives' information, parts 19 and 20: Rachel Sauter, Counsel for Legislation, Regulations, and Policy, Board of Veterans' Appeals. Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 632–5555 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: On August 10, 2018, VA published in the **Federal Register** (83 FR 39818) a proposed rule to implement Public Law (Pub. L.) 115–55, the AMA. The AMA and these implementing regulations provide much-needed comprehensive reform for the legacy administrative appeals process, to help ensure that claimants receive a timely decision on review where they disagree with a VA claims adjudication. The AMA review procedures and these regulations replace the current VA appeals process with a new review process that makes sense for veterans, their advocates, VA, and stakeholders.

The statutory requirements, which VA implements in these regulations, provide a claimant who is not fully satisfied with the result of any review lane additional options to seek further review while preserving an effective date for benefits based upon the original filing date of the claim. For example, a claimant could go straight from an initial agency of original jurisdiction decision on a claim to an appeal to the Board. If the Board decision was not favorable, the claimant has two further options. If the Board's decision helped the claimant understand the evidence needed to support the claim, then the claimant would have one year to submit new and relevant evidence to the agency of original jurisdiction in a supplemental claim. A claimant in this situation could instead appeal within 120 days of the Board decision to the Court of Appeals for Veterans Claims (CAVC) in accordance with CAVC rules and deadlines. Alternatively, a claimant could seek review of the initial decision by filing a supplemental claim or requesting a higher-level review in the agency of original jurisdiction, again, without any impact on the potential effective date for payment of benefits.

The differentiated lane framework required by statute and implemented in these regulations has many advantages. It provides a streamlined process that allows for early resolution of a claimant's appeal and the lane options allow claimants to tailor the process to meet their individual needs and control their VA experience. It also enhances claimants' rights by preserving the earliest possible effective date for an award of benefits, regardless of the option(s) they choose, as long as the claimant pursues review of a claim in any of the lanes within the established timeframes. By having a higher-level review lane within the claims process and a lane at the Board, both providing for review on only the record considered by the initial claims adjudicator, the new process provides a feedback mechanism for targeted training and improved quality in the agency of original jurisdiction.

To ensure that as many claimants as possible benefit from the streamlined features of the new process, the AMA and these regulations provide opportunities for claimants and appellants in the legacy system to take advantage of the new system. Some claimants who received a decision prior to the effective date of the law and thus had a legacy appeal pending, were able to participate in the new system by way of VA's Rapid Appeals Modernization Program (RAMP). Claimants who receive a Statement of the Case (SOC) or Supplemental Statement of the Case (SSOC) as part of a legacy appeal after the effective date of the law will also have an opportunity to opt-in to the new system.

Most of the regulatory amendments prescribed in this final rule are mandatory to comply with the law. Through careful collaboration with VA, VSOs, and other stakeholders, in enacting the AMA, Congress provided a highly detailed statutory framework for claims and appeals processing. VA is unable to alter amendments that directly implement mandatory statutory provisions. In addition to implementing mandatory requirements, VA prescribes a few interpretive or gap-filling amendments to the regulations, which are not specifically mandated by the AMA, but that VA believes are in line with the law's goals to streamline and modernize the claims and appeals process. These amendments reduce unnecessary regulations, modernize processes, and improve services for claimants.

Interested persons were invited to submit comments to the proposed rule on or before October 9, 2018, and 29 comments were received. Those comments have been addressed according to topic in the discussion below. This final rule contains amendments to parts 3, 8, 14, 19, 20, and 21, as described in detail below.

Part 3—Adjudication

VA amends the regulations in 38 CFR part 3 as described in the section-by-section supplementary information below. These regulations govern the adjudication of claims for VA monetary benefits (*e.g.,* compensation, pension, dependency and indemnity compensation, and burial benefits), which are administered by the VBA. These amendments apply to claims processed in the modernized review system as described in § 3.2400.

A. Comments Concerning § 3.1—Definitions

Public Law 115–55, section 2(a), defines ''supplemental claim'' as ''a claim for benefits under laws administered by the Secretary filed by a

claimant who had previously filed a claim for the same or similar benefits on the same or similar basis.'' Although it is possible to read this language as implicating both claims filed as a disagreement with a prior decision, and claims submitted due to a worsening of a condition, this dual interpretation would not be consistent with other sections of the statute. Namely, Public Law 115–55 also revised 38 U.S.C. 5108, which requires the Secretary to ''readjudicate'' a claim where ''new and relevant evidence is presented or secured with respect to a supplemental claim.'' When both sections are read together, it becomes clear that the intent of the law was to make supplemental claims only applicable to situations where a claimant disagrees with a previous VA decision and seeks review and readjudication. Accordingly, as noted in VA's proposed regulation, VA proposed to clarify in regulation the definition of supplemental claim. VA added to the definition of ''claim'' in § 3.1(p) of the proposed rule definitions of ''supplemental claim,'' ''initial claim,'' and ''claim for increase.''

VA received six comments regarding definitions listed in § 3.1(p). Concerns centered around the definitions of initial claim (§ 3.1(p)(1)), claim for increase (§ 3.1(p)(1)(iii)), claim (§ 3.1(p)(2)), and supplemental claim (§ 3.1(p)(2)). Several comments addressed concerns regarding the use of the term ''written communication'' in some definitions while other areas of the proposed rule referenced ''written or electronic'' communication. VA agrees with the need for clarification regarding electronic communication and revises § 3.1(p) to reflect a claim as both a written or electronic communication properly submitted on an application form prescribed by the Secretary.

Several comments raised concerns that a claim for increase was included as a type of initial claim and argued it is more appropriately considered a supplemental claim. VA includes claim for increase in the definition of an initial claim to clarify to claimants that a claim for increase is based on a change or worsening in condition or circumstance since a prior VA decision and not based on disagreement with that decision. Accordingly, VA revises proposed § 3.1(p)(1)(iii) to reflect a claim for increase as a change or worsening in condition or circumstance since a prior VA decision. One comment also expressed concern that ''the VA may sometimes be overbroad in requiring supplemental claims where a veteran has not had a decision on a specific issue or disability previously.'' VA agrees there may be confusion regarding the definition of a supplemental claim and revised § 3.2501 to clarify that a supplemental claim is based upon a disagreement with a prior VA decision.

VA revises the definition of ''initial claim'' in § 3.1(p)(1), to provide clarity concerning the term ''original claim'' in response to comments. Commenters expressed confusion between the terms ''original'' and ''initial'' based on dictionary definitions, which treat them interchangeably. VA's revisions to § 3.1(p)(1) explain that an original claim is the first initial claim.

One commenter expressed a belief that the terms ''issue'' and ''claim'' are used interchangeably in sections of the proposed rule but defined differently. It is clear from § 3.151(c) that the term ''issue'' refers to a distinct determination of entitlement to a benefit, such as a determination of entitlement to service-connected disability compensation for a particular disability. A claim is a request for review of one or more issues. If a claim includes only one issue then the terms may appear to be used interchangeably. Accordingly, VA revises § 3.1(p) to include a reference to § 3.151(c), which defines issues within a claim.

B. Comments Concerning § 3.103—Procedural Due Process and Other Rights

VA received eleven comments regarding procedural due process concerns as referenced in § 3.103.

Two commenters expressed concern that the use of the phrase ''when applicable'' in § 3.103(b)(1) is too broad and open to interpretation. VA agrees that the term is vague and revises § 3.103(b)(1) to refer the reader to subsection (d), which explains the availability of a hearing.

Another commenter expressed concern with the removal of language in § 3.103(c)(2) regarding visual examinations during hearings. These types of visual examinations are obsolete as veterans and VA can now utilize several other methods to add visual examination findings into the record. Claimants may use Disability Benefits Questionnaires (DBQs) that any physician may complete to document visual findings. VA may also assist claimants through the scheduling of contract examinations which support VA's disability evaluation process and make obtaining examinations easier and more efficient by bypassing the requirement to formally schedule one with a VA provider. Accordingly, VA does not make any changes to § 3.103(c)(2) based upon the comment.

Several comments raised concerns regarding § 3.103(c)(2), *Treatment of evidence received after notice of a decision.* The concerns centered around the desire for VA to notify claimants in writing each time VA does not consider evidence received after notice of a decision, when the record is closed. The commenters are correct that VA does not intend to notify a claimant every time the claimant submits evidence during a period when the record is closed. Rather, the initial notice of decision provided to the claimant will explain the review options, the associated evidentiary rules, and the procedures to follow to obtain VA consideration of new evidence. In addition, VA will, in accordance with the AMA and § 3.103(f), provide information to the claimant in the initial decision as to evidence that was considered, and any subsequent review decision, based on a closed record, will inform the claimant generally if VA received evidence that was not considered. Finally, decision notices will provide to claimants instructions for how to obtain or access the actual evidence used in making the decision (the complete record on which the decision was based).

VA takes seriously its obligation to administer its process in a claimant-friendly way, and accordingly provides multiple means for claimants to obtain information on what evidence VA has received and the date of receipt to determine if it was submitted when the evidentiary record was open or closed. Most fundamentally, claimants are able to request a copy of their own claims files. Additionally, accredited representatives are eligible to receive access to the Veterans Benefits Management System, which enables them to see what is in the file at any time. And a claimant can visit the VBA Regional Office to view their claims file in a reading room.

Accordingly, to the extent a claimant is unsure whether a given piece of evidence was considered the claimant can check the review decision to see whether it indicates whether there was any evidence that was not considered. If so, the claimant can check the summary of evidence in the initial decision notice. VA expects this to resolve the matter in most instances. However, to the extent that the claimant needs access to the entire record on which a decision is based, the decision notice will describe that procedure. Finally, whenever the claimant is uncertain, the claimant can submit the evidence in question again as part of a supplemental claim. If this is done within one year, there will be no loss of effective date. If

the evidence was not considered in the prior claim and is relevant, it would be considered in adjudicating the supplemental claim. (As explained in the proposed rule, even if the claimant did not submit with the supplemental claim relevant evidence previously submitted out of time, VA would be obligated to consider it.) The law does not require VA to list evidence not considered because it was received after notice of a decision, or during some other period when the evidentiary record was closed. Before the AMA, 38 U.S.C. 5104 required VA to provide certain information only in cases where VA denied a benefit sought: (1) A statement of reasons for the decision; and (2) a summary of the evidence considered by the Secretary. 38 U.S.C. 5104(b) (2016). In the AMA, Congress directly addressed the information requirements for decision notices in a high level of detail. All decision notices, regardless of whether or not they deny a benefit sought, must now include seven specified data elements. 38 U.S.C. 5104(b)(1)–(7). This includes ''a summary of the evidence considered by the Secretary[.]'' 38 U.S.C. 5104(b)(2). This extensive list of required data elements does not include identification of evidence not considered. It is clear that Congress directly considered the requirements for decision notices, altered the applicable legal requirements in ways generally favorable to claimants, and declined to add a requirement to identify and discuss evidence not considered.

Beyond the fact that the law does not require VA to provide notice of evidence not considered, VA declines to discretionarily impose such a requirement through regulation. From VA's perspective, the closing of the evidentiary record is one of the foundational features of the AMA, and one of its most valuable in terms of enabling VA, over time, to process claims and appeals more efficiently. Requiring VA to notify claimants each time evidence is submitted out of time or list or summarize such evidence individually in review decisions would dilute much of the administrative value of having a closed record following the initial decision. Providing this notice would require VA personnel to review and identify or summarize (if, for example, the evidence is not dated) late-flowing evidence when preparing the decision notice. Such a procedure would unavoidably require ''by hand'' review and processing of evidence by VBA adjudicators, similar to the review required for simply considering the evidence for decisional purposes. In this scenario, VA would be spending its limited adjudicative resources reading and processing documents that are not part of the record and cannot be the basis for a decision.

Apart from the work of reading and summarizing extra-record evidence, imposing this requirement would also carry a significant cost in terms of generating procedural complexity. A regulatory requirement that VA identify or summarize certain evidence would, of necessity, need to be enforceable on appeal in order to be meaningful. (Such a notice requirement would technically be distinct from the argument on appeal that certain evidence was excluded from the record in error, which is an appellate argument that is certainly possible under this final rule.) Accordingly, the argument that VA failed to provide legally adequate notice or description of what evidence was not considered would become a feature of the appellate system. This would be problematic for two reasons. First, it invites appellate activity centered on procedure rather than the substance of veterans' claims. Second, and worse, it creates the specter of argument over the proper discussion of non-record evidence. Evidence that is nominally not part of the record of the decision on appeal would necessarily become central to such an appellate argument. At that point, the evidence would, for all intents and purposes, be part of the record, even though the premise of the argument would necessarily be that the evidence was validly excluded.

We acknowledge that proposed § 20.801(b)(3), which we here confirm as final, will require the Board to provide ''[a] general statement'' that evidence received while the record was closed was not considered. This provision, governing Board practice, is consonant with VA's decision not to impose a requirement on VBA to list or summarize untimely evidence. This provision is necessary to comply with 38 U.S.C. 7104(d)(2), which is specific to Board decisions. That provision only requires a broad statement that untimely evidence was received and not considered, rather than any meaningful engagement with that evidence, such as a listing or summary.

VA recognizes that some individual claimants might prefer that VA either provide notification each time it receives evidence submitted out of time or list such evidence specifically in decision notices. However, in balancing efficiency considerations in line with the expressed goal of Congress to reduce VA backlogs and processing times, VA has chosen the alternative procedures discussed above to provide claimants with information they need to effectively prosecute their claims without prejudice to their ability to have all relevant evidence considered prior to a final adjudication. Accordingly, VA does not make any changes to § 3.103(c)(2) based upon these comments. As the precise procedures for providing such notice may change based on technological systems, as well as other resources, VA will continue to address this matter through internal procedural guidance consistent with the law and regulations.

Multiple commenters recommended that additional information be included in decision notices beyond what is required in § 3.103(f). Suggestions include the compensation rating decision codesheet, information on expected improvement in disability, and full identification of specific evidence not considered (which we discuss above). Current VA procedures require the inclusion of any expected reexaminations due to expected improvement or worsening of a disability consistent with current § 3.327 and, in many instances, allow for the inclusion of the codesheet with compensation rating decision notices. VA has a requirement under § 3.103(f)(7) to explain how to obtain or access evidence used in making the decision. One method authorized representatives may use to access evidence is to request access to the claimant's electronic claims folder. Accordingly, VA does not make any changes to § 3.103(f) based upon these comments.

A commenter noted that the ''new § 3.103 does not require VA to describe evidence in its possession that it did not review'', raising a hypothetical situation in which a claimant was treated for conditions at a VA facility the day prior to the decision being rendered on their higher-level review. This is a constructive receipt argument that VA was in possession of the records from the day prior and therefore cannot appropriately adjudicate a higher-level review without those records, while at the same time arguing this is not ''new evidence'' used in support of a supplemental claim because the records were in general custody of VA at the time.

VA makes minor adjustments to the rule as proposed to clarify the parameters in this area. 38 CFR 3.103(c)(2), *Treatment of evidence received after notice of a decision,* now clearly explains what may be included in the record for adjudication. It states, ''The evidentiary record for a claim before the agency of original jurisdiction closes when VA issues notice of a

decision on the claim. The agency of original jurisdiction will not consider, or take any other action on evidence submitted by a claimant, associated with the claims file, or constructively received by VA as described in § 3.103(c)(2)(iii), after notice of decision on a claim, and such evidence will not be considered part of the record at the time of any decision by the agency of original jurisdiction, except'' in two specific circumstances relating to the submission of a supplemental or initial claim or identification of a duty to assist error.

Additionally, § 3.103(f)(2) identifies the requirement to provide a summary of the evidence considered in notification of decisions. This provides the claimant a clear understanding of what was considered and is consistent with the definitions of evidence reviewable under a higher-level review or supplemental claim. Under these definitions, the evidence raised in the hypothetical situation would be considered new evidence available to be used by the claimant in a supplemental claim. To the extent the commenter means that evidence created by VA shortly before the record closes but not associated with the claims record or identified to adjudicators in any way should be treated as constructively part of the record pursuant to *Bell* v. *Derwinski,* 2 Vet. App. 611 (1992), we note that documents created while the record is closed do not become part of the record by virtue of the doctrine of constructive receipt. At the same time, if a document created while the record was open is identified on direct appeal as having been constructively received at a time when the record was open (*e.g.,* the Board or a higher-level reviewer become aware of a document within the scope of *Bell*), the record can be corrected, including in similar fashion to a duty to assist error. However, in order for a *Bell* error to cause the record to be augmented in this way, the document in question must actually satisfy the law of constructive receipt in the VA context. Case law construing *Bell* makes clear that the mere existence of a record is not sufficient to establish constructive receipt for adjudicative purposes. Rather, VBA adjudicators must have sufficient indication that a given record exists and sufficient information to locate it, even though they do not have actual custody of it, in order to trigger the doctrine of constructive receipt in the VA claims adjudication context. *See Turner* v. *Shulkin,* 29 Vet. App. 207, 217–219 (2018). We have explicitly incorporated this concept into the final rule at 38 CFR 3.103(c)(2)(iii). In terms of the level of VBA awareness necessary to trigger *Bell* in this context, we import a familiar standard from the duty to assist context, which is referenced in *Turner. Turner* noted that 38 U.S.C. 5103A(c)(1)(B) requires VA to obtain records of relevant medical treatment or examination of the claimant at VA health care facilities or at VA expense, ''if the claimant furnishes information sufficient to locate those records.'' *Turner,* 29 Vet. App. at 218. There is no reason why the doctrine of constructive receipt should be broader than VA's duty to obtain records for the claim. While the duty to assist does not apply following the closure of the record, it does apply during the initial claim process when any document that could be the basis of a constructive receipt issue would have to be created. Accordingly, we provide in § 3.103(c)(2)(iii) that VBA must have had knowledge of the document in question ''through information furnished by the claimant sufficient to locate those records.'' Further, we note that to the extent a document potentially within the scope of that provision is discovered after a claim stream has lapsed, the fact that a document was arguably constructively part of the record before adjudicators in the prior decision would not preclude that document as the basis for a supplemental claim if it was not, in fact, considered. A *Bell* error on the part of VA is not a basis to deprive the veteran of his or her right to file a supplemental claim. Accordingly, *Bell* and the ongoing creation of medical treatment records is not a mechanism for preventing the adjudicative record from closing to the extent the law permits and requires it to do so, but at the same time, does not preclude the filing of supplemental claims. These definitions provide a clearer delineation of what is and is not part of the evidentiary record of a particular claim, as compared to the continuous open record of the legacy system. Further, through the decision notice on the initial claim, the claimant is provided a summary of pertinent evidence that was developed as part of VA's duty to assist. When submitting a request for ahigher-level review, the claimant has notice that the evidentiary record will consist of the same information identified in the initial claim decision. Any additional evidence the claimant wishes to be considered would warrant their submission of a supplemental claim request.

C. Comments Concerning § 3.104—Binding Nature of Decisions

VA received eight comments regarding the binding nature of favorable findings. The AMA added a new section, 38 U.S.C. 5104A, providing that any findings favorable to the claimant will be binding on all subsequent adjudicators within VA, unless ''clear and convincing evidence'' is shown to the contrary to rebut the favorable findings. These comments expressed concern over the lack of definition of ''clear and convincing,'' as well as the evidentiary standard specified in the law being a lower evidentiary standard than currently exists and less favorable to claimants.

The CAVC in *Fagan* v. *West,* 13 Vet. App. 48, 55 (1999), clarified that the ''clear and convincing'' evidentiary standard of proof is an intermediate standard between preponderance of the evidence and beyond a reasonable doubt. VA notes that the clear and convincing evidence standard is a lesser standard than that required for a Veteran or claimant to correct a VA error that was not in their favor, which requires evidence of a clear and unmistakable error (CUE) (see 38 U.S.C. 5109A(a) and 7111(a)). While 38 U.S.C. 5104A states that VA must meet a ''clear and convincing'' evidentiary standard prior to overturning a favorable finding, nothing in the statute prohibits VA from administratively adopting a higher evidentiary standard to protect favorable findings on a claimant's behalf.

VA agrees with the commenters, as a matter of policy, regarding the wisdom of setting a higher standard applicable to overturning favorable findings as it is claimant-friendly and will reduce the number of cases where claimants feel VA is adopting an adversarial approach to their claim because VA has overturned a favorable finding. Accordingly, VA revises § 3.104(c) to require clear and unmistakable evidence to rebut a favorable finding. The clear and unmistakable standard applicable to rebuttal is similar to the definition of CUE found in § 3.105(a)(1)(i) and 38 CFR 20.1403(a) that applies to finally adjudicated issues. However, application of the clear and unmistakable standard for rebuttal of a favorable finding is legally distinct because, for instance, it is limited to the scope of the favorable finding itself and does not require a further determination that the outcome of the benefit adjudication would undebatably change. The clear and unmistakable rebuttal standard may be satisfied by a finding that the evidentiary record as a

whole completely lacks any plausible support for the favorable finding.

VA discussed in the proposed rule that no changes are necessary to § 3.105(c) through (h), which govern severance of service connection and reduction in evaluations, and that the standards and procedures set forth in those paragraphs will continue to apply without change. VA received no comments on this issue, and VA's position in this regard has not changed as a result of the choice in the final rule to apply the higher CUE standard to rebuttal of favorable findings.

D. Comments Concerning § 3.105—Revision of Decisions

Two comments expressed concern with the language in proposed § 3.105(a)(1)(iv), entitled *Change in interpretation,* providing that a clear and unmistakable error does not include the otherwise correct application of a statute or regulation where, subsequent to the decision being challenged, there has been a change in the interpretation of the statute or regulation. As explained in the preamble to the proposed rule, this revision to § 3.105(a) is for the purpose of conforming the regulations applicable to CUE in finally adjudicated decisions of the agency of original jurisdiction with existing regulations applicable to CUE in finally adjudicated Board decisions. Accordingly, § 3.105(a)(1)(iv) tracks the language in existing 38 CFR 20.1403(e).

VA does not agree with the commenters' assertion that these provisions are contrary to established caselaw. The Federal Circuit explicitly rejected the premise of retroactive application of judicial interpretations of law in the CUE context in *Jordan* v. *Nicholson,* 401 F.3d 1296 (Fed. Cir. 2005), and *Disabled Am. Veterans (DAV)* v. *Gober,* 234 F.3d 682, 698 (Fed. Cir. 2000). In *DAV,* the Federal Circuit specifically upheld 38 CFR 20.1403(e). *Id.* In *Jordan,* the court explained that ''[t]he Supreme Court has repeatedly denied attempts to reopen final decisions in the face of new judicial pronouncements or decisions.'' *Jordan,* 401 F.3d at 1299; *see Reynoldsville Casket Co.* v. *Hyde,* 514 U.S. 749, 758 (1995) (''New legal principles, even when applied retroactively, do not apply to cases already closed.'').

VA does not agree with the argument by commenters that these cases were overruled by *Patrick* v. *Shinseki,* 668 F.3d 1325 (Fed. Cir. 2011), which was a decision regarding whether a prior position of the government was substantially justified in assessing whether an award of attorney fees was due. Further, to the extent there is any irreconcilable tension between *DAV* and *Jordan* on the one hand and *Patrick* on the other, it is well-established that the earlier decisions control for precedential purposes. *Newell Companies, Inc.* v. *Kenney Mfg. Co.,* 864 F.2d 757, 765 (Fed. Cir. 1988) (''Where there is a direct conflict the precedential decision is the first.''). Similarly, it is not possible for one panel of the Federal Circuit Court to have directly overruled a prior panel. *Sacco* v. *Dep't of Justice,* 317 F.3d 1384, 1386 (Fed. Cir. 2003) (''[a] panel of [the Federal Circuit] is bound by prior precedential decisions unless and until overturned *en banc.*''). VA therefore makes no change to the regulation based on the comments.

One of these commenters recommends the creation of a form specifically for use in applying for review of a CUE. VA agrees there is merit in this recommendation, will review possible options, and may decide to implement a form for this specific use, consistent with the Paperwork Reduction Act. However, the current process for claiming and contesting a CUE should be followed in the absence of such a form. Should VA determine such a form is not necessary, the current process will remain in place.

E. Comments Concerning § 3.151—Claims for Disability Benefits

The AMA added 38 U.S.C. 5104C, which outlines the available review options following a decision by the agency of original jurisdiction. VA proposed to add § 3.2500 and revise § 3.151 consistent with the statute to provide that a claimant may request one of the three review options under § 3.2500 (higher-level review, supplemental claim, or appeal to the Board) for each issue decided by VA, consistent with 38 U.S.C. 5104C. A claimant would not be limited to choosing the same review option for each issue for a decision that adjudicated multiple issues.

One commenter believed that the terms ''issue'' and ''claim'' are used interchangeably in sections of the proposed rule but defined differently. It is clear from § 3.151(c) that the term ''issue'' refers to a distinct determination of entitlement to a benefit, such as a determination of entitlement to service-connected disability compensation for a particular disability. A ''claim'' is a request for review of one or more issues. If a claim includes only one issue then the terms may appear to be used interchangeably. VA agrees with the commenter's suggestion that clarification is necessary and revised § 3.1(p) to include a reference to § 3.151(c), which defines issues within a claim.

F. Comments Concerning § 3.155—How To File a Claim

While the AMA does not specifically address how to file a claim, or the concept of intent to file as it relates to supplemental claims, it is necessary for VA to create a framework for this process. Currently, 38 U.S.C. 501(a) and 5104C(a)(2)(D) place the authority to develop policy in this area on the Secretary.

One comment expressed concern that § 3.155(b), *Intent to file,* does not apply to supplemental claims and recommends recision of this limitation. However, 38 U.S.C. 5110 of the new statutory framework provides that a claimant can maintain the potential effective date of a potential benefits award by submitting a request for review under any of the three new lanes within one year of the date of the decision with which the claimant disagrees. Consistent with this requirement, the intent to file provisions of § 3.155(b) do not apply to supplemental claims because the statute prescribes a one-year filing period in order to protect the effective date for payment of benefits. The commenters recommendation would allow for the submission of a supplemental claim beyond the one-year period. For these reasons, VA will not make any changes to § 3.155 based on the commenter's recommendation.

G. Comments Concerning § 3.156—New Evidence

One commenter expressed concern with the definition of new evidence meaning evidence not yet ''submitted to'' VA and recommended clarification that new evidence is evidence not yet ''considered by'' VA. The commenter suggested this change to ensure that evidence qualifies as ''new'' for purposes of a supplemental claim, where that evidence was associated with the claims file when the record was closed and therefore was not previously considered by a VA adjudicator. VA agrees that clarification along these lines is necessary but has revised the regulatory language in different manner. Instead of the change recommended by the commentator, VA has replaced ''not previously submitted to agency adjudicators'' in the definition of new evidence with ''not previously part of the actual record before agency adjudicators.'' This change will accomplish the same goal, with the additional benefit, through use of the phrase ''actual record,'' of clarifying that new evidence may include evidence

deemed constructively received as of a date falling within a period when the record was open, if that evidence had never been part of the record on which a prior adjudication of the issue in question was based.

Other commenters disagreed with the change in title for § 3.156(b), from ''*Pending claim*'' to ''*Pending legacy claims not under the modernized review system,*'' resulting in the non-applicability of current § 3.156(b) in the modernized system. The commenter asserted that VA had not provided a sufficient explanation for this choice.

Section 3.156(b) provides generally that new and material evidence received while a claim is pending before VA must be considered as filed in connection with the pending claim, including evidence received after an initial decision is rendered and during the period available to file an appeal. One practical effect of this provision is that qualifying evidence received during the appeal period automatically requires VA to readjudicate the claim and issue a new decision. Such a requirement would be inconsistent with the structure of the new system. First, new 38 U.S.C. 5104B(d) and revised 38 U.S.C. 7113 mandate specific periods when the record is closed to new evidence, including during the period following an initial VA decision. Second, new 38 U.S.C. 5104C and revised 38 U.S.C. 5108 require a claimant who seeks VA readjudication based on new and relevant evidence to either file a supplemental claim with the agency of original jurisdiction or file a Notice of Disagreement and select a Board docket allowing the submission of new evidence. Defining and limiting the avenues available to a claimant for submission of new evidence during the claim stream is a primary feature of the AMA, which was designed, in part, to ''streamline VA's appeal process'' and ''help ensure that the process is both timely and fair.'' H. Rep. No. 115–135 at 5 (2017). Third, new 38 U.S.C. 5104C provides claimants with a choice of review options following receipt of an adverse initial VA decision—file for a higher-level review within the Veterans Benefits Administration (VBA), file a supplemental claim with new and relevant evidence for readjudication by the VBA, or file a notice of appeal to the Board. If VA were to automatically place the claim on a track for readjudication by the VBA upon receipt of new evidence, that action would effectively preempt the claimant's choice.

Therefore, because § 3.156(b) requires automatic readjudication upon the receipt of new evidence during the one-year appeal period, it is clearly inconsistent with the statutory design of the new system. Nevertheless, excluding § 3.156(b) from the regulations governing new system claims does not adversely impact a claimant's right to obtain a VA readjudication on new and relevant evidence. It simply means that claimants must submit such evidence though the channels established by the AMA. Furthermore, automatic readjudication of claims is not mandated by 38 U.S.C. 5103, even though the implementing regulation for that provision, § 3.159(b), provides for automatic readjudication of legacy claims upon VA receipt during the appeal period of new evidence substantiating the claim. 38 U.S.C. 5103(a)(1) requires VA to provide claimants, prior to an initial decision, with notice of information and evidence necessary to substantiate a claim. Section 5103(b)(1) requires the claimant to provide such evidence within one year of the date of the notice, but states in paragraph (b)(3) that VA is not prohibited from making the initial decision on a claim prior to the expiration of the one year. Consistent with these provisions, VA's implementing regulations for legacy claims provide that if a claimant does not respond to the notice within 30 days, VA may decide the claim prior to the expiration of the one-year period. *See* 38 CFR 3.159(b)(1). If VA does so and the claimant subsequently provides information or evidence substantiating the claim before the end of the one-year period, the regulations provide that ''VA must readjudicate the claim.'' *Id.*

However, the regulatory procedure of automatically readjudicating the claim in these circumstances was not required by section 5103. Rather, when the key features of current 38 U.S.C. 5103 were enacted in 2000 and 2003 (in the Veterans Claims Assistance Act of 2000 (VCAA) and the Veterans Benefits Improvement Act of 2003 (VBIA of 2003), VA had a long-standing practice, as set forth in § 3.156(b), of automatically readjudicating a claim upon the receipt of additional evidence from a claimant—not just within the year following issuance of the 5103(a) notice, but within the longer one-year period beginning with the issuance of the initial decision. Following enactment of the VCAA, VA indicated that it would simply chose to maintain this practice. 66 FR 45,620, 45623 (Aug. 29, 2001) (final rule). VA viewed the essence of 5103(b) not as requiring automatic readjudication, but as ''essentially an effective date provision governing the earliest date from which benefits may be paid if a claimant submits requested information and evidence.'' *Id.*

VA recognized that the longer period for submission of new evidence provided in § 3.156(b) might be in tension with the bar to awarding benefits in section 5103(b)(1) where supporting evidence was not received within a year of the VA notice, *id.,* but that bar was removed in the VBIA of 2003 and Congress substituted the requirement that the substantiating evidence ''must be received by the Secretary within one year of the notice date.'' 149 Cong Rec H 11,705, (Nov. 20, 2003). At the same time, Congress added section 5103(b)(3), providing that VA is not prohibited from adjudicating a claim prior to the expiration of the one-year period following section 5103 notice. Congress explained, consistent with the view that section 5103(b) was essentially an effective date preservation provision, that the statutory changes were designed to promote the streamlined adjudication of claims, while ensuring that claimants had two essential rights: (1) The opportunity, following an initial decision, to submit substantiating information or evidence for VA readjudication within the one-year period, and (2) in such cases, maintenance of the effective date associated with the filing of the claim. 108 S. Rpt. 169 at 15 (''In such cases, the one-year time period would still enable a claimant to submit the requested information or evidence and if benefits are granted on readjudication, assign an effective date of award as if VA had not made the initial decision.''); *see also* 149 Cong Rec H 11,705, 11,720 (Nov. 20, 2003) (Explanatory Statement of the House and Senate Committees, indicating that the House accepted the provisions from the Senate Bill in this regard).

The new system under the AMA affords claimants these essential rights, as claimants are entitled to a VA readjudication based on new and relevant evidence submitted within the one-year appeal period, while their effective date is protected. Rather than providing for an automatic readjudication, however, claimants must submit the new evidence in connection with a choice of review options. The claimant may file either a supplemental claim pursuant to § 3.2501 or a Notice of Disagreement with the Board indicating selection of a docket allowing for the submission of additional evidence. If either filing is completed within the one-year period under the AMA to maintain continuous pursuit of the claim (generally one year from the date of issuance of the initial decision), the claimant will not lose the

effective date associated with the filing of the claim. The availability of readjudication based on new evidence under the AMA therefore fulfils the essential purpose of section 5103(b) as an effective date provision governing the earliest date from which benefits may be paid if a claimant submits requested information and evidence following an initial adjudication.

Nothing in 38 U.S.C. 5103 or caselaw interpreting it requires VA to automatically readjudicate a claim or precludes orderly procedural requirements for the submission of new evidence following an initial decision. Similarly, there is no indication in the relevant legislative history that Congress understood itself to be creating such a requirement. Therefore, the AMA is not inconsistent with section 5103(b) and section 5103 does not require VA to create a special exception to the claim processing rules set forth in the new law.

To the extent that section 5103(b) could be viewed as potentially conflicting with the AMA by providing an unrestricted right to submit evidence and receive readjudication for up to one year following the VCAA notice, notwithstanding the timing of any intervening VA decision, it would be VA's duty to resolve the conflict for operational purposes. Therefore, regardless of whether one adopts the view that section 5103(b) provides such a right, VA interprets section 5103(b) and the AMA together to provide that evidence may be submitted in the one-year period established by section 5103(b), including following a VA decision, but must be submitted through the channels provided in the AMA when VA has issued an initial decision. VA believes that allowing submission of new evidence only through the channels provided in the AMA gives the maximum possible effect to both statutory provisions bearing on the issue and safeguards a claimant's essential statutory rights. Further, as a matter of policy, creating a year-long exception to the structure of the AMA would introduce complexity and confusion to the new claims processing rules, both for VA adjudicators and claimants, and would substantially undermine the goal of the AMA to streamline the VA appeals system and allow VA to resolve appeals more quickly.

Consistent with this discussion, VA eliminates § 3.156(b) for modernized system claims and makes conforming amendments to § 3.159, as discussed below, to require that new and relevant evidence, to the extent that it is submitted following a VA decision but within the year established in section 5103(b), must be submitted to VA through the channels established by the new law.

H. Comments Concerning § 3.159—Department of Veterans Affairs Assistance in Developing Claims

The definition of a substantially complete application in 3.159 has been amended to add the requirement that a supplemental claim application include or identify potentially new evidence and that a higher-level review request identify the date of the decision for which review is sought. VA's duty to assist is reinstated when a substantially complete initial claim or supplemental claim is filed or when a claim is returned to correct a ''duty to assist'' error in a prior decision as required by 38 U.S.C 5103A(f), as amended by the AMA.

One commenter is concerned with the term ''potentially new evidence'' as used in §§ 3.159(a)(3)(vii) and in 3.160(a)(6). In this context, ''potentially new evidence'' references evidence that may be new and relevant to the claim, thereby providing some potential basis for a supplemental claim. As adjudicated in the supplemental claim process, evidence submitted or identified by a claimant may be found to be duplicative, not relevant, or otherwise not new. If this is the case, the adjudicator then must issue a decision indicating that there is not sufficient evidence to readjudicate the claim. If the evidence is found to be new and relevant, the claim must be readjudicated. This identification of ''potentially new evidence'' is consistent with § 3.2501. For the above reasons, VA make no changes to § 3.159 based upon the comment.

However, VA is making technical amendments to § 3.159 in the final rule necessary to conform with the procedural requirements of the AMA. Specifically, paragraph (b)(4) is added and paragraph (b)(1) is amended to clarify, consistent with new section 5104C, that submission of new evidence following an initial VA decision must be accomplished either by filing a supplemental claim on a form prescribed by the Secretary or by filing a Notice of Disagreement with the Board on a form prescribed by the Secretary and selecting a review option allowing for the submission of new evidence. As explained above in the prior section, VA views these amendments as consistent with section 5103.

I. Comments Concerning § 3.160—Status of Claims

While the AMA does not specifically address status of claims, the law did, however, replace ''a claim for reopening a prior decision on a claim, or a claim for increase of benefits'' with ''supplemental claim'' in section 5103(a). Further, section 5104C(a)(2)(D) places the authority to develop policy in this area on the Secretary.

Claimants may request review of VA's decision by submitting a supplemental claim after a decision by the agency of original jurisdiction, the Board, or the CAVC. VA proposed revising § 3.160(e) to reflect the requirement that as of the applicability date of the new law, VA will no longer accept requests to ''reopen'' claims and a claimant must file a supplemental claim under § 3.2501 to seek review of a finally adjudicated claim for a previously disallowed benefit.

One commenter contends that those who have filed their claims in the legacy system have the right to have those claims adjudicated in the legacy system and VA cannot force them into the modernized system outside of the statutorily prescribed opt-in periods citing that the courts have held a claimant has the right to demand the benefit of the laws in existence at the time the claim was filed and any new laws that come into existence during that claim's pendency that are more favorable to the claimant, absent a specific indication that the change in law was intended to be retroactive. VA agrees with the commenter in part; however, VA did not propose to apply a new law that is less advantageous to the claimant. By requiring the filing of a supplemental claim, VA will no longer require claimants to identify new and material evidence to reopen a finally adjudicated claim. VA will now allow the submission of evidence that is ''new and relevant'', which Congress has indicated is a lesser standard and reduces the claimant's burden. In addition, this change in filing requirement does not change VA's review of the claim and application of the laws in effect at the time the claim was originally decided when readjudicating the claim. What VA intends, by allowing claimants with legacy claims to file under the supplemental claim framework, is to reduce claimants' filing burden while still maintaining all requirements for review of the decision based on all applicable laws and regulations whether in existence at the time of prior decision or now. For these reasons, no changes are made based on this comment.

J. Comments Concerning § 3.328—Independent Medical Opinions

The AMA repealed 38 U.S.C. 7109, which authorized the Board to obtain

independent medical opinions (IMOs). This repeal removed the ability for the Board to request IMOs. Under 38 U.S.C. 5103A(f)(2) and 5109(d), as added by the AMA, the Board will, when deemed necessary, direct the agency of original jurisdiction to obtain an IMO. VA proposed to amend § 3.328 to include a requirement that VBA process IMO instructions received from the Board.

One commenter requested clarification on the definition of ''director of the Service'' in § 3.328(c). Previous language referenced approval to be ''granted only upon a determination by the Compensation Service or the Pension and Fiduciary Service''. The change to ''director of the Service'' in § 3.328(c)(1)(i) is necessary because the modernized system affects all VA administrations and is not limited to the Veterans Benefits Administration's Compensation Service and Pension and Fiduciary Service. To address the commenter's concern, VA is adding language to clarify the meaning of ''director of the Service''.

Another commenter requested clarity on the use of the word ''obscurity'' and the phrase ''such controversy in the medical community at large'' in proposed § 3.328(c)(1)(i) and recommended a revision to reflect the language of the statute. VA agrees that the regulation should track the language of the statute and revised § 3.328(c)(1)(i) accordingly.

K. Comments Concerning § 3.2400—Applicability of Modernized Review System

The AMA provides direction on the applicability of the modernized review system. Accordingly, § 3.2400 defines which claims are processed under the modernized review system and which clams are processed under the legacy appeals system. § 3.2400 also clarifies that the new review system will generally apply to initial decisions provided on or after the effective date denying requests to revise a decision by the agency of original jurisdiction based on CUE.

One commenter interpreted proposed § 3.2400, specifically the provision proscribing supplemental claims based upon CUE, as somehow limiting CUE claims generally. However, § 3.2400 clarifies that the new review system will generally apply to initial decisions issued on or after the effective date of this final rule, to include decisions denying requests to revise a decision by the agency of original jurisdiction based upon CUE. Although such requests are not ''claims'' subject to the AMA because the requester is not pursuing a claim for benefits pursuant to part II or III of Title 38 of the U.S. Code, *Livesay* v. *Principi,* 15 Vet. App. 165, 178–179 (2001), it is VA's policy to allow the requestor to elect review of such decisions in the higher-level review lane or through an appeal to the Board. Revision of a decision based upon CUE cannot be requested in a supplemental claim because CUE must be based upon the facts and law that existed at the time of the prior decision, not new and relevant evidence. For these reasons, VA does not make any changes based upon the comment.

Another comment expressed concern that character of discharge determinations are not expressly addressed in § 3.2400. While character of discharge determinations could be reviewed under the modernized review process, the AMA does not specifically implicate or change any existing law regarding character of discharge determinations. Accordingly, no changes are made based on this comment.

L. Comments Concerning § 3.2500—Review of Decisions

In the legacy appeals process, claimants who are dissatisfied with the initial decision on their claim are given only one avenue to seek review of that decision. The new system created by the AMA allows claimants to choose from several different review options. Congress added 38 U.S.C. 5104C to provide claimants with streamlined, early resolution options within the agency of original jurisdiction or in an appeal directly to the Board. VA proposed to add § 3.2500 to implement the new decision review options and set forth the rules that apply to those options under section 5104C. In line with the statutory requirements, VA proposed to allow a claimant to file for one of the three review options upon receipt of a decision by the agency of original jurisdiction on an initial claim. Under § 3.2500(b), a claimant will be able to elect a different review option for each issue adjudicated in the decision. It is clear from § 3.151(c) that the term ''issue'' refers to a distinct determination of entitlement to a benefit, such as a determination of entitlement to service-connected disability compensation for a particular disability. An ''issue'' is distinct from a ''claim'' in that a claim may contain one or more issues.

Several commenters expressed concern over § 3.2500(b), which provides that a claimant may not elect to have the same issue reviewed concurrently under different review options, consistent with section 5104C(a)(2)(A). Some of these comments were specific to the concurrent election of a different review lane while an appeal is simultaneously being reviewed by a federal court. In general, it is inefficient and raises potential conflicts for the same issue to be reviewed concurrently by two different processes (*e.g.,* concurrent review in multiple review lanes or in a review lane and at a court). These different review lanes may come to different conclusions. This final rule establishes a process for a potentially different conclusion in a lane than in a previous lane. It is inefficient and confusing for those conclusions to be reached separate from each other without the benefit of the other review's conclusions. The appropriate method for a claimant to seek a different conclusion is to allow for a decision to be made, then seek another appropriate review option to address any additional evidence, difference of opinion, or perceived error in the prior conclusion. VA also notes that concurrent review of a matter by a lower level review lane and a federal court is prevented as a matter of law, due to VA's lack of jurisdiction to review a matter pending before a higher-level authority. Accordingly, no changes are made to § 3.2500(b) based on these comments.

One commenter expressed a belief that the proposed rule limits the options for a claimant to appeal downstream issues to reviewing them all in a single lane. The example offered by the commenter was a case in which the Board grants service connection for a left knee condition, but the claimant disagrees with the effective date and percentage of disability assigned by the Board, and the claimant must choose one lane for adjudication for each of these issues, even though the effective date issue might be better resolved in a higher-level review and the evaluation might be better resolved in a supplemental claim. The proposed rule did not specifically address downstream issues, which are those that necessarily arise from a decision on one element of a claim. Ratings and effective dates, using the commenter's example, are separate issues that may arise from a Board grant of service connection.

VA recognizes that a claimant might sometimes want to seek review of each downstream issue in a different lane. However, as VA discussed in the preamble to the proposed rule, allowing a claim to be splintered into several pieces for review, each potentially subject to different evidentiary rules and timelines, would render the new review system administratively unworkable, risk self-contradictory decision-making by VA, and undermine Congressional

intent to streamline the review process and reduce adjudication times. Although problems would not necessarily arise in every instance, from the standpoint of administering an entire system that produces timely adjudications for all claimants, VA must attempt to achieve a balance between more flexibility for individual claimants and administrative efficiency that benefits all veterans. Based on extensive experience administering a claims adjudication system, and considering that one of the express goals of the AMA is to improve the effciency of VA claims and appeals processing and reduce overall wait times, VA will not allow claimants to choose different review lanes for downstream issues. Rather, each separate benefit entitlement sought by a claimant is considered an issue as defined in § 3.351(c) and cannot be split into different review lanes for purposes of admistrative review. VA makes no regulatory changes based on the comment.

Some commenters suggested that the regulatory provision indicating review options following a Board decision should include reference to the option to file a notice of appeal with the U.S. Court of Appeals for Veterans Claims (CAVC). VA agrees and revises § 3.2500(c)(3) accordingly. Other commenters suggested that proposed § 3.2500(c)(4) should track the statutory language providing that the one-year period for continuous pursuit begins upon issuance of a CAVC decision, rather than a CAVC judgment. VA agrees and revises the language in § 3.2500(c)(4) accordingly.

Proposed § 3.2500(d) implements section 5104C(a)(2), providing that the Secretary may, as the Secretary considers appropriate, implement a policy for claimants to switch between the different review options. A claimant or the claimant's duly appointed representative may, for example, wish to withdraw a request for higher-level review or a supplemental claim at any time prior to VA issuing notice of decision. VA proposed in § 3.2500(d) that a claimant may, if the withdrawal takes place within the one-year period following notice of the decision being reviewed, timely elect another review option to continuously pursue the claim and preserve the potential effective date for payment of benefits.

Two commenters expressed concern that section 5104C(a)(2) does not impose a time limit on selecting additional review options upon withdrawal. However, section 5104C(a)(2)(D) places the discretion to develop policy in this area with the Secretary of Veterans Affairs. Under the AMA (sections 5104B, 5104C, 5110, and 7105), and in order to ensure efficiency, consistency, and timeliness, option election periods are consistently one year from the date of the decision with which the claimant disagrees. A withdrawal and election of a new option must necessarily also be based on the date of that decision. For example, a claimant receives an unfavorable decision and requests a higher-level review. Sometime during the year following the claim decision, but before the higher-level review request has been adjudicated, the claimant decides to change to the supplemental claim lane. The supplemental claim must be filed within that same year from the last decision date. As long as a claimant submits a supplemental claim within the same one-year period that follows the relevant decision, VA will consider this to be a continuously pursued claim and continue to base the effective date of an award of benefits on the filing date of the initial claim. This benefits the claimant by ensuring there are clearer periods of time associated with processing an action and definitive decision points in the process on which to better determine if further action is desired while protecting the effective date. Accordingly, no changes are made to § 3.2500 based on these comments.

Concern was expressed regarding lane changes after the one-year period described above, but before a decision review request has been adjudicated. VA understands the concern regarding withdrawing from one lane in favor of another, particularly if the one-year period has expired. Accordingly, VA will consider requests to extend the one-year period for claimants in one review lane to switch to the supplemental claim lane through the above-described procedure without loss of the current effective date. Such requests will be considered on a case-by-case basis for good cause shown under § 3.109(b). Section 3.109(b) generally allows for requests to extend time limits within which claimants are required to act based on good cause, and allows such requests to be made after the relevant time period has expired subject to specified procedural requirements. The only lane into which a claimant may switch after the one-year period has expired is the supplemental claim lane based on new and relevant evidence, regardless of whether a good cause exception is allowed for purposes of maintaining continuous pursuit of the claim.

VA makes changes in § 3.2500(e) in accordance with the above discussion in response to the comment.

VA also makes technical changes to § 3.2500(d), including adding the requirement that withdrawal of a supplemental claim or a request for a higher-level review must be in writing or through electronic submission in a manner prescribed by the Secretary and must be filed with the agency of original jurisdiction. These changes are required for orderly administrative processing and to provide useful information to claimants.

M. Comments Concerning § 3.2501—Supplemental Claims

VA received multiple comments requesting clarification about electronic submissions in § 3.2501. These comments correctly identify that § 3.2501 states that applications may be made ''in writing'' and says nothing about electronic submissions. VA agrees on the need for clarification regarding electronic submissions. Accordingly, VA revises § 3.2501 to clarify that a claimant or their authorized representative may submit supplemental claims in writing or electronically, consistent with § 3.160(a). Additionally, clarity is added regarding new and relevant evidence that may be in custody of the VA when reasonably identified by the claimant consistent with revisions in § 3.103(c)(2). The definition of new and relevant evidence in § 3.2501(a)(1) is revised in a similar manner to the revision of § 3.156 regarding evidence not previously ''considered by'' agency adjudicators.

N. Comments Concerning § 3.2502—Returns by Higher-Level Adjudicator or Remand by the Board of Veterans' Appeals

Several commenters expressed confusion over the inclusion of the term ''adjudication activity.'' VA agrees that our use of this term in the proposed rule was confusing. Accordingly, VA revises § 3.2502 to use the term ''agency of original jurisdiction'' throughout the final rule. Similarly, commenters requested further clarity on what it means to ''take immediate action to expedite readjudication.'' The AMA amended 38 U.S.C. 5109B to state, ''The Secretary shall take such actions as may be necessary to provide for the expeditious treatment by the Veterans Benefits Administration of any claim that is returned by a higher-level adjudicator under section 5104B of this title or remanded by the Board of Veterans' Appeals.'' VA agrees that clarification is necessary and revises § 3.2502 to more closely mirror the statutory language. The statute does not further define what is meant by

''expeditious,'' leaving timely treatment of claims to the Secretary. Clearly, Congress intended that VA would process these claims as expeditiously as possible depending upon available resources. VA will similarly not further define ''expeditious'' in the rule to provide the Secretary the discretion to direct expeditious processing of actions through allocation of available resources, appropriate prioritization of workload, and issuance of procedures.

O. Comments Concerning § 3.2601—Higher-Level Review

The higher-level review consists of a closed evidentiary record and does not allow for the submission of new evidence or a hearing. While the closed evidentiary record does not allow for submission of new evidence, VA proposes to provide claimants and/or their representatives with an opportunity to point out any specific errors in the case as part of the higher-level review. The sole purpose of an informal conference is to provide a claimant or his or her representative with an opportunity to talk with the higher-level adjudicator so that the claimant and/or his or her authorized representative can identify errors of fact or law in the prior decision. To comply with the statutory requirement of a closed evidentiary record, VA would not allow claimants or representatives to supplement the evidentiary record during the informal conference through the submission of new evidence or introduction of facts not present at the time of the prior decision.

Several commenters expressed concern over the term ''good cause'' in § 3.2601(e) as it relates to VA's ability to conduct the higher-level review at the office which rendered the initial decision when desired by the claimant. VA agrees that clarity is needed. Accordingly, language is added for clarification regarding situations in which the VA may not be able to conduct the higher-level review at the office which rendered the initial decision.

P. Comments Concerning General Timeliness

VA received several comments recommending timelines and goals related to timeliness be included in the rule. VA is committed to the purpose of appeals modernization, which is to provide fair, efficient, and more timely resolution of cases in which a claimant disagrees with a VA decision. Though VA intends to maintain a 125-day average goal for completion of higher-level reviews and supplemental claims, the statute does not require a specific goal and the Secretary must retain the authority and responsibility to monitor and prioritize workload, allocate resources appropriately, and establish appropriate procedures to best meet priorities established by any given change in administration or policy. Regulating a specific goal eliminates the judgement and decision-making authority of the Secretary and reduces the ability to adapt to change appropriately. Goals and timelines for timely completion of VA processes will be established and monitored through VA procedures and policy. For these reasons, no changes are made based on these comments.

Q. Comments Outside the Scope of the Rule

One commenter suggested using non-VA staff, physicians, or case managers at non-VA facilities to be trained in the claims and appeals process in order to fulfill the duty to assist responsibility, stating this would shorten the claims and appeals process. This comment is outside the scope of the proposed rule because it relates to the specific methods in which VA accomplishes the training and management of the law and regulations. Therefore, no change is made based on this comment.

Another comment concerned denial rates under the Rapid Appeals Modernization Program (RAMP). This comment is outside the scope of the proposed rule, therefore, no change is made based on this comment.

Part 8—National Life Insurance Program

Based on comments received relative to part 3, language in § 8.30 is adjusted to be standardized with the language used in Part 3 in reference to favorable findings, supplemental claims, and higher-level reviews.

Part 14—Legal Services, General Counsel, and Miscellaneous Claims

For the reasons set forth in the proposed rule and in this final rule, VA is adopting the proposed amendments to 38 CFR part 14 as final, with minor changes, as explained in the section-by-section supplementary information below. These regulations govern recognition of veterans service organizations (VSO); accreditation of attorneys, agents, and VSO representatives; representation of claimants before VA, including the rules of conduct applicable while providing claims assistance; and fees charged by attorneys and agents for representation.

R. Comment Concerning § 14.631—Powers of Attorney; Disclosure of Claimant Information

VA proposed only one change to current § 14.631, to update a reference in paragraph (c) from 38 CFR 20.608 to 38 CFR 20.6 to reflect proposed revisions to the Board of Veterans' Appeals' (Board) Rules of Practice. Nevertheless, VA received one comment, from a VA-recognized VSO, asking VA to clarify how claimants may change representation and what their ''continuing obligations'' might be, and specifically asking for clarification as to how a claimant would change representation from an attorney to a veterans service organization. Although the commenter asked this question in regard to the organization's clients, the comment pertains to other scenarios as well, including when a claimant changes representation from one attorney or agent to another attorney or agent or from an attorney or agent to proceeding without representation.

As a starting point, unless an appeal is before the Board, the claimant may discharge the attorney or agent at any time and for any reason. A claimant may do so by informing VA of the revocation or by filing a new power of attorney. Attorneys, agents, and VSOs are also permitted to withdraw from representation while the case is before the agency of original jurisdiction (AOJ) so long as the withdrawal would not adversely impact the claimant's interests or if there is good cause for the withdrawal such as if the claimant pursues a course of action that the representative believes to be fraudulent and is being furthered through the representative's representation on the claim. Current § 14.631 identifies the effect of withdrawal from representation and the effect of a revocation of a power of attorney. Withdrawal before the Board, proposed § 20.6, sets forth a different procedure and, in some circumstances, a higher standard that must be met before a representative is permitted to withdraw. Upon withdrawing from representation, the representative must generally return all of the claimant's property to the claimant.

Under § 14.631(f)(1), receipt of a new power of attorney by VA generally revokes existing powers of attorney. Under § 14.631(f)(2), however, an agent or attorney may limit the scope of his or her representation to a particular claim by describing the limitation on VA Form 21–22a. If a VA Form 21–22a, which limits the scope of representation to a particular claim, is submitted, after a VA Form 21–22 or VA Form 21–22a

that did not, then the, organization or individual with a prior unlimited power of attorney would retain representation for all claims before VA with the exception of the particular claim indicated on the new VA Form 21–22a with the limited scope. Conversely, under § 14.631(f)(1), if VA receives a new VA Form 21–22 or VA Form 21–22a, which contains no limitations in scope, it would revoke an existing power of attorney even if the initial VA Form 21–22a indicated that it was limited in its scope to a particular claim. VA will make no further changes to § 14.631 based on this comment.

As to the claimant's continuing obligations to the attorney or agent pertaining to fees, this aspect of the comment will be discussed further below with regard to § 14.636.

S. Comment Concerning § 14.632—Standards of Conduct for Persons Providing Representation Before the Department

In § 14.632(c)(6), VA proposed to amend the current regulation which provides, ''An individual providing representation on a particular claim under § 14.630, representative, agent, or attorney shall not . . . [s]olicit, receive, or enter into agreements for gifts related to *representation provided before an agency of original jurisdiction has issued a decision on a claim or claims and a Notice of Disagreement has been filed with respect to that decision.*'' (Emphasis added.) VA proposed new language that would state, ''An individual providing representation on a particular claim under § 14.630, representative, agent, or attorney shall not . . . [s]olicit, receive, or enter into agreements for gifts related to *services for which a fee could not lawfully be charged.*'' (Emphasis added.) One commenter supported the premise of the provision because it would discourage unethical charging of fees disguised as gifts, but the commenter urged VA to clarify that VA does not intend to include de minimis gifts within the prohibition. The commenter noted that veterans or their families may want to send small tokens of gratitude to advocates.

VA has not changed the language from the proposed rule. Section 14.632(c)(6), as well as other provisions such as current § 14.628(d)(2)(i) (essentially prohibiting recognized organizations and their accredited representatives from charging or accepting a ''fee or gratuity for service to a claimant''), implement statutory prohibitions or limitations on the charging of fees, such as those contained in 38 U.S.C. 5902(b)(1)(A) and 5904(c)(1). VA appreciates the commenter's support for preventing unethical behavior and recognizes that *most* accredited practitioners would not attempt to circumvent statutory or regulatory prohibitions on charging fees through the acceptance of gifts. But, unfortunately, based on VA's experience monitoring the conduct of accredited individuals and addressing complaints received regarding the receipt of gifts and donations, VA does not believe that exceptions to the rule should be recognized because doing so could open the door to potential abuses. Indeed, to be clear, VA believes that, in circumstances in which a fee would be unlawful, a prudent practitioner would return any gift to the donor to avoid the appearance of a violation of the standards of conduct in § 14.632. VA declines to alter the proposed language or otherwise offer the clarification or exception for de minimis gifts requested by the commenter. To assuage the commenter's concerns, VA notes that the prohibition in § 14.632(c)(6) does not extend to accepting de minimis gifts under circumstances where a fee could be charged by the agent or attorney, but cautions that if the gift is determined not to be de minimis it could prevent the attorney or agent from directly collecting a fee from VA out of the claimant's past-due benefits (where a fee may be charged but must be contingent on whether the matter is resolved in a manner favorable to the claimant and may not exceed 20 percent of the total amount of the past-due benefits awarded). Acceptance of such a ''gift'' in addition to the amount to be paid directly from past due benefits could cause the fee charged to exceed 20 percent of past due benefits. VA notes that in many jurisdictions the appropriateness of accepting of a gift under circumstances when a fee could be charged would still be governed by a version of Rule 1.8(c) of the American Bar Association's Model Rules of Professional Conduct—which generally prohibits attorneys from soliciting substantial gifts from clients—and by extension, current § 14.632(d), which provides that an accredited attorney is bound by ''the rules of professional conduct of any jurisdiction in which the attorney is licensed to practice law.''

T. Comments Concerning § 14.636—Payment of Fees for Representation by Agents and Attorneys in Proceedings Before Agencies of Original Jurisdiction and Before the Board of Veterans' Appeals

VA proposed multiple changes to § 14.636. VA did not receive comments on all the proposed changes and will only address here those pertinent to the comments. One commenter objected to language in proposed § 14.636 that was proposed to reflect how Public Law 115–55 changes the starting point at which fees for representation may be charged. The commenter specifically objected to the phrase ''if notice of the decision on a claim or claims was issued on or after the effective date of the modernized review system as provided in § 19.2(a)'' in proposed § 14.636(c)(1)(ii) and the phrase ''a Notice of Disagreement has been filed with respect to that decision on or after June 20, 2007'' in both proposed § 14.636(c)(2)(i) and (c)(2)(ii). The commenter also objected to all of proposed § 14.636(c)(3), which states the limitations on whether an attorney or agent can charge a fee in cases in which a Notice of Disagreement was filed on or before June 19, 2007.

As VA explained in the preamble to the proposed rule, current 38 U.S.C. 5904(c)(1) directs that agents and attorneys may be paid for services provided after a Notice of Disagreement is filed in a case. VA proposed language in § 14.636(c) to implement the change in section 2(n) of Public Law 115–55 that fees may be charged upon VA's issuance of notice of an initial decision on a claim. The commenter correctly recognizes that the proposed regulation describes ''multi-level predicates'' for when it is permissible for attorneys and agents to charge fees. The basis for this structure is the fact that Congress has shifted the delimiting event for when fees may be charged by agents and attorneys three times, most recently with the passage of Public Law 115–55. When Congress has done so, VA has structured § 14.636 and its predecessor, former 38 CFR 20.609, to reflect the statutory amendments to 38 U.S.C. 5904 and its predecessor, former 38 U.S.C. 3404, using the effective dates of the Public Laws. VA's structure of proposed § 14.636 only continues this structure. This is best reflected by proposed § 14.636(c)(3), which is *identical* in language to current § 14.636(c)(2), having been renumbered from (c)(2) to (c)(3) because proposed subparagraph (c)(1) has been added to the regulation address fees under the modernized appeal system.

But the commenter asserts that such a structure for the regulation is ''not supported by the plain language of the statute.'' The commenter explains that 38 U.S.C. 5904(c)(1), as amended by Public Law 115–55, will state, in pertinent part, the limit on fees as, ''a fee may not be charged, allowed, or paid for services of agents and attorneys with respect to services provided before the

date on which a claimant is provided notice of the agency of original jurisdiction's initial decision under section 5104 of this title with respect to the case.'' So, the commenter reasons, the only limitation supported by the plain language of the amended statutory section is that the claimant has been provided notice of the AOJ's initial decision under 38 U.S.C. 5104 regardless of when it was issued or if a Notice of Disagreement or Board decision followed.

The commenter urges a reading of Public Law 115–55—essentially as a retroactive repeal of prior versions of sec. 5904(c)(1) rather than a prospective amendment—which would impermissibly ignore part of the statute. Although VA referred specifically to section 2(n) of Public Law 115–55 in the preamble to explain the basis for proposed § 14.636, the structure provided in the regulation also encompasses section 2(x) of Public Law 115–55, which states that the amendments made by the public law only apply to claims for which a notice of decision is provided by the AOJ on or after the effective date of the new review system. In addition to ignoring sec. 2(x), the expansion of the language in sec. 2(n) urged by the commenter is unrelated to the primary aim of Public Law 115–55—to amend, going forward, the procedures applicable to administrative review and appeal of VA decisions on claims for benefits in order to create a new, modernized review system. Accordingly, VA declines to change the structure of the proposed rule based on this comment. However, in reviewing the proposed rule in light of the comment, VA did discover a gap between the language for proposed paragraphs 14.636(c)(1)(ii) and (c)(2)(ii), regarding when agents and attorneys may charge fees for representation provided with respect to a request for revision of a decision of an AOJ under 38 U.S.C. 5109A or the Board under 38 U.S.C. 7111 based on clear and unmistakable error.

This gap was created by VA's mistaken reference, in proposed § 14.636(c)(2)(ii), to the notice of the decision on the request for revision rather than the notice of the decision that is being challenged based on clear and unmistakable error. By requiring the notice of decision on the request for revision to be issued *before* the effective date of the modernized review system, it created a gap involving circumstances in which the request for revision of a prior decision based on clear and unmistakable error is filed after the effective date of the modernized review system but challenges the decision that was issued prior to the modernized review system and for which a Notice of Disagreement had been filed after June 20, 2007. The proposed language would have meant that agents and attorneys could not charge fees under these circumstances until after VA had issued a decision on the request for revision. Despite the proposed language indicating otherwise, VA had intended to permit agents and attorneys to charge fees for representation provided with respect to a request for revision of a decision of an agency of original jurisdiction under 38 U.S.C. 5109A or the Board of Veterans' Appeals under 38 U.S.C. 7111 based on clear and unmistakable error if notice of the challenged decision was issued before the effective date of the modernized review system; a Notice of Disagreement was filed with respect to the challenged decision on or after June 20, 2007; and the agent or attorney has complied with the power of attorney requirements in § 14.631 and the fee agreement requirements in § 14.636(g). VA has revised the amendatory language to address this unintended gap so that an attorney or agent may charge a fee in these circumstances regardless of whether VA has already issued a decision on the request for revision.

Further, VA has also revised § 14.636(c)(1)(ii) to clarify that an attorney or agent may charge a fee for representation provided on a request to revise a decision based on clear and unmistakable error if the notice of the decision being challenged based on clear and unmistakable error was issued after the modernized review system. Additionally, VA has added language in § 14.636(c)(1)(i) to clarify that, in requests for revision based on clear and unmistakable error that are not otherwise addressed in § 14.636(c)(1)(ii) or (c)(2)(ii) (*e.g.,* requests challenging decisions issued before June 20, 2007), a decision on the request for revision will be considered the initial decision for purposes of allowing fees to be charged for representation.

The same commenter recommended that VA define the term ''case'' as used in 38 U.S.C. 5904(c)(1), as amended by Public Law 115–55, to include all requests by a specific individual for a specific monetary benefit (*e.g.,* compensation, pension, or dependency or indemnity compensation) within a single case. Under the interpretation suggested by the commenter, once an individual receives an initial decision with respect to a specific type of benefit, fees could be charged for any subsequent services provided with respect to the same type of ''benefit,'' even if the services related to a claim with an entirely different basis (*e.g.,* an initial decision with respect to compensation for hearing loss would permit fees to be charged with respect to the veteran's subsequent application for compensation based on service connection for a mental disorder). VA disagrees with commenter because such a rule would untie the term ''case'' from the initial decision by the AOJ. The commenter's proposal would have the effect of permitting agents and attorneys to charge fees to file claims, except the very first claim filed under a specific benefit program. If Congress had intended such a result, it could have accomplished it by repealing or replacing the ''with respect to the case'' language in its entirety. Congress did not, and, therefore, VA will not interpret the amended statute in a manner that would essentially achieve that result in the absence of any indication that this was Congress' intent.

As to the more general aspect of the commenter's suggestion that VA should expressly define the term ''case,'' at this time, VA does not believe that it is necessary to expressly define the term in regulation to explain under what circumstances an agent or attorney may charge fees. Rather, in proposed § 14.636(c), VA continues to explain the term for the purpose of fees in the context of a ''claim'' and maintains the general position that VA must be allowed to decide a matter before paid representation is available. *See* 73 FR 29852, 29868 (May 22, 2008) (the final rule shifting, pursuant to Public Law 109–461, the delimiting point for the restriction of fees to the Notice of Disagreement with respect to the case). VA recognizes that the term ''claim'' has different meanings in different contexts other than attorney's fees, so to clarify the application of the rule VA has provided guidance in proposed § 14.636(c) on three of the more nuanced circumstances relating to fees: Supplemental claims, claims for increase in a rate of disability, and requests for revision of a prior decision based on clear and unmistakable error. VA believes that the proposed § 14.636(c) provided sufficient guidance as to when, and under what circumstances, a fee may be charged, but has opted to revise the language to clarify VA's current position.

In a similar regard, three commenters objected to language in proposed § 14.636(c)(1) that specifies the circumstances in which an AOJ's decision adjudicating a supplemental claim will be considered the initial decision on a claim. Specifically, VA had proposed adding a sentence to § 14.636(c) stating, ''For purposes of this

paragraph (c)(1)(i), a decision by an AOJ adjudicating a supplemental claim will be considered the initial decision on a claim unless that decision was made while the claimant continuously pursued the claim by filing any of the following, either alone or in succession: A request for higher-level review, on or before one year after the date on which the AOJ issued a decision; a supplemental claim, on or before one year after the date on which the AOJ issued a decision; a Notice of Disagreement, on or before one year after the date on which the AOJ issued a decision; a supplemental claim, on or before one year after the date on which the Board issued a decision; or a supplemental claim, on or before one year after the date on which the Court of Appeals for Veterans Claims issued a decision.'' The commenters advocated for an interpretation that would allow for agents and attorneys to receive fees for representation on all supplemental claims regardless of whether they are being continuously pursued by the claimant. One commenter expressed a belief that, based on information conveyed to the commenter by a director of a VSO, the non-inclusion of all supplemental claims within the case restriction in the proposed regulation is contrary to the negotiations between VA and its stakeholders. Ultimately, he characterizes the proposed language as ''a[n impermissible] denial of professional services to veterans.''

It is VA's position that the regulatory text is consistent with the language of the amended statute, and to explain VA's interpretation of the statute it is helpful to consider the legislative history of the statutory restrictions on attorney's fees. Since 1988, Congress has restricted fees on VA appeals by: (1) Prohibiting fees prior to a specific event in the appeal proceeding, and (2) permitting reasonable fees thereafter. VA views the language proposed in § 14.636(c) as being consistent with that scheme. Originally, in 1988, under Public Law 100–687, the Veterans Judicial Review Act, the delimiting point was a decision by the Board, which was the decision that was appealable to the Veterans Court. Then, under Public Law 109–461, the Veterans Benefits, Health Care, and Information Technology Act of 2006, Congress shifted the delimiting point to the Notice of Disagreement, the threshold requirement to receiving a Board decision. Under Public Law 115–55, the delimiting point will shift again, from the Notice of Disagreement to the notice of the initial decision by an AOJ.

As to how VA views Public Law 115–55 in relation to the prior scheme, VA interprets the amendment of section 5904(c) by sec. 2(n) of Public Law 115–55 as merely a means to allow paid representation with respect to the claimant's expanded options for seeking review of an initial decision on a claim. As noted above, prior to Public Law 115–55, to obtain direct review of an AOJ decision, a claimant had to file a Notice of Disagreement. Thus, the filing a Notice of Disagreement was the logical entry point for ensuring that paid representation was available with respect to review of AOJ decisions. However, pursuant to Public Law 115–55, direct review of an AOJ decision may be obtained without filing a Notice of Disagreement. It may be obtained by choosing from three differentiated lanes—filing a Notice of Disagreement, filing a request for higher-level review, and filing a supplemental claim. As a result, to permit paid representation regardless of the form of review, Congress necessarily had to shift the entry point for paid representation to the AOJ decision itself. VA does not view the amendment as altering the general premise that ''VA must have an opportunity to decide a matter before paid representation is available.'' *See* 73 FR 29852, 29868 (May 22, 2008) (the final rule shifting, pursuant to Public Law 109–461, the delimiting point for the restriction of fees). To the extent that there is any variation from this general rule when it comes to evidence submitted shortly after the AOJ's decision, it is explained below.

VA has set forth in § 14.636(c)(1)(i) the circumstances when an attorney or agent may charge a claimant for services in response to an adverse AOJ decision—after the initial decision on the claim. The proposed language referring to when ''an agency of original jurisdiction adjudicating a supplemental claim will be considered the initial decision'' was intended to distinguish an initial decision by an AOJ from review actions made by the same entity while the claimant continuously pursued the matter. VA carefully chose the ''continuously pursued'' language included in the proposed rule. Pursuant to Public Law 115–55, Congress shifted from a single-option appellate system to a multi-option appellate system involving the following three options: a supplemental claim, higher level review by the AOJ, and appeal to the Board. In addition to alternatives for pursuing appeals, the new system allows claimants to pursue appellate options in succession, each relating back to the same AOJ decision for effective date purposes.

VA acknowledges that this approach treats supplemental claims differently based on whether they were filed within one year of a prior decision. If a supplemental claim is filed within one year of a prior decision, the supplemental claim relates back to the claim that gave rise to the earlier claim. As a result, the relevant time period with respect to the supplemental claim overlaps the time period considered in the earlier decision and is considered a continuation of that claim. A supplemental claim filed more than one year after a prior decision, on the other hand, is distinct from the prior decision because it does not overlap with the timeframe considered in the prior decision, and, thus, is the beginning of a new claim for the purposes of assigning an effective date and a new claim—or a new case—for the purpose of determining when attorney fees may be charged. The distinction between the submission of evidence on an AOJ decision for which the review has not expired and the submission of evidence after a AOJ decision has been finally adjudicated, is not a new concept. Pursuant to current 38 CFR 3.156(b), new and material evidence received after an AOJ decision but prior to the expiration date of the appeal period, or prior to the appellate decision if a timely appeal was filed, has long since been considered to have been filed in connection with the initial claims proceeding. In contrast, pursuant to 38 CFR 3.156(a), a finally adjudicated claim could be reopened but the new proceeding would not be treated as a continuation of the prior claim.

Furthermore, unlike supplemental claims that are filed more than one year after an AOJ decision or a Board decision, VA does not have a duty to notify the claimant who files a supplemental claim while continuously pursuing the matter of the information or evidence necessary to substantiate the claim in accordance with 38 U.S.C. 5103. *See* Public Law 115–55, section 2(b). The exclusion of this pro-claimant obligation also favors treating a continuously pursued supplemental claim as part of the matter stemming from the AOJ's initial decision. In contrast, the fact that VA still does have this obligation with respect to supplemental claims filed when the claimant has not continuously pursued the matter only bolsters the conclusion that VA should again be permitted to decide the matter prior to the need for paid representation.

VA has revised proposed § 14.636(c) to clarify VA's position regarding supplemental claims, claims for increase in a rate of disability and requests for revision based on clear and unmistakable error, but has not made

any substantive changes to VA's position.

Finally, turning back to the commenter who asked VA about a claimant's ''continuing obligations'' to a former attorney or agent, VA is amending § 14.636(e) and (f) based on this comment to help clarify a claimant's continuing obligations with regard to fees. Simply because a claimant has discharged an attorney or agent, or the attorney or agent has withdrawn from representation does not eliminate the attorney or agent's right to compensation. But the standard for evaluating a reasonable fee does change. In the typical case, in which an attorney or agent has a contingent fee agreement that does not exceed 20-percent and provides continuous representation from the date of the agreement through the date of the decision awarding benefits, the fee called for in the fee agreement is presumed to be reasonable in the absence of clear and convincing evidence to the contrary. 38 U.S.C. 5904(a)(5); 38 CFR 14.636(f); *see also Scates* v. *Principi,* 282 F.3d 1362, 1365 (Fed. Cir. 2002) (explaining that even if a fee agreement provides for a fee of 20 percent of past-due benefits awarded, implicit in that arrangement is the understanding that the attorney or agent's right to receive the full fee called for in the fee agreement only arises if the attorney or agent continues as the veteran's representative until the case is successfully completed). In contrast, if the attorney or agent's representation of the claimant ends before the date of the decision awarding benefits, the attorney or agent may still be eligible to receive a fee, but the full amount of the fee stated in the agreement generally does not represent a reasonable fee for that attorney or agent. Rather a reasonable fee for a discharged agent or attorney would be limited to the amount of the ''fee that fairly and accurately reflects [the attorney or agent's] contribution to and responsibility for the benefits awarded.'' *Scates,* 282 F.3d at 1366.

Accordingly, VA is amending paragraph (f) of § 14.636 by revising the caption to ''Presumptions and discharge,'' amending the current language to specify that the presumption that a fee of 20 percent of any past-due benefits awarded is reasonable applies ''if the agent or attorney provided representation that continued through the date of the decision awarding benefits,'' and adding a new paragraph (f)(2). Paragraph (f)(2) will explain that a reasonable fee for an agent or attorney who is discharged by the claimant or withdraws from representation before the date of the decision awarding benefits is one that fairly and accurately reflects his or her contribution to and responsibility for the benefits awarded and that the amount of the fee is informed by an examination of the factors in § 14.636(e). VA has also amended paragraph (e) of § 14.636, which lists factors considered in determining whether a fee is reasonable, to add as a factor, when applicable, ''the reasons why an agent or attorney was discharged or withdrew from representation before the date of the decision awarding benefits.'' *See Scates,* 282 F.3d at 1368.

Beyond these regulatory changes, it is important to remember that VA's Office of General Counsel does not initiate review of the reasonableness of fees in every case. However, this does not mean that a claimant who is unhappy with the representation provided by his or her agent or attorney, or former agent or attorney, is without protection and/or potential recourse. First, pursuant to VA's standards of conduct in 38 CFR 14.632, attorneys and agents are prohibited from charging, soliciting, or receiving fees that are clearly unreasonable, and, if an attorney or agent who is found to have violated this standard of conduct, the attorney or agent would risk losing his or her accreditation to represent claimants before VA. Second, if a claimant believes that the total amount of the fee charged, solicited or received by the attorney or agent was not earned, the claimant may initiate his or her own motion for VA's Office of General Counsel to review of the fee. *See* 38 CFR 14.636(i) (explaining how a claimant initiates a motion requesting a reasonableness review).

Parts 19 and 20—Board of Veterans' Appeals

VA amends the regulations in 38 CFR parts 19 and 20 as described in the section-by-section supplementary information below. These regulations govern appeals and rules of practice for the Board of Veterans' Appeals.

A. Comments Concerning § 19.2—Appellant's Election for Review of a Legacy Appeal in the Modernized System

Proposed 38 CFR 19.2(d) discussed the manners in which appellants with claims or appeals pending in the legacy system may elect to have their claims or appeals adjudicated in the modernized review system. One commenter requested clarification regarding the effect of the phrase ''pursuant to the Secretary's authorization to participate in a test program'' in 38 CFR 19.2(d)(3), given that 38 CFR 19.2(d)(1) also addresses election into a test program; specifically, the Rapid Appeals Modernization Program (RAMP). The commenter did not suggest any changes.

Section 4(a) of the AMA of 2017 authorizes VA to conduct test programs to evaluate the assumptions used to develop a plan for processing legacy appeals and supporting the new appeals system. Although RAMP is one such program, CFR 19.2(d)(3) acknowledges the more general authority to conduct test programs that was granted by Section 4(a) of the Appeals Modernization Act. That authority was used to conduct the Board's Early Applicability of Appeals Modernization (BEAAM), a small-scale research program conducted to assess preliminary data about veterans' choices and experiences in the modernized review system. VA makes no changes based on this comment.

B. Comments Concerning § 19.30—Furnishing the Statement of the Case and Instructions for Filing a Substantive Appeal; and § 19.31—Supplemental Statement of the Case

One commenter expressed concern regarding the notice provided to claimants in statements of the case. The commenter remarked that VA should provide adequate notice to enable a veteran to make a fully informed decision as to which review option is most appropriate. However, the commenter did not suggest a specific regulatory change. As an initial matter, VA notes that statements of the case and supplemental statements of the case are not contemplated under the Appeals Modernization Act framework, but will be provided in legacy claims. To that end, VA agrees that the notice provided with statements of the case and supplemental statements of the case must contain adequate information as to the claimant's opportunity to opt into the new system pursuant to section 2, paragraph (x)(5) of the AMA. In order to clarify this procedure, VA has amended 38 CFR 3.2400(c)(2) and 19.2(d)(2) to provide that elections to opt into the new system must be made on a form prescribed by the Secretary.

C. Comments Concerning § 19.35—Certification of Appeals

One commenter noted that while proposing to remove the requirement for VA Form 8 contained in § 19.35, VA indicated in the preamble that certification for legacy appeals will be accomplished ''by other means.'' This commenter asked for clarification of what these other means will entail. VA is not changing the process by which appeals are certified to the Board, VA is merely no longer requiring the

prescribed use of the VA Form 8. Veterans and representatives will still receive a letter indicating their appeal has been transferred to the Board and will still be able to determine the status of their appeal by checking their claims file.

Another commenter expressed concern that the administrative delay of certification may impact the evidentiary timelines under the Appeals Modernization Act. Under the Appeals Modernization Act, an appeal is under the Board's jurisdiction once a valid Notice of Disagreement is filed. Therefore, it is the filing of the Notice of Disagreement, not certification, that will determine the evidentiary timeline. Certification is not consistent with the design of the Appeals Modernization Act. VA makes no changes based on these comments.

D. Comments Concerning § 20.3—Definitions

A commenter expressed concern that the elimination of the phrase ''argument and/or'' from the definition contained in 38 CFR 20.3(h) could be interpreted as a means to limit or eliminate arguments from accredited representatives at a Board hearing. VA directs the commenter to § 20.700(b), which states, ''The purpose of a hearing is to receive argument and testimony relevant and material to the appellate issue or issues.'' VA assures the commenter that the change to § 20.3(h) does not, and was not intended to, limit arguments from representatives. Rather, the change was merely to eliminate redundant language that is already contained in § 20.700(b). VA will continue to accept argument from accredited representatives at a Board hearing. VA makes no changes based on this comment.

E. Comments Concerning Former § 20.102—Delegations of Authority—Rules of Practice; § 20.108—Delegation of Authority to Chairman and Vice Chairman, Board of Veterans' Appeals; and § 20.109—Delegation of Authority to Vice Chairman, Deputy Vice Chairmen, or Members of the Board

Two commenters expressed concern that the proposed deletion of § 20.102 means the delegation of authority rule of practice is being removed from the Board of Veterans' Appeals. VA assures these commenters that the delegation of authority described remains in §§ 20.108 and 20.109. The proposed deletion of § 20.102 is merely to eliminate redundant language. Therefore, VA makes no changes based on this comment.

F. Comments Concerning § 20.104—Jurisdiction of the Board

A commenter expressed concern that VA proposed deleting the following language from § 20.104, ''In its decisions, the Board is bound by applicable statutes, the regulations of the Department of Veterans Affairs and precedent opinions of the General Counsel of the Department of Veterans Affairs.'' This commenter felt the removal of this language suggested the Board would no longer be bound by precedential opinions of the General Counsel. VA assures the commenter that the change to § 20.104 does not, and was not intended to, suggest the Board is not bound by precedential opinions of the General Counsel. Rather, this change was merely to eliminate redundant language that is already contained in § 20.105. VA makes no changes based on this comment.

G. Comments Concerning § 20.105—Criteria Governing Disposition of Appeals

A commenter suggested VA take this rulemaking to modify 38 CFR 20.105 to clarify the precedential or persuasive value of manual provisions. As explained in § 20.105, ''The Board is not bound by Department manuals, circulars, or similar administrative issues.'' VA makes no changes based on this comment.

H. Comments Concerning § 20.202—Notice of Disagreement

VA received serveral comments concerning § 20.202, and will therefore address these comments by topic, as follows.

1. Comments Concerning § 20.202(a)—''Specific Determination''

Commenters remarked that the term ''specific determination'' as used in § 20.202(a) should be defined. An additional commenter also asked if a veteran could indicate they were appealing ''all issues.'' The language ''specific determination'' was included in the statute. However, VA agrees that it would be useful to further define this term in the regulation. VA therefore amends § 20.202(a) to require identification of the decision and the specific issue or issues therein with which the claimant disagrees. The amended language references the definition of issue in 38 CFR 3.151(c). This change will better inform claimants of the scope of the identification requirement and aligns it with other AMA implementation definitions.

The Notice of Disagreement needs to contain sufficient information for VA to determine the issue and adjudication with which the veteran disagrees. The design of the new Notice of Disagreement form prompts the veteran to provide the issue and the date of decision with which the veteran is disagreeing. Additionally, § 20.202 notes that ''[t]he Board will construe such arguments in a liberal manner for purposes of determining whether they raise issues on appeal.'' This language protects the rights of a veteran who, for example, incorrectly identifies the date of the agency of original jurisdiction decision, but does provide enough information that VA is able to identify the issue and decision on appeal. Determination of whether an adequate Notice of Disagreement was filed falls within the Board's jurisdiction. 38 U.S.C. 7105(b)(1)(C). As the proposed rule makes clear, the Board will construe Notices of Disagreement in a liberal manner for purposes of determining whether they raise issues on appeal. Finally, if the Board receives an unclear Notice of Disagreement on the form prescribed by the Secretary and the Board cannot identify which denied issue or issues the claimant wants to appeal, or which option the claimant intends to select, the Board will seek clarification of the Notice of Disagreement before dismissing the appeal. Therefore, VA makes no changes based on this comment.

2. Comments Concerning § 20.202(b)(3)—Submission of Evidence in Conjunction With Notice of Disagreement

Two commenters noted that 38 CFR 20.202 provides time limits on the veteran's opportunity to submit additional evidence or modify the Notice of Disagreement to elect a different evidentiary lane, starting from the date that the Board receives the Notice of Disagreement. The commenters expressed concern that VA does not provide adequate notice as to when it received the Notice of Disagreement and therefore the veteran will not be able to calculate the relevant deadlines. VA has carefully considered this comment and has determined that no changes to the regulatory amendments are required. It is currently the Board's practice to notify veterans and representatives when an appeal has been received and docketed at the Board. As the precise procedures for providing such notice may change based on technological systems, as well as other resources, VA will continue to address this matter through internal procedural guidance consistent with the law and regulations. VA makes no changes based on this comment.

3. Comments Concerning § 20.202(c)—Policies on Modifying the Notice of Disagreement and Changing Dockets

Several commenters expressed concern with the policies on modifying the Notice of Disagreement and switching dockets in §§ 20.202(c) and 20.800(a)(2). Under § 20.202(c), a veteran may request a different evidentiary docket than the one selected on the Notice of Disagreement, as long as the request is made within one year of the notice of the agency of original jurisdiction decision, or within 30 days of receipt of the Notice of Disagreement, whichever is later. This policy accounts for the common situation in which a veteran files the Notice of Disagreement at the end of the one-year period, and does not retain representation until after the Notice of Disagreement is filed. The policy reflected in the proposed rule provided an additional 30 days after the filing of the Notice of Disagreement so that the representative has an opportunity to recommend that the veteran modify the initial choice of an evidentiary record. However, if a veteran has already submitted evidence or testified at a Board hearing, the request will be denied. If a veteran requests to switch into the docket allowing submission of additional evidence, he or she will have 90 days to submit additional evidence. The 90-day window will begin on the day that VA issues a letter notifying the veteran that the request to switch dockets has been granted. Veterans who request to switch dockets will retain their original docket date, based upon VA's receipt of the Notice of Disagreement. Therefore, there is no ''penalty'' for switching dockets.

Two commenters asserted that the one-year period referenced in § 20.202(c) is not authorized by statute and recommended a more liberal policy. VA does not agree with the statement that the policy developed by VA is not authorized by the statute. The amendments to 38 U.S.C. 7107(e) authorize the Secretary to ''develop and implement a policy allowing an appellant to move the appellant's case from one docket to another docket.'' The statute places no restrictions on the agency's discretion to impose a time limitation in such policy. Congress acknowledged this fact in H. Rept. 115–135, noting that, ''H.R. 2288 does not mandate that VA allow veterans to switch from one option to another. It is expected that the Secretary will use their discretion to develop policies that are in the best interest of veterans.''

Turning to a commenter's suggestion that veterans should have unlimited time in which to switch dockets, VA does not view this policy as consistent with the design of the new system. Allowing the veteran unlimited time to modify their Notice of Disagreement would create an unfair result for other veterans. VA has established a 365-day average processing time goal for appeals in the direct review docket. VA may not be able to meet this commitment if some veterans are able to enter the direct docket ahead of other veterans who have been waiting on that docket. VA is also committed to transparency, including providing veterans with accurate data about average processing time on all three dockets. In the new system, veterans have many choices to tailor their experience to best suit their individual needs, and this data will inform their choices. Allowing some veterans to switch dockets at any time in the process will make it difficult for VA to provide accurate data to all veterans, effectively taking away their ability to choose the best path. Moreover, the primary goal of the Appeals Modernization Act is to create a better, more efficient claims and appeals system that works for veterans. In the current legacy system, appellants may add evidence, request a hearing, or withdraw a hearing request at any time. Allowing appellants to switch lanes at any time would mimic this feature of the legacy system and preclude the efficiencies built into the new system, and would thus be contrary to Congress' intent.

To that end, the Congressional Budget Office (CBO) determined that section 2 of the AMA, directing VA to implement the new process to handle appeals of claims for veterans' benefits, would be cost neutral. CBO noted that, ''the current system allows for repeated revisions and resubmissions of claims . . .'' resulting in wait times of three to six years and a backlog of approximately 470,000 claims. CBO further noted that the ''proposed changes are intended to significantly streamline the appeal process, which would allow appeals to be finalized in a shorter period of time and require the efforts of fewer employees . . . [E]fficiencies of the new system would allow the agency to continue processing legacy appeals under the current system, very gradually reducing the existing backlog, without the need for additional employees.''

Several commenters have suggested that the policy deprives veterans of some of the options available in the new appeals system, because they may not understand the ramifications of their initial review lane choice. In particular, one commenter suggested that a veteran who has been waiting for a long time in the hearing docket should be able to move to the direct docket. Another commenter expressed concern with the policy disallowing a change in dockets if the veteran had already submitted evidence with the Notice of Disagreement. The commenter suggested that VA should consider allowing veterans who had already submitted evidence to subsequently request a hearing. The commenter expressed that this change would not provide an unfair advantage to the veteran, but would allow a veteran whose circumstances had changed to request a hearing before the Board.

The Appeals Modernization Act provides several new choices for veterans seeking review of a VA decision. VA encourages veterans to seek the advice of their authorized representative, if any, as soon as possible when determining which option best suits their individual circumstances and to consider published average wait times associated with each option. VA understands that circumstances may change to the extent that a different option is preferable to the one initially chosen. As noted above, however, VA has carefully balanced the needs of a veteran wishing to switch dockets against the needs of all the other veterans waiting for the Board to decide their appeals. The proposed policy provides an opportunity for a veteran to switch dockets without creating an unfair disadvantage to other veterans who wish to continue with their initial choice, but might experience longer wait times as a result of others switching dockets.

Nevertheless, VA recognizes that exceptional circumstances may sometimes warrant extensions of the time period to switch dockets on an individual basis. Accordingly, VA amends § 20.203 to add paragraph (c), which provides that the time limit for filing a Notice of Disagreement or a request to modify a Notice of Disagreement may be extended if the Board grants the appellant's motion for good cause. Examples of good cause may include serious illness or injury of the appellant or representative, or the appellant's inability to access mail services due to homelessness, overseas deployment, or other reasons. Examples that would not constitute good cause include change in representation, change in preference of a review option at the agency of original jurisdiction or among the Board review options, difficulty in obtaining evidence, or discovery of new evidence during a period in which the duty to assist does not apply.

In addition to the above, another commenter stated that knowing wait time predictions (which is linked with timeliness goals) is important at the time the initial rating decisions are made under the new system so that claimants can make an informed decision about which Board docket to choose in a Notice of Disagreement. VA will be publishing wait times pursuant to the law, but this is not a reason for any regulation change.

VA does make a change to § 20.202(c) in response to comments on a related **Federal Register** notice. Because the Notice of Disagreement form is not a new information collection, but a revised information collection under OMB control number 2900–0674, it was not published with the proposed rulemaking. Rather, notice of the proposed changes to 2900–0674 was published in the **Federal Register** on August 23, 2018, pursuant to the Paperwork Reduction Act. 83 FR 42769. One commenter suggested changes to the Notice of Disagreement for the purpose of clarifying the procedures for modifying the Notice of Disagreement. The commenter recommended that VA use a standard form for Notice of Disagreement modifications. VA agrees with the commenter, and in order to address the commenter's concerns, VA has amended the procedures described in § 20.202(c) to state that requests to modify a Notice of Disagreement for the purpose of selecting a different review option must be made by filing a new Notice of Disagreement form.

Several commenters remarked that the policy does not provide enough time to change the initial election in the event that the veteran does not retain representation until after the Notice of Disagreement is filed. This concern was originally addressed in the policy by providing an additional 30 days following receipt of the Notice of Disagreement. Moreover, the Appeals Modernization Act has shifted important decision points for veterans seeking review of a VA decision to earlier in the process. Under the new system, the expert advice of representatives will, in many cases, be beneficial to veterans as soon as possible following VA's initial decision on their claim. Veterans may wish to rely on a representative to assist them in choosing the review option that best suits their needs. However, VA acknowledges that some veterans will not retain representation until after they file a request for review. In light of the commenter's concerns, VA has amended the policy in § 20.202(c)(2) to provide an additional 60 days following receipt of the Notice of Disagreement, instead of 30. VA hopes that this additional time will assist veterans' representatives in better serving their clients.

4. Comments Concerning § 20.202(d) and (e)—Use of Non-Standard Form

Under proposed § 20.202(d), the Board will not accept a Notice of Disagreement ''submitted in any format other than the form prescribed by the Secretary, including on a different VA form.'' Section 20.202(e) provides that the filing of an alternate form or other communication will not extend, toll, or otherwise delay the time limit for filing a Notice of Disagreement, as provided in § 20.203(b). Several commenters requested that the Board provide notice if it rejects a communication under the circumstances described in § 20.202(d) and (e). As an initial matter, the statute requires that Notices of Disagreement are filed on a standard form. VA implemented standardized forms procedures in 2014. See Standard Claims and Appeals Forms, 79 FR 57660 (Sept. 25, 2014). This 2014 rule amended VA's adjudication and appeal regulations to require that all claims and appeals originate on standard VA forms. Therefore, claimants should be aware that VA will not accept Notices of Disagreement submitted in any format other than the form prescribed by the Secretary. VA is developing procedures for notifying claimants when a communication cannot be accepted as a Notice of Disagreement. As the precise procedures for providing such notice may change based on technological systems, as well as other resources, VA will continue to address this matter through internal procedural guidance consistent with the law and regulations. Moreover, VA has a longstanding practice of providing the status of an appeal or communication upon request. VA makes no changes based on this comment.

5. Comments Concerning § 20.202(f) and (g)—Clarification of Notice of Disagreement

One commenter remarked that a Notice of Disagreement could be rejected by the Board after the Board requested clarification because the clarification was received one year after the agency of original jurisdiction decision. This concern is addressed in §§ 20.202(f) and 20.202(g). If within one year after mailing an adverse decision (or 60 days for simultaneously contested claims), the Board receives an unclear Notice of Disagreement completed on the form prescribed by the Secretary, then the Board will contact the claimant to request clarification of the claimant's intent. The claimant must respond to the Board's request for clarification on or before the later of 60 days after the date of the Board's clarification request or one year after the date of mailing of notice of the adverse decision being appealed (60 days for simultaneously contested claims). VA will follow the provisions of §§ 20.202(f) and 20.202(g), as well as the statute, 38 U.S.C. 7105(b)(1)(C), which provides that questions as to timeliness or adequacy of the Notice of Disagreement shall be decided by the Board.

An additional commenter requested that VA provide a period longer than 60 days for clarification of a Notice of Disagreement and provide good cause exception to the rule. The proposed rule providing 60 days for clarification is based on the current regulation § 19.26, which provides 60 days for clarification of an unclear Notice of Disagreement received under the current system. We are not aware of hardship resulting from the current rule. Therefore, VA makes no changes based on these comments.

The same commenter wanted to know how the Board will contact veterans to request clarification. VA will contact veterans via oral, written, or other means. The commenter did not put forth a specific recommendation; therefore, VA makes no changes based on this comment.

I. Comments Concerning § 20.203—Place and Time Filing Notice of Disagreement

One commenter suggested that, when a veteran selects either the Supplemental Claim or Higher-Level Review options, the one-year time limit to file a Notice of Disagreement must be tolled. The commenter is mistaken as to this aspect of the new system framework. Pursuant to the AMA, a veteran may choose to file a Notice of Disagreement within the one-year period following an initial agency of original jurisdiction decision on a claim, a decision on a Supplemental Claim, or a decision on a Higher-Level Review. Such filing will protect the effective date for any granted benefit. VA makes no changes based on this comment.

Commenters remarked that § 20.203(b) uses the term ''determination'' as it relates to the requirement of filing a Notice of Disagreement whereas the term ''decision'' is used in section §§ 3.103, 3.104, and 3.2500. VA proposed the term ''determination'' in § 20.203(b) as this is the term used in the Appeals Modernization Act to describe the determination with which the claimant disagrees. However, VA agrees with the commenters' concerns that use of ''determination'' will lead to confusion,

and therefore amends § 20.203(b) to instead use the term ''decision''. This change does not alter the requirement in § 20.202(a) to identify to specific decision and issue or issues therein with which the claimant disagrees.

A commenter questioned whether Notices of Disagreement or other communications can be digitally submitted to the Board through Direct Mail Upload or electronically submitted through a VA Regional Office and still be considered as received by the Board. The commenter expressed concern that these provisions encourage the use of the paper mail versus the use of electronic/digital submissions. Additionally, the commenter suggested that the Board's mailing address should be reflected on standard forms but not the regulations.

Pursuant to 38 U.S.C. 7105(b)(2)(C), notices of disagreement shall be filed with the Board. Therefore, notices of disagreement may not be filed with a VA Regional Office. As to the commenter's suggestion that the Board's mailing address should not be contained in regulation, the Board is statutorily required to receive notices of disagreement and motions directly from parties. It has been VA's longstanding policy to inform the public and settle in law the mailing address to which those submissions must be sent. VA makes no changes based on this comment.

A commenter expressed concern regarding VA's procedures for mailing notice to representatives, and in particular the provisions of proposed 38 CFR 20.203(b), regarding timeliness of a Notice of Disagreement. The commenter asserted that the 90-day evidence window for cases described in § 20.302 should begin on the date that the appellant is notified of VA's receipt of the Notice of Disagreement, rather than on the date of VA's receipt of the Notice of Disagreement. Pursuant to 38 U.S.C. 7113(c)(2), however, the evidentiary record for such cases shall include evidence submitted ''within 90 days following receipt of the Notice of Disagreement.'' Accordingly, VA will follow the statute and will make no changes based on this comment.

The same commenter disagreed with the agency's presumption, pursuant to § 20.203(b), that notice of a VA decision was mailed on the date of the letter. The commenter contended that VA correspondence to representatives is often postmarked after the date of the letter. The commenter submitted several letters and postmarked envelopes from VA to individual veterans in support of this argument. Pursuant to 38 U.S.C. 7105(b)(1)(C), questions as to timeliness or adequacy of the Notice of Disagreement shall be decided by the Board, which is consistent with the fact that the presumption of regularity is rebuttable. We further note that the possibility that the presumption might be rebutted in a non-trivial number of cases does not establish that it is inappropriate in a system the size of VA's claims system, which receives and sends millions and millions of pieces of mail each year. Finally, operational issues of the type mentioned by the commenter are more appropriately addressed at the sub-regulatory policy level.

Commenters raised concerns that VA would not extend the filing deadline for requests for review of a decision. Accordingly, VA amends § 20.203 to add paragraph (c), which provides that the time limit for filing a Notice of Disagreement or a request to modify a Notice of Disagreement may be extended if the Board grants the appellant's motion for good cause. Examples of good cause may include serious illness or injury of the appellant or representative, or the appellant's inability to access mail services due to homelessness, overseas deployment, or other reasons. Examples that would not constitute good cause include change in representation, change in preference of a review option at the agency of original jurisdiction or among the Board review options, difficulty in obtaining evidence, or discovery of new evidence during a period in which the duty to assist does not apply.

Additionally, VA corrects a technical error in the title of § 20.203, amending ''Place and time filing Notice of Disagreement'' to read Place and time of filing Notice of Disagreement''.

J. Comments Concerning § 20.205—Withdrawal of Appeal

One commenter remarked that VA should include clarifying language regarding withdrawal of appeals to ensure that VA only withdraws claims when that is the veteran's intention. Initially, VA notes that this is outside the scope of the Appeals Modernization Act. However, VA is still bound by the caselaw governing adequate withdrawals of claims and appeals. Nothing in the Appeals Modernization Act limits this governing caselaw. VA makes no changes based on this comment.

One commenter remarked that § 20.205(c) is outside the scope of the Appeals Modernization Act. Section 20.205(c) provides that the withdrawal of an appeal does not preclude the filing of a new Notice of Disagreement, a request for higher-level review, or a supplemental claim as to any issue withdrawn provided such filing would be timely if the withdrawn appeal had never been filed. The commenter states that there is no justification for VA to require the refiling to be done within the initial one year period once a timely Notice of Disagreement has been submitted. The Appeals Modernization Act also provides the Secretary the authority to develop and implement a policy for claimants who wish to withdraw their Notice of Disagreement. The Appeals Modernization Act clearly provides the claimant one year to seek review of the agency of original jurisdiction determination. Therefore, this time period is incorporated into § 20.205(c). Accordingly, § 20.205(c) is not outside the scope of the Appeals Modernization Act, and VA makes no changes based on this comment.

Commenters suggest that VA should allow a claimant to withdraw an appeal at the Board in order to file a supplemental claim with VBA prior to receiving a Board decision. The Appeals Modernization Act specifically states that for ''purposes of determining the effective date of an award . . . the date of application shall be considered the date of the filing of the initial application for a benefit if the claim is continuously pursued by filing . . . A supplemental claim . . . on or before the date that is one year after the date on which the Board of Veterans' Appeals issues a *decision*'' 38 U.S.C. 5110(a)(2)(D) (emphasis added). Accordingly, the preservation of the effective date provisions of the Appeals Modernization Act generally would not apply to a claimant who withdraws an appeal at the Board and files a supplemental claim with VBA prior to receiving a Board decision if more than one year has passed since the agency of original jurisdiction determination. However, the agency of original jurisdiction may consider a request for extension of the one-year period in which to file a supplemental claim in these circumstances while maintaining continuous pursuit of the claim (see, *e.g.,* § 3.2500(e)(2)). Accordingly, VA makes no changes to this section based on these comments.

K. Comments Concerning Part 20, Subpart D—Evidentiary Record

One commenter requested clarification regarding how VA will adjudicate increased rating claims. The evidentiary record before the Board is defined by the Appeals Modernization Act. The Appeals Modernization Act did not change the substantive case law governing increased rating claims. Accordingly, VA makes no change to the regulations based on this comment.

One commenter suggested that evidence submitted to (or constructively received by) the agency of original jurisdiction after a supplemental claim is adjudicated should be later reviewable by the Board when an Notice of Disagreement is filed, even if the veteran selects the Board lane precluding submission of new evidence. This is contrary to the statutory design of the system. Statutory section 7113 provides that the record before the Board consists of the record before the agency of original jurisdiction at the time that the supplemental claim was adjudicated. This rule is clearly mirrored in § 20.301.

If a veteran wants to have VA consider evidence not received by VA when the record before the agency of original jurisdiction was open, the available options are to (a) file another supplemental claim with new and relevant evidence or (b) file a Notice of Disagreement, select a Board lane allowing submission of new evidence, and submit the evidence during the applicable 90-day window as provided in §§ 20.302 and 20.303. Therefore, VA makes no changes based on these comments.

The regulations as proposed require the Board to notify a veteran in a Board decision if the Board did not consider evidence that had been submitted outside the allowed time period. One commenter asserted that the regulations should require the Board to additionally notify the veteran at the time such evidence is received by the Board. The commenter asserted that waiting to provide such notice until issuance of the Board decision creates needless confusion and delay. As we discuss above in the context of VBA decisions, VA does not have resources available to quickly identify evidence submissions as untimely and provide notice to the veteran. VA must prioritize processes which increase efficiency and reduce average processing times, so that the new system as a whole will be successful. As the Federal Circuit has stated, ''VA possesses a duty not only to individual claimants, but to the effective functioning of the veterans compensation system as a whole. Moreover, because the VA possesses limited resources, these dual obligations may sometimes compel it to make necessary tradeoffs.'' *Veterans Justice Grp, LLC* v. *Sec'y of Veterans Affairs,* 818 F.3d 1336, 1351, 1352, 1354 (Fed. Cir. 2016). However, VA will take the comment under consideration, and will explore the possibility of developing additional procedures for identification of untimely evidence in the future to the extent technological and other resources lessen the associated administrative burden. VA further notes that there are already procedures in place to inform veterans of the applicable evidence submission periods and the consequences of untimely evidence submission. When veterans receive notice of their initial decisions, they are informed of their available review options and the periods during which they may submit evidence based on the options they select. Furthermore, as the commenter acknowledged, if evidence is received untimely from a veteran, he or she is informed of that fact when a Board decision is issued, pursuant to proposed 38 CFR 20.801(b)(3). A veteran may resubmit the evidence with a supplemental claim within one year of the Board's decision and preserve the effective date associated with his or her appeal to the Board. VA makes no changes based on this comment.

Under 38 CFR 20.302(a), when a Board hearing is requested in the Notice of Disagreement, the Board's decision will include consideration of testimony and evidence submitted by the appellant or his or her representative at the hearing and within 90 days following the hearing. Under 38 CFR 20.303(b), when a Board hearing is not requested, but the veteran elects to submit additional evidence, the Board's decision will include consideration of evidence submitted with the Notice of Disagreement and within 90 days following receipt of the Notice of Disagreement. Several commenters expressed concern or confusion regarding these proposed evidence submission periods.

Specifically, one commenter expressed concern that veterans who submit evidence prior to a hearing will not be notified that such evidence may not be considered by the Board unless it is resubmitted during the 90-day period following the hearing. The commenter suggested that the Board advise the appellant on the types of actions available and that the evidence needs to be presented at the hearing to be considered by the Board. Additionally, the commenter expressed appreciation for the discretionary provisions contained in § 20.302(b) and (c), which allows for a 90-day evidence submission period even when a hearing request is withdrawn or the appellant does not appear for a scheduled hearing.

When veterans receive notice of their initial decisions, they are informed of their available review options and the periods during which they may submit evidence based on the options they select. Pursuant to § 20.705(b), a Veterans Law Judge presiding over a hearing may find it appropriate to discuss applicable evidence submission rules and how those rules apply to an individual veteran's circumstances. Furthermore, if evidence is received untimely from a veteran, he or she will be informed of that fact (and the options available to have that evidence reviewed) when a Board decision is issued, pursuant to section 7104(d)(2) as implemented in proposed 38 CFR 20.801(b)(3). In light of the statutory direction to provide notice in the Board decision and the procedures already in place in the proposed regulations to inform veterans of the applicable evidence submission periods and consequences of untimely evidence submission, VA makes no changes based on this comment.

One commenter asserted generally that limiting veterans' ability to submit evidence to certain time periods represented a shortcoming in the new system. Another commenter stated that the 90-day evidence submission window was concerning regarding FOIA requests, specifically, since FOIA procedures take time to complete. Finally, another commenter suggested that representatives do not have an opportunity to review the claims file, compile relevant evidence, and submit argument in support of the veteran's appeal prior to issuance of a Board direct review decision, and that a reasonable time period for submission of a written statement addressing relevant evidence and argument must be written into the regulations. Although the modernized review system confines evidence submission to certain periods, the statute and proposed regulations do not—apart from creating a faster review process—restrict a representative's ability to submit argument. The design of the system favors advocacy early in the appeals process because this is the most efficient way to reach a comprehensive and speedy decision. VA is confident that veterans' advocates will be able to meet this expectation. VA made no changes based on these comments.

Another commenter, in addressing proposed 38 CFR 20.302 and 20.303, expressed concern that those regulations created a timeframe, between the agency of original jurisdiction's initial decision and the Board hearing, or the agency of original jurisdiction's initial decision and submission of a Notice of Disagreement, during which a veteran could introduce evidence into the record that would not be considered by the Board. The commenter recommended that VA include provisions allowing for submission of evidence during those periods, in part because the commenter interpreted the

provisions for evidence submission in 38 CFR 20.302 and 20.303 as inconsistent with each other.

The proposed time periods for evidence submission included in 38 CFR 20.302 and 20.303 are not inconsistent with each other. Rather, they represent two separate review options defined by the statute. For each option, the statute clearly specifies what evidence is included in the record before the Board based on when the evidence is submitted. Because the proposed regulations track the plain language of the statute, no changes will be made in response to the comment. VA notes that, should a veteran submit evidence untimely, he or she generally may resubmit the evidence with a supplemental claim within one year of the Board's decision and preserve the effective date associated with the appeal to the Board. VA makes no changes based on these comments.

Finally, two commenters' discussions reflected general confusion regarding the timeline for submitting additional evidence under 38 CFR 20.303(b), where the veteran elects in the Notice of Disagreement to submit additional evidence without a Board hearing. One commenter asked if a veteran had a total of 150 days to submit additional evidence following the initial decision—60 days after the initial decision and 90 days after submission of the Notice of Disagreement. Another commenter remarked that claimants only have 60 days to appeal to the Board, which is not enough time to compile relevant evidence. VA initially notes that the commenters are mistaken that veterans only have 60 days to appeal to the Board—this deadline only applies to simultaneously contested claims. In other cases, the veteran has one year from the date of notice of a VA decision to appeal to the Board. However, if the evidence submission option is chosen (but no hearing), the veteran may submit evidence with the Notice of Disagreement and then has a total of 90 days, starting on the day the Notice of Disagreement is received, to submit additional evidence for consideration by the Board. Evidence submitted before or after this 90-day window will not be considered by the Board. The commenters did not suggest specific amendments; therefore, VA makes no changes based on these comments.

L. Comments Concerning § 20.600—Applicability

One commenter stated that the regulations concerning hearings on appeal did not clearly identify which rules pertain to legacy appeals and referenced the applicability provision at § 20.600(b). The commenter suggested generally that, to avoid confusion, VA provide more clarity in this area. The commenter did not make a specific suggestion for change. VA has attempted in the regulation to be as clear as possible regarding which regulations apply to legacy claims and which apply to claims in the modernized review system. For this reason, and because the commenter did not make a specific suggestion for change, VA made no changes based on the comment.

M. Comments Concerning § 20.602—When a Hearing Before the Board of Veterans' Appeals May Be Requested in a Legacy Appeal; Procedure for Requesting a Change in Method of Hearing; and § 20.703—When a Hearing Before the Board of Veterans' Appeals May Be Requested; Procedure for Requesting a Change in Method of Hearing

Proposed 38 CFR 20.602 and 20.703 describe how the Board will determine the method of a requested hearing in the legacy and modernized review systems, respectively. One commenter asserted that the Board should continue to allow veterans to select from among available hearing options, rather than the Board making the initial selection based on the earliest practical date and allowing the veteran one request for a change in hearing method. Amendments to hearing regulations for legacy and new system appeals are necessary in light of the Jeff Miller and Richard Blumenthal Veterans Health Care and Benefits Improvement Act of 2016, Public Law 114–315. Section 102 of Public Law 114–315, by amending 38 U.S.C. 7107, directs the Board, upon request for a hearing, to determine what type of hearing it will provide an appellant, while affording the appellant the opportunity to request an alternative type of hearing once the Board makes its initial determination. Proposed 38 CFR 20.602 and 20.703 are necessary to comply with Public Law 114–315; therefore, VA makes no changes to the regulations based on this comment.

Another commenter asserted that the hearing method determinations proposed in 38 CFR 20.602 and 20.703 would only be effective if the veteran could choose his or her preferred method. The commenter requested an explanation as to how the Board planned to determine the method of hearing after such a preference was expressed. In accordance with revised section 7107 and the regulations as proposed, if a veteran requests a different hearing method than the one initially assigned by VA, the veteran's request will be honored. However, VA will only honor one such request. As the commenter did not suggest an amendment, VA makes no changes based on this comment.

N. Comments Concerning 20.700—General

One commenter suggested VA retain the option for veterans to submit electronic records of oral argument to the Board of Veterans' Appeals in lieu of participating in a formal hearing. The commenter stated that submitting oral argument would be easier for some veterans, including those who live in a rural area, since it may be difficult for those veterans to travel to the nearest VA facility for a formal hearing. VA proposed removing the provisions to allow for submission of oral recording in light of the benefits of in-person testimony, as well as the ability to submit argument through other means when testifying at an in-person hearing is not practical or desired. Veterans are able to request a video hearing before a Veterans Law Judge, which benefits rural veterans. Veterans are also able to submit photographs and other visual evidence during an appropriate evidentiary window. Finally, veterans and their representatives are able to submit written argument, including an informal hearing presentation.

Section 504 of the Rehabilitation Act requires Federal agencies to provide individuals with disabilities meaningful access to programs, activities and facilities. Section 794(a) of title 29, United States Code, states that ''[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity conducted by any Executive agency.'' VA regulations implementing the Rehabilitation Act are found at 38 CFR part 15. VA is prohibited from ''[d]eny[ing] a qualified individual with handicaps an opportunity to participate in or benefit from the aid, benefit, or service.'' 38 CFR 15.130(b)(1)(i). Also, VA is required to ''furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.'' 38 CFR 15.160(a)(1). The term ''[a]uxiliary aids means services or devices that enable persons with impaired sensory, manual or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs for activities conducted by the agency.'' 38 CFR 15.103.

VA's proposed amendments to 38 CFR 20.700 do not indicate any intent by the Department to forego its obligations under the Rehabilitation Act and implementing regulations. VA did not propose any amendments to 38 CFR part 15. Rather, as required by the Rehabilitation Act and implementing regulations, if an individual has a disability that prevents or limits his or her ability to submit a written argument to the Board or attend a hearing at a VA facility and informs the Board that he or she needs an accommodation that will enable submission of an argument, the Board will make every effort to meet that need, including accepting an oral argument on audio cassette. However, given the fact that 38 CFR part 15 governs Department efforts to ensure that individuals with disabilities can participate in all VA programs and that no one has submitted an oral argument on audio cassette to the Board in recent years, we do not believe it is necessary to maintain the reference to submission of oral argument on outdated technology in the new rule. VA notes that, prior to the changes 38 CFR 20.700 that we proposed and here confirm as final, paragraph (d) of that section made submission of argument by audio cassette available whenever an appellant ''cannot, or does not wish to'' appear. That provision made submission of argument by audio cassette much more broadly available than is necessary to comply with the Rehabilitation Act. Accordingly, the elimination of this provision does not create any tension with VA's continued compliance with its regulations implementing the Rehabilitation Act.

The commenter also states that VA should consider the efficiencies to the adjudication process of submission of recordings in lieu of formal hearings. VA strongly disagrees. Any such efficiencies are greatly outweighed by the benefits of an in-person hearing, the purpose of which is to elicit relevant and material testimony, assess the credibility of witnesses, resolve disputed issues of fact, and pose follow-up questions to witnesses and representatives. 38 CFR 20.700(b).

As for the suggestion that argument submitted on an audio cassette would be ''attractive to the schedules'' of clinics and their clients, VA points out that, under § 20.704(a)(1) and (c), Board hearings are ''scheduled at the convenience of appellants and their representatives with consideration of the travel distance involved,'' and a written request to reschedule a hearing ''may be made at any time up to two weeks prior to the scheduled date of the hearing if good cause is shown.''

VA therefore makes no changes based on these comments.

O. Comments Concerning § 20.705—Functions of the Presiding Member

Three commenters stated that § 20.705(b)(7), allowing Veterans Law Judges to reject evidence presented during a hearing on the basis of irrelevance, contradicts the pro-veteran nature of Veterans' law. The commenter requested that it be removed, asserting that veterans should be permitted to submit whatever evidence they wish into the record and that the Judge would be free to assess the evidence's probative value. Paragraph (b)(7) states that it is the duty of the presiding member to exclude documentary evidence, testimony, and/or argument which is not relevant or material to the issue or issues being considered or which is unduly repetitious. Paragraph (b)(7) may not be used to exclude evidence that is relevant to the issue or issues on appeal. The commenter is correct that veterans may submit evidence and/or testimony into the record, and that the function of the presiding Member is to assess the evidence's probative value. Rather, the purpose of paragraph (b)(7) is to allow the presiding Member to focus hearing testimony on the issue or issues on appeal.

Another commenter expressed concern that VA is seeking to abrogate *Bryant* v. *Shinseki,* 23 Vet.App. 488 (2010) by including paragraph (b)(7). These regulations do not and do not intend to limit the holding of *Bryant.* This regulation will assist in providing a focused, directed hearing which will be as assistive as possible to the veteran in substantiating the claim consistent with *Bryant.* However, based on the commenters' concerns, VA will amend § 20.705(b)(7) to state that the duties of the presiding Member include ''determining whether documentary evidence, testimony, and/or argument is relevant or material to the issue or issues being considered and not unduly repetitious''. This amendment makes clear that VA will not exclude any evidence, but rather, will assist the veteran in focusing on evidence that helps to establish the elements of the claim. For example, if the VA decision on appeal contained a binding favorable finding as to the veteran's current diagnosis, the presiding Member may instruct the veteran that no further testimony or other evidence is needed as to the current diagnosis, as that element of the claim has already been established.

P. Comments Concerning § 20.714—Correction of Hearing Transcipts

A commenter addressed 38 CFR 20.714, which requires a veteran to seek correction of the hearing transcript within 30 days ''after the date that the transcript is mailed'' to the appellant. The commenter explains that this requirement is not accompanied with an assurance that a copy of the transcript will be provided to the veteran (unless requested) and points out that the veteran will not know to ask for the transcript or seek correction within such a limited timeframe unless the Board notifies him or her. Under § 20.712, if the appellant or representative requests a copy of the written transcript in accordance with § 1.577, the Board will furnish one copy to the appellant or representative. It would be unnecessary and wasteful to provide written transcripts where they are not requested; instead the veteran is given the choice to request a transcript. As stated, upon request, the transcript will be provided. VA has made no changes based on these comments.

Q. Comments Concerning § 20.715—Loss of Hearing Tapes Or Transcripts—Motion for New Hearing

In proposing § 20.715, the title read: ''Loss of hearing recordings or transcripts—motion for new hearing.'' The inclusion of the word ''motion'' in the title was an error. Motions are no longer required, as the content of the rule makes clear. This final rule revises ''motion'' to read ''request''.

In regard to § 20.715(a)(2), one commenter stated that a veteran would be unfairly disadvantaged in the event that a recording is lost through no fault of his or her own, and suggested that affording the opportunity to submit argument and evidence within 60 days would be more equitable than only giving the veteran 30 days to respond to a letter asking whether a new hearing was requested.

This rule eliminates the prior requirement that a motion for a new hearing be made by the veteran prior to VA offering a new hearing. This formality proved unnecessary in practice because VA often offered a new hearing without a motion. VA has proposed limiting the time period to 30 days in the interest of expediting the case. It is intuitive that a veteran who had recently appeared for a hearing would be responsive to an offered choice. Giving the veteran a choice in the face of a lost or destroyed recording is consistent with the general theme of the Appeals Modernization Act. Regarding the commenter's suggestion

that VA offer a third option—an additional 60 days to submit evidence or argument in lieu of a new hearing, this is not necessary as this option already exists. The veteran has 90 days following the Board hearing in which to submit evidence and may submit argument at any time prior to the Board decision. Accordingly, the veteran would have already had an opportunity to submit evidence and argument. VA has made no changes in response to this comment.

R. Comments Concerning § 20.800—Order of Consideration of Appeals

One commenter expressed concern that the proposed 38 CFR 20.800 removes the authority of the Chairman of the Board of Veterans' Appeals to expedite (advance on docket) cases on his or her own motion. The commenter is mistaken, as § 20.800 maintains the authority of the Chairman to advance cases on the docket on the Chairman's own motion. (''A case may be advanced on the docket to which it is assigned on the motion of the Chairman . . .'')

Several commenters raised concerns regarding claims in which the veteran chooses to appeal to the Board again following a Board remand and readjudication by the agency of original jurisdiction. Commenters suggested that such appeals must be automatically returned to the Board after the readjudication, and the original docket date restored. Automatically returning appeals to the Board without the veteran's affirmative election would be inconsistent with the AMA. This facet of the current regulatory system means that veterans seeking further review are forced to return to the Board by default, regardless of whether this is their choice, or the most advantageous option. At the same time, the Board is compelled to expend limited resources on cases where the claimant may no longer disagree with VA's decision, delaying adjudication of new appeals.

In contrast, the AMA provides veterans with review choices whenever a VA decision is issued, without regard to whether the decision follows a remand from the Board. A veteran whose case is returned by the Board for readjudication has the same options as a veteran seeking review for the first time. In many instances, one of the agency of original jurisdiction lanes will be a better review option for a veteran whose case is adjudicated following remand, rather than an appeal to the Board. VA makes no changes based on this comment.

S. Comments Concerning § 20.801—The Decision

Multiple commenters asserted that the general statement required under proposed 38 CFR 20.801(b)(3) will not adequately inform veterans of the evidence that was not considered in a Board decision due to untimely submission. The commenters recommended that the Board decision include a more detailed description of the evidence that was not considered, to include noting the date unconsidered evidence was submitted. One of those commenters also asserted that the proposed regulations did not create an avenue for informing a veteran what recourse he or she has when evidence is not considered by VA. The law requires that each decision will contain a general statement indicating whether evidence submitted while the record was closed was not considered, and notice of the options available to have such evidence considered. *See* AMA section 2(w)(2)(C). The information in the decision should be the avenue for the pertinent information the veteran requires to prevail on the claim. As the precise procedures for providing more detailed notice may change based on technological systems, as well as other resources, VA will continue to address this matter through internal procedural guidance consistent with the law and regulations. VA made no changes based on these comments.

T. Comments Concerning § 20.802—Remand for Correction of Error

Several commenters suggested that the Board should expedite claims in which the veteran chooses to appeal to the Board again following a Board remand and readjudication by the agency of original jurisdiction. One commenter specifically stated that § 20.800(e), providing that a new Notice of Disagreement filed after a reajudication by the agency of original jurisdiction will be docketed according to the date of the new Notice of Disagreement, was in conflict with § 20.802(c), which provides that the agency of original jurisdiction must provide for the expeditious treatment of any claim that is remanded by the Board.

VA disagrees that the rules are in conflict. Section 20.802(c) requires that the agency of original jurisdiction treat remands from the Board expeditiously; it does not require expeditious treatment by the Board. This section is consistent with revised 38 U.S.C. 5109, which provides: ''The Secretary shall take such actions as may be necessary to provide for the expeditious treatment, by the Veterans Benefits Administration, of any claim that is returned by a higher-level adjudicator under section 5104B of this title or remanded by the Board of Veterans' Appeals.'' This provision does not apply to the Board. Accordingly, 20.800(e) is consistent with the statute and there is no conflict between §§ 20.800(e) and 20.802(c).

In amending 38 U.S.C. 5104B, Congress chose not to include a requirement that the Board expedite cases re-appealed to the Board following remand. If the Board were to expedite new appeals following remand, adjudication of other appeals at the Board would be delayed. In addition, as discussed above, under the new system the veteran must file a new Notice of Disagreement following the decision on remand to elect review by the Board. The Notice of Disagreement initiates a new appeal at the Board that may challenge the adjudication below on an entirely new basis on a new evidentiary record. Given these factors and Congress' choice to limit the scope of section 5104B, prioritizing adjudication according to the date the Notice of Disagreement is received (within the evidentiary lane selected) achieves a reasonable balance among the interests at stake. VA makes no changes based on these comments.

A commenter questioned how appeals returned from CAVC would be docketed. The AMA did not change the procedures at the Board for expediting cases returned from CAVC. Consistent with 38 U.S.C. 7112, the Board will continue to expedite the adjudication required by a CAVC remand. Notably, CAVC remands require the Board to readjudicate the appeal based upon the same record previously before the Board; accordingly, such appeals would be placed on the same docket that the veteran was on previously. VA makes no changes based on this comment.

A commenter expressed general concerns as to how advisory medical opinions will be implemented pursuant to § 20.802(b). The commenter stated, ''[w]hile 38 [CFR] 20.802(c)(1)(ii) allows thorough consideration of the issues presented in the claim by experienced Board personnel and gives the Board broad authority to request IMOs in remands, we are concerned that this important tool may be buried under the clunky procedures in the regulation.'' The commenter did not offer any specific suggestions or recommendations for this rulemaking, but did suggest that the new procedures placed a greater burden on the veteran to request an advisory medical opinion at the claim stage. The AMA eliminated

the statutory provision which previously authorized the Board to independently request medical opinions, and created a new process by which the Board orders such opinions through remands. 38 U.S.C. 5103A(f)(2)(B). Section 20.802(b) implements the statutory amendments to this process. Therefore, VA makes no changes based on this comment.

A commenter expressed concern that because remanded cases are no longer returned to the Board per the proposed rule, the Board will not be able to ensure that the agency of original jurisdiction complied with all remand directives, consistent with *Stegall* v. *West*, 11 Vet. App. 268, 271 (1999). The commenter urged VA to develop and implement a dedicated quality review methodology for Board remands. The design of the new system provides ample protections to ensure that subsequent adjudicators comply with the Board's remand directives. The AMA requires that any pre-decisional duty to assist error discovered by an adjudicator be cured and that the decision be readjudicated by the agency of original jurisdiction. Following readjudication, the veteran may again request Higher-Level Review, file a Supplemental Claim, or appeal to the Board. If such action is taken within one year, the original effective date will be preserved.

Regarding the commenter's recommendation for dedicated quality review, the Direct Review docket, described in proposed § 20.301, captures quality feedback from appeals in which no additional evidence is added to the record. This allows VA to identify areas in which the claims process can be improved and will allow VA to develop targeted training. VA makes no changes based on these comments.

U. Comments Concerning § 20.1003—Hearing on Reconsideration

A commenter contended that the provision of § 20.1003 precluding a hearing on allowed Motions for Reconsideration unless the veteran had requested a hearing on the underlying Notice of Disagreement violates due process. The commenter remarked that a Motion for Reconsideration is solely based on the Board's decision and therefore should not be affected by the Notice of Disagreement, which was filed prior to the Board's decision. As laid out in § 20.1003, hearings are only provided if a motion for reconsideration has been allowed. Once allowed, the Chairman will assign a panel to adjudicate the underlying issues that were before the Board. This means the reconsideration panel continues to adjudicate pursuant to the Notice of Disagreement which led to the prior Board decision. Under the Appeals Modernization Act, the Notice of Disagreement indicates the claimant's selection of a Board review option. For consistency purposes and because reconsideration is an adjudication pursuant to the Notice of Disagreement, VA makes no changes based on this comment.

V. Comments Concerning § 20.1103—Finality of Determinations of the Agency of Original Jurisdiction Where Issue Is Not Appealed

Two commenters were concerned that § 20.1103 did not make clear the continued applicability of §§ 3.105 and 3.156(c) to all claims. Additional commenters recommended adding a reference to CUE and 38 CFR 3.105 in proposed § 20.1103. VA agrees that prior to the initial decision on the claim VA must consider VA records as explained in *Bell* v. *Derwinski*, 2 Vet. App. 611 (1992). The Bell doctrine of constructive possession will continue to apply, unchanged, while the duty to assist applies. This means that until the veteran receives the notice of decision of his claim or supplemental claim, all treatment records in the agency's possession are deemed associated with the veteran's file. The other commenter wanted VA to include a reference to § 3.156(c) in proposed regulation § 20.1103; this is unnecessary because § 3.156(c) was untouched by the Appeals Modernization Act. Neither inclusion is necessary, and VA makes no changes based on these comments.

W. Comments Concerning § 20.1302—Death of Appellant During Pendency of Appeal Before the Board

A commenter suggested that VA should modify 38 CFR 20.1302 to provide that a substituted appellant will have similar timeframes to those the veteran would have had in the modernized appeal system. The language of 38 CFR 20.1302 already provides this policy. The amended rule provides that a substituted appellant will assume the veteran's appeal in its original place on the docket. That means, the substituted appellant will maintain the same evidentiary timeframes of the docket the veteran selected. Furthermore, the substituted appellant will be free to submit argument in support of their appeal. VA makes no changes based on this comment.

X. Comments Concerning § 20.1304—Request for a Change in Representation

A commenter suggested that the timeframe for changing representation should mirror the timeline for submitting evidence, so that if the record is closed the veteran is no longer able to switch representation. This commenter explained once the record is closed, representation is ''seriously constrained as to the strategy of the appeal at that stage.'' VA proposed to maintain the 90-day window to change representation once an appeal is at the Board in § 20.1304 so that it mirrors the policy in place under the legacy system. Representatives maintain the ability to decline representation if they determine they cannot adequately support the veteran's appeal. Furthermore, representatives maintain the ability to submit argument on the veteran's appeal. VA makes no changes based on this comment.

Y. Comments Concerning § 20.1305—Procedures for Legacy Appellants To Request a Change in Representation, Personal Hearing, or Submission of Additional Evidence Following Certification of an Appeal to the Board of Veterans' Appeals

Another commenter asked VA to add language to proposed 38 CFR 20.1305 acknowledging the possibility of multiple 90-day notices and the opportunity for multiple Board hearings in a legacy system claim. In support of that request, the commenter asserted that multiple Board hearings are provided for in continuously pursued claims in the modern review system, provided a veteran had filed a supplemental claim between the hearings. However, the commenter is conflating the concept of continuous pursuit for the purposes of preserving an effective date and the concept of a continuous claim for the purposes of providing development such as a Board hearing. The modernized review system does not specifically provide for multiple Board hearings during processing of a single claim. Thus, the commenter's assertion that the legacy system regulation should mirror the provisions applicable to Board hearings in the modernized system is misplaced. VA makes no changes based on this comment.

One commenter objected to the option in the new system for a veteran who receives an adverse Board decision to file a supplemental claim based on new and relevant evidence, asserting that this option may operate to prevent finality and judicial review. The commenter was concerned that a

veteran in receipt of an adverse Board decision might be tempted to exercise the option to file a supplemental claim, causing the veteran to return to the first step of the adjudication process and thereby prolonging resolution of the claim. Because the option to file a supplemental claim following a Board decision is a feature of the statute, VA does not have discretion to adopt a different procedure. In any event, filing a supplemental claim following a Board decision is optional, and the veteran may instead choose to file an appeal with the U.S. Court of Appeals for Veterans Claims or, alternatively, file a request with the Board for revision based on clear and unmistakable error once the judicial appeal period has expired. To the extent that the commenter suggests that VA adjudicators will be predisposed to deny supplemental claims, any such predisposition is against VA policy. Adjudicators are required to review a supplemental claim objectively and fairly based on its merits under applicable law. VA makes no changes based on this comment.

Z. Comments Concerning § 20.1403—What Constitutes Clear and Unmistakable Error; What Does Not

One commenter questioned why VA inserted a time limitation on the evidence in § 20.1403 that would affect legacy appellants. However, this final rule does not amend the 90-day time period already mentioned in § 20.1403; there is no new time limitation.

Another commenter expressed concern that the proposed regulations newly restrict evidence that may be submitted in support of a motion for revision of a prior Board decision based on CUE or, at the least, do not seem to accommodate the possibility, under the modernized system, of submitting additional evidence to support a CUE motion via a supplemental claim. However, the outcome of CUE continues to be based on the evidence of record before the Board at the time of the prior Board decision. That underlying consideration is unchanged by the Appeals Modernization Act. To the extent that the description of CUE in § 3.105(a) has been expanded in the proposed regulations, that expansion merely incorporates longstanding caselaw. As the outcome of a CUE motion continues to depend upon whether the correct facts, as they were known at the time of the decision, were before the adjudicator, and whether the statutory and regulatory provisions extant at the time were correctly applied, VA makes no changes based on this comment.

AA. General Comments

Several commenters encouraged VA to create timeliness goals regarding the processing of legacy and Appeals Modernization Act cases. One commenter suggested that the regulations should include a provision requiring that representatives have access to online tools that provide wait time predictions and appeal status. VA has carefully considered this comment, and has determined that no changes to the regulatory amendments are required. The issue raised by the commenter concerns a sub-regulatory policy determination within the agency's discretion. VA will address this matter through internal procedural guidance consistent with the law and regulations.

One commenter stated that VA should amend the regulations to specify the time period when the claimant and representative may submit a written argument when the claimant files a Notice of Disagreement and requests direct review without the opportunity for a hearing or to submit additional evidence. The proposed regulations did not limit the period when written argument can be submitted to the Board between the filing of an NOD and issuance of the Board decision. We do not believe that imposition of a time period for submission of argument would appreciably speed up the appellate process, and it could deprive the veteran of an opportunity to argue in favor of his or her claim. VA makes no changes based on this comment.

One commenter remarked that VA should define the term ''timely'' in regulation, and that failure to do so would be unlawful. The AMA did not amend 38 U.S.C. 7101 which already provides that the Board must have sufficient resources to ''conduct hearings and dispose of appeals properly before the Board in a timely manner.'' However, VA may not determine future resource levels without Congressional authorization. Defining the term ''timely'' in regulation would be improper as it would infringe on the appropriations process. Only Congress may determine whether VA requires additional resources. Therefore, VA makes no changes based on this comment.

Several commenters expressed concern that the new system will be too complicated and will disadvantage pro se claimants. The fundamental features of the framework are required by law; however, VA acknowledges the commenter's concern and remains committed to the non-adversarial process.

One commenter asked whether, if a veteran has an appeal in the legacy system that becomes inextricably intertwined with an issue in the modernized appeal system, the veteran will be given the choice to remain in the legacy system or have both issues proceed in the modernized system. VA has carefully considered this comment and has determined that no changes to the regulatory amendments are required. The issue raised by the commenter may be dealt with as a sub-regulatory policy determination within the agency's discretion. VA makes no regulatory changes based on this comment, but will address this matter through internal procedural guidance consistent with the law and regulations.

One commenter remarked that the ability to select different review options for different claims will cause confusion and asked if claims can be rejoined once the claimant selects different review options. VA will respect the veteran's choice to select different review options for different issues. A claimant may choose to modify the Notice of Disagreement, as provided in § 20.202(c), if he or she wishes to change review options. Thus, it is possible for a claimant to ''rejoin'' claims as described by the commenter. However, VA will not automatically rejoin claims for administrative efficiency purposes or any other reason unless the claimant specifically requests this under § 20.202(c). The fundamental features of the framework are required by law, and VA encourages claimants to discuss their review options with their representatives, if they have one. Claimants have one year from the date of notification of the rating decision on appeal to modify their review option. VA makes no changes based on this comment.

One commenter suggested that VA does not need to create a third docket at the Board for Veterans' Appeals for veterans who wish to submit new evidence without holding a hearing, since the Appeals Modernization Act only required a minimum of at least two dockets. This commenter suggests veterans who submit additional evidence within 90 days of the Notice of Disagreement should be maintained on the same docket as the closed record review. VA has considered this comment, but determined that combining the direct review and evidence only dockets would be contrary to the spirit of the Appeals Modernization Act. One key advantage of maintaining a separate docket that does not allow for a hearing or submission of additional evidence is that the Board reviews the same record

that was before the agency of original jurisdiction. This review provides VA with a quality feedback loop, in which VA is able to identify trends and areas for correction in the adjudications by the agencies of original jurisdiction. This quality feedback loop will provide for more targeted training of VA staff to ensure accurate adjudication of claims. If additional evidence was added to appeals in this lane, then the Board's determination may be based on the changed record and would no longer provide the same direct quality review feedback. VA makes no changes based on this comment.

A commenter suggested that if a veteran who has an appeal pending with the Board submits evidence, this new evidence should automatically be considered as a supplemental claim. This suggestion is contrary to the framework established in the Appeals Modernization Act. Specifically, the Appeals Modernization Act explicitly provides that once a veteran chooses a review option he/she may not pursue another review option until a decision is received or the veteran affirmatively withdraws the initial review option. 38 U.S.C. 5104C(a)(2)(A). Accordingly, VA makes no changes based on this comment.

One commenter remarked that VA should provide a formal application for a motion for CUE. The purpose of this rulemaking is to amend VA's claims adjudication, appeals, and Rules of Practice of the Board of Veterans' Appeals regulations as required to implement the AMA. Nevertheless, VA will take the commenter's suggestion under advisement.

Additional commenters suggested that VA create a standardized form for Veterans to use in withdrawing appeals before the Board. The purpose of this rulemaking is to amend VA's claims adjudication, appeals, and Rules of Practice of the Board of Veterans' Appeals regulations as required to implement the AMA. Nevertheless, VA will take the commenters' suggestion under advisement.

BB. Comments Concerning VA Form 10182—Notice of Disagreement

One commenter raised concern that the required forms referred to in the regulations were not published as part of the rulemaking proposal. Because the Notice of Disagreement is not a new information collection, but a revised information collection under OMB control number 2900–0674, it was not published with the proposed rulemaking. Rather, notice of the proposed changes to 2900–0674 was published in the **Federal Register** on August 23, 2018, pursuant to the Paperwork Reduction Act. 83 FR 42769. The fact of separate publication was noted at the proposed rule stage and publication of the notice closely followed publication of the rulemaking proposal. As noted in the notice, a copy of the draft form will be provided upon request. VA makes no change based on this comment.

One commenter expressed concern that VA forms are too long and suggested the information could instead be found on a web page. VA wants to ensure all Veterans have access to the important information, including those Veterans without access to the internet. Therefore, VA will continue to include this information on the forms. However, VA has worked to streamline the design of these forms and the accompanying information. VA makes no change based on this comment.

CC. Comments of Scope

Two commenters inquired about VA's plan regarding staffing, personnel issues, and training. These comments are outside the scope of the rulemaking.

Part 21—Vocational Rehabilitation and Education

VA received two comments specifically related to Vocational Rehabilitation and Education (VR&E). One comment concerned VR&E's lack of automation and how that may impact timely processing of payments to facilities. The comment stated ''VR&E is antiquated and may need updates. For example, it is not automized, at least for certifying officials, which means some certifications may fall into a 'black hole'. Schools often wait up to 6 months to receive payment.'' This comment is not related to appeals processing and does not affect the rule. Therefore, VA makes no changes to the rule based on this comment.

The second comment stated ''VR&E is also significantly understaffed. How would current staffing accommodate the new lanes of appeals? For example, one of the proposed ''lanes'' would enable a claimant to get a second opinion on VA's claims decision. If VR&E employees are busy giving second opinions, what type of further backlog would this create for newly submitted claims? Or would the newly-required second opinion in appeals fall by the wayside?'' VR&E currently has a process in place for ''second opinions'', which VA refers to as administrative reviews. Administrative reviews are very similar to a higher-level review in the new appeals process. Under VR&E's current processes, administrative reviews are completed by management level personnel at the regional office, and in some very specific situations, at the Central Office level. Under the new appeals process, management level personnel, as well as supervisory personnel who are not currently permitted to perform administrative reviews, will be tasked with completing higher-level reviews. As such, VR&E will have more employees available to perform higher-level reviews than it does under the current system for administrative reviews. VR&E does not anticipate an increase in the number of requests for a ''second opinion'', or higher-level review, under the new appeals process than it receives under the current administrative review process. In addition, it is important to note that newly submitted claims are processed by non-management level VR&E staff, Vocational Rehabilitation Counselors (VRC). VRCs will not be performing higher-level reviews. Lastly, and unrelated to the new appeals process, VR&E is currently in the process of hiring an additional 169 VRCs across the nation. These VRCs manage all aspects of the claims process, including newly submitted claims. Therefore, based on these many factors, staffing issues are not an identified area of concern for VR&E under the new appeals process; as such, VA makes no changes to the rule based on this comment.

One commenter expressed concern about the impact implementation of the AMA may have on the implementation of the Forever GI Bill. VA does not expect implementation of the AMA to impact ongoing benefits or the implementation of the Forever GI Bill.

Finally, several commenters urged consistent use of terms, definitions, and descriptions. Based on comments received relative to Part 3, redundant language in § 21.416 is adjusted to refer back to part 3, specifically § 3.2601, in order to avoid potential confusion. Additionally, references to timeliness goals in § 21.416 have been removed for reasons discussed.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that VA consider the impact of paperwork and other information collection burdens imposed on the public. According to the 1995 amendments to the Paperwork Reduction Act (5 CFR 1320.8(b)(2)(vi)), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number. This rule includes provisions constituting

new collections of information under the Paperwork Reduction Act of 1995 that require approval by the OMB. Accordingly, under 44 U.S.C. 3507(d), VA has submitted a copy of this rulemaking action to OMB for review.

OMB assigns control numbers to collections of information it approves. VA may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. 38 CFR 3.160(c), 3.2501, 3.2601, 8.30, 20.202, and 21.1034 contain collections of information under the Paperwork Reduction Act of 1995. If OMB does not approve the collections of information as requested, VA will immediately remove the provisions containing a collection of information or take such other action as is directed by the OMB.

The collections of information contained in 38 CFR 3.160(c), 3.2501, 3.2601, 8.30, 20.202, 21.416, and 21.1034 are described immediately following this paragraph. VA intends to revise OMB Control No. 2900–0674 so that it will contain all appeals-related information collections for the legacy and new systems, including the four claims and appeals related information collections previously approved under OMB Control No. 2900–0085. OMB Control No. 2900–0085 will be discontinued upon approval of the request to renew 2900–0674. As discussed in the regulatory impact analysis, VA believes that the net impact of the reorganization of the collections of information is likely to be deregulatory.

For each of the collections of information below, VBA used general wage data from the Bureau of Labor Statistics (BLS) to estimate the respondents' costs associated with completing the information collection. According to the latest available BLS data, the mean hourly wage of full-time wage and salary workers was $24.34 based on the BLS wage code—''00–0000 All Occupations.'' This information was taken from the following website: *https://www.bls.gov/oes/current/oes_nat.htm* (May 2017).

Title: Decision Review Request: Supplemental Claim (VA Form 20–0995).

OMB Control No.: 2900–XXXX (NEW).

CFR Provisions: 38 CFR 3.160(a), 3.2501, 8.30, 21.416, and 21.1034.

Summary of collection of information: VA administers an integrated program of benefits and services, established by law, for veterans, service personnel, and their dependents and/or beneficiaries. Title 38 U.S.C. 5101(a) provides that a specific claim in the form provided by the Secretary must be filed in order for benefits to be paid to any individual under the laws administered by the Secretary. VA is proposing a new information collection in this regulatory action under 38 CFR 3.160(c), 3.2501, 8.30, 21.416, and 21.1034 for supplemental claims in accordance with Public Law 115–55. Public Law 115–55 includes a new review option for Veterans or claimants who disagree with a VA claims decision known as a ''supplemental claim'' that is conducted within the agency of original jurisdiction. This review option is designed to allow submission of new and relevant evidence in connection with a previously decided claim. The new collection of information in 38 CFR 3.160(c), 3.2501, and 8.30 would require claimants to submit VA Form 20–0995 in either paper or electronic submission, where applicable, in order to initiate a supplemental claim for VA disability benefits.

Description of need for information and proposed use of information: The collection of information is necessary to determine the issue(s) upon which a claimant is dissatisfied and seeks to initiate a supplemental claim for VA disability benefits. VA will use this information to initiate or determine the claimant's eligibility under the supplemental claim in accordance with the AMA.

Description of likely respondents: Veterans or claimants who indicate dissatisfaction with a decision issued by a VA agency of original jurisdiction and would like review of new and relevant evidence in support of their claim for disability benefits. VA cannot make further assumptions about the population of respondents because of the variability of factors such as the educational background and wage potential of respondents. Therefore, VBA used general wage data to estimate the respondents' costs associated with completing the information collection.

Estimated number of respondents per month/year: 80,000 annually.

Estimated frequency of responses per month/year: One time for most Veterans or other claimants; however, the frequency of responses is also dependent on the number of claims submitted on this form by the claimant as VA does not limit the number of claims that a claimant can submit.

Estimated average burden per response: 15 minutes.

Estimated total annual reporting and recordkeeping burden: 20,000 hours.

Estimated cost to respondents per year: VBA estimates the total cost to all respondents to be $486,800 per year (20,000 burden hours × $24.34 per hour). Legally, respondents may not pay a person or business for assistance in completing the information collection. Therefore, there are no expected overhead costs for completing the information collection.

Title: Decision Review Request: Higher-Level Review (VA Form 20–0996).

OMB Control No.: 2900–XXXX (NEW).

CFR Provisions: 38 CFR 3.2601, 8.30, 21.416, and 21.1034.

Summary of collection of information: VA administers an integrated program of benefits and services, established by law, for veterans, service personnel, and their dependents and/or beneficiaries. Title 38 U.S.C. 5101(a) provides that a specific claim in the form provided by the Secretary must be filed in order for benefits to be paid to any individual under the laws administered by the Secretary. The new collection of information in 38 CFR 3.2601, 8.30, 21.416, and 21.1034 would require claimants to submit VA prescribed applications in either paper or electronic submission of responses, where applicable, in order to request a higher-level review of a VA decision on a claim for benefits.

Description of need for information and proposed use of information: The collection of information is necessary to determine the issue(s) upon which a claimant is dissatisfied and seeks higher-level review by VA. VA will use this information to initiate a higher-level review by an agency adjudicator in accordance with the AMA.

Description of likely respondents: Veterans or other claimants who indicate dissatisfaction with a decision issued by a VA office agency of original jurisdiction.

Estimated number of respondents per month/year: 35,000 annually.

Estimated frequency of responses per month/year: One response total.

Estimated average burden per response: 15 minutes.

Estimated total annual reporting and recordkeeping burden: 8,750 hours.

Estimated cost to respondents per year: As above, VBA used May 2017 general wage data to estimate the respondents' costs associated with completing the information collection. VBA estimates the total cost to all respondents to be $212,975 per year (8,750 burden hours × $24.34 per hour). Legally, respondents may not pay a person or business for assistance in completing the information collection. Therefore, there are no expected

overhead costs for completing the information collection.

Title: Decision Review Request: Board Appeal (Notice of Disagreement) (VA Form 10182).

OMB Control No.: 2900–0674.

CFR Provisions: 38 CFR 20.202.

Summary of collection of information: 38 CFR 20.202 would require that in order for a claimant to appeal one or more previously decided issues to the Board, that claimant must file a Notice of Disagreement in the form prescribed by VA. In order to promote efficiency in the adjudication process while ensuring that the process is simple and reliable for claimants, VA will require the use of a specific form for this purpose. VA Form 10182 will be titled Decision Review Request: Board Appeal (Notice of Disagreement). To be accepted by the Board, a complete Notice of Disagreement will be required to identify the specific determination with which the claimant disagrees and must indicate if the claimant requests to have a hearing before the Board, an opportunity to submit additional evidence, or neither. 38 U.S.C. 7105(b)(3). Additionally, in order to permit appellants and their representatives to exercise their appeal-related rights, the information collected will include withdrawals of services by representatives (38 CFR 20.6), requests by appellants for changes in hearing dates or methods (38 CFR 20.703), and motions for reconsideration of Board decisions (38 CFR 20.1002).

Description of need for information and proposed use of information: This collection of information is necessary to permit claimants to appeal to the Board, to identify their request for a hearing and selection of the evidentiary record on appeal, to request new times or methods for hearings, to seek reconsideration of Board decisions, and so that representatives may effectively move to withdraw their representation of a claimant.

Description of likely respondents: Veterans or other claimants who indicate dissatisfaction with a decision issued by a VA agency of original jurisdiction, and who are appealing one more issues in that decision to the Board.

Estimated number of respondents per month/year: 43,000 annually.

Estimated frequency of responses per month/year: One response per respondent accounted for above.

Estimated average burden per response: An average of 30 minutes.

Estimated total annual reporting and recordkeeping burden: 21,500 hours annually.

Estimated cost to respondents per year: The respondent population for this information collection is composed of individual appellants or their representatives. In this regard, VA notes that the earning capacity of individual appellants spans an extremely wide spectrum. Additionally, an appellant's representative may be an employee of a recognized Veterans' Service Organization who provides appellate services as part of their overall free services to Veterans, or may be an attorney-at-law or accredited agent that charges a fee. VA cannot make further assumptions about the population of respondents because of the variability of factors such as the educational background and wage potential of respondents. Therefore, VBA used the BLS general wage data from May 2017 to estimate the respondents' costs associated with completing the information collection. VA seeks comment as to whether use of the general wage data is appropriate in light of this wide spectrum of earning capacity in individual respondents. VA estimates the total cost to respondents using VA Form 10182 in the new appeals system to be $523,310 per year (21,500 burden hours × $24.34 per hour).

The total costs of these information collections to respondents is estimated to be $8.4 million over a five-year period (FY2019–FY2023). Although it is difficult to predict the percentage of respondents that will be able to take advantage of the new system forms each year beginning in February 2019, VA estimates that the incremental information collection costs for respondents will be $1,092,258 in FY2019. VA has also determined there will be incremental information collection savings of $6,258,423 over a five-year period, once the legacy forms are no longer in use. This equates to approximately $1.25 million per year or $1.77 million per year on an ongoing basis discounted at 7 percent relative to year 2016, over a perpetual time horizon. This final rule is considered an E.O. 13771 deregulatory action.

Regulatory Flexibility Act

The Secretary hereby certifies that these regulatory amendments 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. These amendments will not directly affect any small entities. Only VA beneficiaries and their survivors would be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), these amendments are exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Orders 12866, 13563, 13771

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,'' which requires review by 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 this Executive Order.''

The economic, interagency, budgetary, legal, and policy implications of this rule have been examined, and it has been determined that this is an economically significant regulatory action under Executive Order 12866. As discussed in the Paperwork Reduction Act section of this final rule, we estimate that this final rule will lead to paperwork cost savings of approximately $1.77 million This rule is expected to be an E.O. 13771 deregulatory action. Details on the estimated cost savings of this rule can be found in the rule's economic analysis. 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 the rulemaking and its impact analysis are available on VA's website at *http://www.va.gov/orpm* by following the link for VA Regulations Published from FY 2004 Through Fiscal Year to Date.

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 an 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 given year. This rule will have no such effect on State, local, and tribal governments, or on the private sector.

Congressional Review Act

The Secretary of Veterans Affairs finds that there is good cause under the provisions of 5 U.S.C. 808(2) to publish this final rule without prior Congressional review and to make the rule effective on February 19, 2019.

This final rule meets the ''impracticable'' and ''public interest'' exceptions in 5 U.S.C. 808(2) because any delay in implementing the rule would have a severe detrimental impact on Veterans seeking benefits. VA's legacy appeals process is overly complex and can take many years for claimants to receive resolution on their claims. Under the legacy appeals process, Veterans wait an average of 3 years for a final decision if they choose to appeal, and an average of 7 years if they continue their appeal to the Board. The Veterans Appeals Improvement and Modernization Act authorizes a streamlined process that provides Veterans and other claimants with choices when seeking review of a VA decision and much faster resolution. This rule is necessary to implement the Act, and provides much-needed comprehensive reform for the legacy appeals process. VA estimates that under this rule the average time to complete an appeal will be approximately 2 years less than under the legacy appeals process. However, Congress required within the Act that VA have the 'resources, personnel, office space, procedures, and information technology required' to implement the new system. VA cannot implement the Act as planned without final regulations allowing claimants to participate in the new system. Delaying the effective date of this final rule will prolong the existence, and result in an increased number of legacy process appeals, thus increasing the number of appeals that are subject to, and will themselves add to, severe delays in appeals processing and a prolonged inability for Veterans to timely receive their earned benefits.

While the severity of the impact on Veterans seeking benefits constitutes good cause to implement these presumptions with an earlier effective date, there is an additional basis for the Secretary's decision that good cause exists. Although the rule is a major rule under the Congressional Review Act, VA believes that this rule will not result in any new or increased benefit payments (transfers) to claimants. Furthermore, the transfers associated with this rulemaking ($100 million or more in any given year), which would already be due to Veterans, would be the same with or without this rule. The difference is simply because VA believes that the rule will lead to claimants receiving a decision earlier than they would under the legacy appeals process, causing a shift in the timing of benefits paid to Veterans and other beneficiaries to earlier fiscal years.

Lastly, VA would be obligated to pay these transfers regardless of timing and the amount of transfers awarded to veterans would not be a result of this rulemaking. Since the rule will reduce the time it takes to review or adjudicate an appeal, the benefits will be paid much quicker than under the legacy appeals process. VA believes that total benefits paid to an individual beneficiary granted a positive appeal decision would be the same under both this rule and the legacy appeals process; only the timing of these payments would differ. The provisions of this rule do not go beyond the intent or structure of the Act, which was enacted after the Congress received a cost-neutral assessment from the Congressional Budget Office. Therefore, because Congress itself has already committed to the structure that is causing the timing of the benefits payments to be ''pulled forward'' in time and is aware of the impact of the law as enacted, it would be unnecessary and contrary to the public interest to delay the effective date of the final rule to allow for the congressional review contemplated by the Congressional Review Act. Accordingly, the Secretary has determined that there is good cause under 5 U.S.C. 808(2) to publish this final rule with a February 19, 2019 effective date.

VA received 29 comments in response to the proposed rule. The comments received were generally requests for clarification or recommendations for substantive changes. In turn, the majority of changes made in response to comments were clarifying in nature, conformed the regulations more closely to the statutory requirements, or, where substantive, were of a pro-claimant nature. The comments received and subsequent changes made were not controversial. For example, based on commenter suggestions, VA provided additional clarity on the definitions of ''claim,'' ''issue,'' and ''new evidence.'' VA made changes to the evidentiary standard used to overturn favorable findings that provided greater protection to claimants, made improvements to the notice provided to claimants regarding opportunities to opt into the new system, and extended the amount of time appellants have to modify their Notice of Disagreement. Additionally, parts 8 and 21 were updated in several areas to more closely align with the language of the Act.

As noted, the comments received, and changes made in response, generally only addressed marginal aspects of the rule, and did not oppose the underlying substance of the rule, which mainly implemented mandatory requirements imposed by Congress in the Act. This demonstrates that a delay of the effective date of the rule for an additional period of congressional review for an assessment of the burden on the public would be unnecessary.

Accordingly, the Secretary finds there is good cause to dispense with the opportunity for prior Congressional review and to publish this final rule with an effective date on February 19, 2019.

Catalog of Federal Domestic Assistance Numbers and Titles

The Catalog of Federal Domestic Assistance program numbers and titles for this rule are 64.100, Automobiles and Adaptive Equipment for Certain Disabled Veterans and Members of the Armed Forces; 64.101, Burial Expenses Allowance for Veterans; 64.102, Compensation for Service-Connected Deaths for Veterans' Dependents; 64.103, Life Insurance for Veterans; 64.104, Pension for Non-Service-Connected Disability for Veterans; 64.105, Pension to Veterans Surviving Spouses, and Children; 64.106, Specially Adapted Housing for Disabled Veterans; 64.109, Veterans Compensation for Service-Connected Disability; 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death; 64.114, Veterans Housing—Guaranteed and Insured Loans; 64.115, Veterans Information and Assistance; 64.116,Vocational Rehabilitation for Disabled Veterans; 64.117, Survivors and Dependents Educational Assistance; 64.118, Veterans Housing—Direct Loans for Certain Disabled Veterans; 64.119, Veterans Housing—Manufactured Home Loans; 64.120, Post-Vietnam Era Veterans' Educational Assistance; 64.124, All-Volunteer Force Educational Assistance; 64.125, Vocational and

Educational Counseling for Servicemembers and Veterans; 64.126, Native American Veteran Direct Loan Program; 64.127, Monthly Allowance for Children of Vietnam Veterans Born with Spina Bifida; and 64.128, Vocational Training and Rehabilitation for Vietnam Veterans' Children with Spina Bifida or Other Covered Birth Defects.

List of Subjects

38 CFR Part 3

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

38 CFR Part 8

Life insurance, Military personnel, Veterans.

38 CFR Part 14

Administrative practice and procedure, Claims, Courts, Foreign relations, Government employees, Lawyers, Legal services, Organization and functions (Government agencies), Reporting and recordkeeping requirements, Surety bonds, Trusts and trustees, Veterans.

38 CFR Parts 19 and 20

Administrative practice and procedure, Claims, Veterans.

38 CFR Part 21

Administrative practice and procedure, Armed forces, Civil rights, Claims, Colleges and universities, Conflict of interests, Defense Department, Education, Employment, Grant programs—education, Grant programs—veterans, Health care, Loan programs—education, Loan programs—veterans, Manpower training programs, Reporting and recordkeeping requirements, Schools, Travel and transportation expenses, Veterans, Vocational education, Vocational rehabilitation.

Signing Authority

The Secretary of Veterans Affairs 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. Robert L. Wilkie, Secretary, Department of Veterans Affairs, approved this document on November 29, 2018, for publication.

Dated: December 21, 2018.

Consuela Benjamin,

Regulations Development Coordinator, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

For the reasons set forth in the preamble, VA amends 38 CFR parts 3, 8, 14, 19, 20, and 21 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 § 3.1 by revising paragraph (p) to read as follows:

§ 3.1 Definitions.

* * * * *

(p) *Claim* means a written or electronic communication requesting a determination of entitlement or evidencing a belief in entitlement, to a specific benefit under the laws administered by the Department of Veterans Affairs submitted on an application form prescribed by the Secretary. (See scope of claim, § 3.155(d)(2); complete claim, § 3.160(a); issues within a claim, § 3.151(c)).

(1) *Initial claim.* An initial claim is any complete claim, other than a supplemental claim, for a benefit on a form prescribed by the Secretary. The first initial claim for one or more benefits received by VA is further defined as an original claim. (See original claim, § 3.160(b)). Initial claims include:

(i) A new claim requesting service connection for a disability or grant of a new benefit, and

(ii) A claim for increase in a disability evaluation rating or rate of a benefit paid based on a change or worsening in condition or circumstance since the last decision issued by VA for the benefit.

(2) *Supplemental claim.* A supplemental claim is any complete claim for a VA benefit on an application form prescribed by the Secretary where an initial or supplemental claim for the same or similar benefit on the same or similar basis was previously decided. (See supplemental claim; § 3.2501.)

* * * * *

§ 3.31 [Amended]

■ 3. In § 3.31, remove the word ''reopened'' and add in its place the word ''supplemental''.

■ 4. Amend § 3.103 by revising the section heading and paragraphs (b)(1), (c), (d), and (f) to read as follows:

§ 3.103 Procedural due process and other rights.

* * * * *

(b) * * *

(1) *General.* Claimants and their representatives are entitled to notice of any decision made by VA affecting the payment of benefits or the granting of relief. Such notice will clearly set forth the elements described under paragraph (f) of this section, the right to a hearing on any issue involved in the claim as provided in paragraph (d) of this section, the right of representation, and the right, as well as the necessary procedures and time limits to initiate a higher-level review, supplemental claim, or appeal to the Board of Veterans' Appeals.

* * * * *

(c) *Submission of evidence*—(1) *General rule.* VA will include in the record, any evidence whether documentary, testimonial, or in other form, submitted by the claimant in support of a pending claim and any issue, contention, or argument a claimant may offer with respect to a claim, except as prescribed in paragraph (c)(2) of this section and § 3.2601(f).

(2) *Treatment of evidence received after notice of a decision.* The evidentiary record for a claim before the agency of original jurisdiction closes when VA issues notice of a decision on the claim. The agency of original jurisdiction will not consider, or take any other action on evidence that is submitted by a claimant, associated with the claims file, or constructively received by VA as described in paragraph (c)(2)(iii) of this section, after notice of decision on a claim, and such evidence will not be considered part of the record at the time of any decision by the agency of original jurisdiction, except as described in § 3.156(c) and under the following circumstances:

(i) *Receipt of a complete claim.* The agency of original jurisdiction subsequently receives a complete application for a supplemental claim or initial claim; or

(ii) *Board and higher-level review returns.* A claim is pending readjudication after identification of a duty to assist error (which includes an error resulting from constructive receipt of evidence prior to the notice of decision), during a higher-level review or appeal to the Board of Veterans' Appeals. Those events reopen the record and any evidence previously submitted to the agency of original jurisdiction or associated with the

claims file while the record was closed will become part of the evidentiary record to be considered upon readjudication.

(iii) *Constructive receipt of VA treatment records.* Records within the actual custody of the Veterans Health Administration are deemed constructively received by the Veterans Benefits Administration at the time when the Veterans Benefits Administration had knowledge of the existence of said records through information furnished by the claimant sufficient to locate those records (see 38 U.S.C. 5103A(c)).

(d) *The right to a hearing.* (1) Upon request, a claimant is entitled to a hearing on any issue involved in a claim within the purview of part 3 of this chapter before VA issues notice of a decision on an initial or supplemental claim. A hearing is not available in connection with a request for higher-level review under § 3.2601. VA will provide the place of hearing in the VA field office having original jurisdiction over the claim, or at the VA office nearest the claimant's home having adjudicative functions, or videoconference capabilities, or, subject to available resources and solely at the option of VA, at any other VA facility or federal building at which suitable hearing facilities are available. VA will provide one or more employees who have original determinative authority of such issues to conduct the hearing and be responsible for establishment and preservation of the hearing record. Upon request, a claimant is entitled to a hearing in connection with proposed adverse actions before one or more VA employees having original determinative authority who did not participate in the proposed action. All expenses incurred by the claimant in connection with the hearing are the responsibility of the claimant.

(2) The purpose of a hearing is to permit the claimant to introduce into the record, in person, any available evidence which he or she considers relevant and any arguments or contentions with respect to the facts and applicable law which he or she may consider pertinent. All testimony will be under oath or affirmation. The claimant is entitled to produce witnesses, but the claimant and witnesses must be present. The agency of original jurisdiction will not normally schedule a hearing for the sole purpose of receiving argument from a representative. It is the responsibility of the VA employees conducting the hearings to explain fully the issues and suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant's position. To assure clarity and completeness of the hearing record, questions which are directed to the claimant and to witnesses are to be framed to explore fully the basis for claimed entitlement rather than with an intent to refute evidence or to discredit testimony.

* * * * *

(f) *Notification of decisions.* The claimant or beneficiary and his or her representative will be notified in writing of decisions affecting the payment of benefits or granting of relief. Written notification must include in the notice letter or enclosures or a combination thereof, all of the following elements:

(1) Identification of the issues adjudicated;

(2) A summary of the evidence considered;

(3) A summary of the laws and regulations applicable to the claim;

(4) A listing of any findings made by the adjudicator that are favorable to the claimant under § 3.104(c);

(5) For denied claims, identification of the element(s) required to grant the claim(s) that were not met;

(6) If applicable, identification of the criteria required to grant service connection or the next higher-level of compensation;

(7) An explanation of how to obtain or access evidence used in making the decision; and

(8) A summary of the applicable review options under § 3.2500 available for the claimant to seek further review of the decision.

* * * * *

■ 5. Amend § 3.104 as follows:

■ a. Revise the section heading;

■ b. Revise paragraph (a);

■ c. Add a heading to paragraph (b); and

■ d. Add paragraph (c).

The revisions and additions read as follows:

§ 3.104 Binding nature of decisions.

(a) *Binding decisions.* A decision of a VA rating agency is binding on all VA field offices as to conclusions based on the evidence on file at the time VA issues written notification in accordance with 38 U.S.C. 5104. A binding agency decision is not subject to revision except by the Board of Veterans' Appeals, by Federal court order, or as provided in §§ 3.105, 3.2500, and 3.2600.

(b) *Binding administrative determinations.* * * *

(c) *Favorable findings.* Any finding favorable to the claimant made by either a VA adjudicator, as described in § 3.103(f)(4), or by the Board of Veterans' Appeals, as described in § 20.801(a) of this chapter, is binding on all subsequent agency of original jurisdiction and Board of Veterans' Appeals adjudicators, unless rebutted by evidence that identifies a clear and unmistakable error in the favorable finding. For purposes of this section, a finding means a conclusion either on a question of fact or on an application of law to facts made by an adjudicator concerning the issue(s) under review.

■ 6. Amend § 3.105 by revising paragraphs (a) and (b) and adding paragraph (j) to read as follows:

§ 3.105 Revision of decisions.

* * * * *

(a)(1) *Error in final decisions.* Decisions are final when the underlying claim is finally adjudicated as provided in § 3.160(d). Final decisions will be accepted by VA as correct with respect to the evidentiary record and the law that existed at the time of the decision, in the absence of clear and unmistakable error. At any time after a decision is final, the claimant may request, or VA may initiate, review of the decision to determine if there was a clear and unmistakable error in the decision. Where evidence establishes such error, the prior decision will be reversed or amended.

(i) *Definition of clear and unmistakable error.* A clear and unmistakable error is a very specific and rare kind of error. It is the kind of error, of fact or of law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error. If it is not absolutely clear that a different result would have ensued, the error complained of cannot be clear and unmistakable. Generally, either the correct facts, as they were known at the time, were not before VA, or the statutory and regulatory provisions extant at the time were incorrectly applied.

(ii) *Effective date of reversed or revised decisions.* For the purpose of authorizing benefits, the rating or other adjudicative decision which constitutes a reversal or revision of a prior decision on the grounds of clear and unmistakable error has the same effect as if the corrected decision had been made on the date of the reversed decision. Except as provided in paragraphs (d) and (e) of this section, where an award is reduced or discontinued because of administrative error or error in judgment, the provisions of § 3.500(b)(2) will apply.

(iii) *Record to be reviewed.* Review for clear and unmistakable error in a prior final decision of an agency of original

jurisdiction must be based on the evidentiary record and the law that existed when that decision was made. The duty to assist in § 3.159 does not apply to requests for revision based on clear and unmistakable error.

(iv) *Change in interpretation.* Clear and unmistakable error does not include the otherwise correct application of a statute or regulation where, subsequent to the decision being challenged, there has been a change in the interpretation of the statute or regulation.

(v) *Limitation on Applicability.* Decisions of an agency of original jurisdiction on issues that have been decided on appeal by the Board or a court of competent jurisdiction are not subject to revision under this subsection.

(vi) *Duty to assist not applicable.* For examples of situations that are not clear and unmistakable error see 38 CFR 20.1403(d).

(vii) *Filing Requirements*—(A) *General.* A request for revision of a decision based on clear and unmistakable error must be in writing, and must be signed by the requesting party or that party's authorized representative. The request must include the name of the claimant; the name of the requesting party if other than the claimant; the applicable Department of Veterans Affairs file number; and the date of the decision to which the request relates. If the applicable decision involved more than one issue, the request must identify the specific issue, or issues, to which the request pertains.

(B) *Specific allegations required.* The request must set forth clearly and specifically the alleged clear and unmistakable error, or errors, of fact or law in the prior decision, the legal or factual basis for such allegations, and why the result would have been manifestly different but for the alleged error. Non-specific allegations of failure to follow regulations or failure to give due process, or any other general, non-specific allegations of error, are insufficient to satisfy the requirement of the previous sentence.

(2) *Error in binding decisions prior to final adjudication.* Prior to the time that a claim is finally adjudicated, previous decisions which are binding will be accepted as correct by the agency of original jurisdiction, with respect to the evidentiary record and law existing at the time of the decision, unless the decision is clearly erroneous, after considering whether any favorable findings may be reversed as provided in § 3.104(c).

(b) *Difference of opinion.* Whenever an adjudicative agency is of the opinion that a revision or an amendment of a previous decision is warranted on the basis of the evidentiary record and law that existed at the time of the decision, a difference of opinion being involved rather than a clear and unmistakable error, the proposed revision will be recommended to Central Office. However, a decision may be revised under § 3.2600 or § 3.2601 without being recommended to Central Office.

* * * * *

(j) *Supplemental claims and higher-level review.* VA may revise an earlier decision denying benefits, if warranted, upon resolution of a supplemental claim under § 3.160(c) or higher-level review under § 3.2601.

* * * * *

§ 3.110 [Amended]

■ 7. In § 3.110, amend paragraph (b) by removing ''§§ 20.302 and 20.305'' from the last sentence and adding in its place ''§§ 19.52, 20.203, and 20.110''.

§ 3.114 [Amended]

■ 8. In § 3.110, remove the word ''reopened'' and add in its place the word ''supplemental''

■ 9. Amend § 3.151 by revising paragraph (a) and adding paragraphs (c) and (d) to read as follows:

§ 3.151 Claims for disability benefits.

(a) *General.* A specific claim in the form prescribed by the Secretary must be filed in order for benefits to be paid to any individual under the laws administered by VA. (38 U.S.C. 5101(a)). A claim by a veteran for compensation may be considered to be a claim for pension; and a claim by a veteran for pension may be considered to be a claim for compensation. The greater benefit will be awarded, unless the claimant specifically elects the lesser benefit. (See scope of claim, § 3.155(d)(2); complete claim, § 3.160(a); supplemental claims, § 3.2501(b)).

* * * * *

(c) *Issues within a claim.* (1) To the extent that a complete claim application encompasses a request for more than one determination of entitlement, each specific entitlement will be adjudicated and is considered a separate issue for purposes of the review options prescribed in § 3.2500. A single decision by an agency of original jurisdiction may adjudicate multiple issues in this respect, whether expressly claimed or determined by VA to be reasonably within the scope of the application as prescribed in § 3.155(d)(2). VA will issue a decision that addresses each such identified issue within a claim. Upon receipt of notice of a decision, a claimant may elect any of the applicable review options prescribed in § 3.2500 for each issue adjudicated.

(2) With respect to service-connected disability compensation, an issue for purposes of paragraph (c)(1) of this section is defined as entitlement to compensation for a particular disability. For example, if a decision adjudicates service-connected disability compensation for both a knee condition and an ankle condition, compensation for each condition is a separate entitlement or issue for which a different review option may be elected. However, different review options may not be selected for specific components of the knee disability claim, such as ancillary benefits, whether a knee injury occurred in service, or whether a current knee condition resulted from a service-connected injury or condition.

(d) *Evidentiary record.* The evidentiary record before the agency of original jurisdiction for an initial or supplemental claim includes all evidence received by VA before VA issues notice of a decision on the claim. Once the agency of original jurisdiction issues notice of a decision on a claim, the evidentiary record closes as described in § 3.103(c)(2) and VA no longer has a duty to assist in gathering evidence under § 3.159. (See § 3.155(b), submission of evidence).

* * * * *

■ 10. Amend § 3.155 by revising the second sentence of the introductory text and paragraph (d)(1) to read as follows:

§ 3.155 How to file a claim.

* * * The provisions of this section are applicable to all claims governed by part 3, with the exception that paragraph (b) of this section, regarding intent to file a claim, does not apply to supplemental claims.

* * * * *

(d) * * *

(1) *Requirement for complete claim and date of claim.* A complete claim is required for all types of claims, and will generally be considered filed as of the date it was received by VA for an evaluation or award of benefits under the laws administered by the Department of Veterans Affairs.

(i) *Supplemental claims.* Upon receipt of a communication indicating a belief in entitlement to benefits that is submitted in wiritng or electronically on a supplemental claim form prescribed by the Secretary that is not complete as defined in § 3.160(a) of this section, the Secretary shall notify the claimant and the claimant's representative, if any, of the information necessary to complete the application form prescribed by the

Secretary. If VA receives a complete claim within 60 days of notice by VA that an incomplete claim was filed, it will be considered filed as of the date of receipt of the incomplete claim (see § 3.2501).

(ii) *For other types of claims.* If VA receives a complete claim within 1 year of the filing of an intent to file a claim that meets the requirements of paragraph (b) of this section, it will be considered filed as of the date of receipt of the intent to file a claim. Only one complete claim for a benefit (*e.g.,* compensation, pension) may be associated with each intent to file a claim for that benefit, though multiple issues may be contained within a complete claim. In the event multiple complete claims for a benefit are filed within 1 year of an intent to file a claim for that benefit, only the first claim filed will be associated with the intent to file a claim. In the event that VA receives both an intent to file a claim and an incomplete application form before the complete claim as defined in § 3.160(a) is filed, the complete claim will be considered filed as of the date of receipt of whichever was filed first provided it is perfected within the necessary timeframe, but in no event, will the complete claim be considered filed more than one year prior to the date of receipt of the complete claim.

* * * * *

■ 11. Amend § 3.156 as follows:
■ a. Revise the section heading;
■ b. Add introductory text;
■ c. Revise paragraph (a);
■ d. Revise the paragraph (b) heading; and
■ e. Add paragraph (d);

The revisions and additions read as follows:

§ 3.156 New evidence.

(a) *New and material evidence.* For claims to reopen decided prior to the effective date provided in § 19.2(a), the following standards apply. A claimant may reopen a finally adjudicated legacy claim by submitting new and material evidence. New evidence means evidence not previously considered by agency adjudicators. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim.

(Authority: 38 U.S.C. 501, 5103A(h), 5108)

(b) *Pending legacy claims not under the modernized review system.* * * *

* * * * *

(d) *New and relevant evidence.* On or after the effective date provided in § 19.2(a), a claimant may file a supplemental claim as prescribed in § 3.2501. If new and relevant evidence, as defined in § 3.2501(a)(1), is presented or secured with respect to the supplemental claim, the agency of original jurisdiction will readjudicate the claim taking into consideration all of the evidence of record.

* * * * *

■ 12. Amend § 3.158 by revising the first sentence of paragraph (a) to read as follows:

§ 3.158 Abandoned claims.

(a) * * * Except as provided in § 3.652, where evidence requested in connection with an initial claim or supplemental claim or for the purpose of determining continued entitlement is not furnished within 1 year after the date of request, the claim will be considered abandoned. * * *

* * * * *

■ 13. Amend § 3.159 as follows:
■ a. Revise paragraph (a)(3);
■ b. Revise the first and last sentence of paragraph (b)(1);
■ c. Revise paragraph (b)(3);
■ d. Add paragraph (b)(4);
■ e. Revise paragraph (c) introductory text;
■ f. Revise paragraph (c)(4)(iii);
■ g. Add paragraph (c)(4)(iv); and
■ h. In paragraph (d) introductory text, in the first sentence, remove the text ''for a claim'' and add in its place ''for an initial or supplemental claim''.

The revisions and additions read as follows:

§ 3.159 Department of Veterans Affairs assistance in developing claims.

(a) * * *

(3) *Substantially complete application* means an application containing:

(i) The claimant's name;

(ii) His or her relationship to the veteran, if applicable;

(iii) Sufficient service information for VA to verify the claimed service, if applicable;

(iv) The benefit sought and any medical condition(s) on which it is based;

(v) The claimant's signature; and

(vi) In claims for nonservice-connected disability or death pension and parents' dependency and indemnity compensation, a statement of income;

(vii) In supplemental claims, identification or inclusion of potentially new evidence (see § 3.2501);

(viii) For higher-level reviews, identification of the date of the decision for which review is sought.

* * * * *

(b) * * * (1) Except as provided in paragraph (3) of this section, when VA receives a complete or substantially complete initial or supplemental claim, VA will notify the claimant of any information and medical or lay evidence that is necessary to substantiate the claim (hereafter in this paragraph referred to as the ''notice'') * * * If VA does so, however, and the claimant subsequently provides the information and evidence within one year of the date of the notice in accordance with the requirements of paragraph (b)(4) of this section, VA must readjudicate the claim.

* * * * *

(3) No duty to provide the notice described in paragraph (b)(1) of this section arises:

(i) Upon receipt of a supplemental claim under § 3.2501 within one year of the date VA issues notice of a prior decision;

(ii) Upon receipt of a request for higher-level review under § 3.2601;

(iii) Upon receipt of a Notice of Disagreement under § 20.202 of this chapter; or

(iv) When, as a matter of law, entitlement to the benefit claimed cannot be established.

(4) After VA has issued a notice of decision, submission of information and evidence substantiating a claim must be accomplished through the proper filing of a review option in accordance with § 3.2500 on a form prescribed by the Secretary. New and relevant evidence may be submitted in connection with either the filing of a supplemental claim under § 3.2501 or the filing of a Notice of Disagreement with the Board under 38 CFR 20.202, on forms prescribed by the Secretary, and election of a Board docket that permits the filing of new evidence (see 38 CFR 20.302 and 20.303).

(c) *VA's duty to assist claimants in obtaining evidence.* VA has a duty to assist claimants in obtaining evidence to substantiate all substantially complete initial and supplemental claims, and when a claim is returned for readjudication by a higher-level adjudicator or the Board after identification of a duty to assist error on the part of the agency of original jurisdiction, until the time VA issues notice of a decision on a claim or returned claim. VA will make reasonable efforts to help a claimant obtain evidence necessary to substantiate the claim. VA will not pay

any fees charged by a custodian to provide records requested. When a claim is returned for readjudication by a higher-level adjudicator or the Board after identification of a duty to assist error, the agency of original jurisdiction has a duty to correct any other duty to assist errors not identified by the higher-level adjudicator or the Board.

* * * * *

(4) * * *

(iii) For requests to reopen a finally adjudicated claim received prior to the effective date provided in § 19.2(a) of this chapter, this paragraph (c)(4) applies only if new and material evidence is presented or secured as prescribed in § 3.156.

(iv) This paragraph (c)(4) applies to a supplemental claim only if new and relevant evidence under § 3.2501 is presented or secured.

* * * * *

■ 14. Amend § 3.160 by revising paragraphs (a), (d), and (e) and removing paragraph (f).

The revisions read as follows:

§ 3.160 Status of claims.

(a) *Complete claim.* A submission of an application form prescribed by the Secretary, whether paper or electronic, that meets the following requirements:

(1) A complete claim must provide the name of the claimant; the relationship to the veteran, if applicable; and sufficient information for VA to verify the claimed service, if applicable.

(2) A complete claim must be signed by the claimant or a person legally authorized to sign for the claimant.

(3) A complete claim must identify the benefit sought.

(4) A description of any symptom(s) or medical condition(s) on which the benefit is based must be provided to the extent the form prescribed by the Secretary so requires.

(5) For nonservice-connected disability or death pension and parents' dependency and indemnity compensation claims, a statement of income must be provided to the extent the form prescribed by the Secretary so requires; and

(6) For supplemental claims, potentially new evidence must be identified or included.

* * * * *

(d) *Finally adjudicated claim.* A claim that is adjudicated by the Department of Veterans Affairs as either allowed or disallowed is considered finally adjudicated when:

(1) For legacy claims not subject to the modernized review system, whichever of the following occurs first:

(i) The expiration of the period in which to file a Notice of Disagreement, pursuant to the provisions of § 19.52(a) or § 20.502(a) of this chapter, as applicable; or

(ii) Disposition on appellate review.

(2) For claims under the modernized review system, the expiration of the period in which to file a review option available under § 3.2500 or disposition on judicial review where no such review option is available.

(e) *Reopened claims prior to effective date of modernized review system.* An application for a benefit received prior to the effective date provided in § 19.2(a) of this chapter, after final disallowance of an earlier claim that is subject to readjudication on the merits based on receipt of new and material evidence related to the finally adjudicated claim, or any claim based on additional evidence or a request for a personal hearing submitted more than 90 days following notification to the appellant of the certification of an appeal and transfer of applicable records to the Board of Veterans' Appeals which was not considered by the Board in its decision and was referred to the agency of original jurisdiction for consideration as provided in § 20.1304(b)(1) of this chapter. As of the effective date provided in § 19.2(a) of this chapter, claimants may no longer file to reopen a claim, but may file a supplemental claim as prescribed in § 3.2501 to apply for a previously disallowed benefit. A request to reopen a finally decided claim that has not been adjudicated as of the effective date will be processed as a supplemental claim subject to the modernized review system.

(Authority: 38 U.S.C. 501, 5108)

§ 3.161 [Removed and Reserved]

■ 15. Remove and reserve § 3.161.

§ 3.321 [Amended]

■ 16. In § 3.321, remove the word ''reopened'' and add in its place the word ''supplemental''.

§ 3.326 [Amended]

■ 17. In § 3.326, remove the word ''reopened'' and add in its place the word ''supplemental''

■ 18. Amend § 3.328 in paragraph (b), in the first sentence, by removing the text ''at the regional office level'' and add in its place ''before VA'' and by revising paragraph (c).

The revision reads as follows:

§ 3.328 Independent medical opinions.

* * * * *

(c) *Approval.* (1) Requests for independent medical opinions shall be approved when one of the following conditions is met:

(i) The director of each Service from which a benefit is sought, or his or her designee, determines that the issue under consideration poses a medical problem of such complexity or controversy as to justify solicitation of an independent medical opinion; or

(ii) The independent medical opinion is required to fulfill the instructions contained in a remand order from the Board of Veterans' Appeals.

(2) A determination that an independent medical opinion is not warranted may be contested only as part of an appeal to the Board of Veterans' Appeals on the merits of the decision rendered on the primary issue by VA.

(Authority: 38 U.S.C. 5109, 5701(b)(1); 5 U.S.C. 552a(f)(3))

* * * * *

§ 3.372 [Amended]

■ 19. In § 3.372, remove the word ''reopened'' and add in its place the word ''supplemental''.

■ 20. Amend § 3.400 by revising the introductory text and paragraphs (h)(1) through (3) and (z)(2) and adding paragraph (z)(3) to read as follows:

§ 3.400 General.

Except as otherwise provided, the effective date of an evaluation and award of pension, compensation, or dependency and indemnity compensation based on an initial claim or supplemental claim will be the date of receipt of the claim or the date entitlement arose, whichever is later. For effective date provisions regarding revision of a decision based on a supplemental claim or higher-level review, see § 3.2500.

* * * * *

(h) *Difference of opinion (§ 3.105).* (1) As to decisions not finally adjudicated (see § 3.160(d)) prior to timely receipt of an application for higher-level review, or prior to readjudication on VA initiative, the date from which benefits would have been payable if the former decision had been favorable.

(2) As to decisions which have been finally adjudicated (see § 3.160(d)), and notwithstanding other provisions of this section, the date entitlement arose, but not earlier than the date of receipt of the supplemental claim.

(3) As to decisions which have been finally adjudicated (see 3.160(d)) and readjudication is undertaken solely on VA initiative, the date of Central Office approval authorizing a favorable decision or the date of the favorable Board of Veterans' Appeals decision.

* * * * *

(z) * * *

(2) Reopened claims received prior to the effective date provided in § 19.2(a) of this chapter: Latest of the following dates:

(i) November 23, 1977.

(ii) Date entitlement arose.

(iii) One year prior to date of receipt of reopened claim.

(3) Supplemental claims received more than one year after notice of decision: Latest of the following dates:

(i) Date entitlement arose.

(ii) One year prior to date of receipt of a supplemental claim.

* * * * *

§ 3.401 [Amended]

■ 21. In § 3.401, remove the word ''reopened'' and add in its place the word ''supplemental''.

§ 3.402 [Amended]

■ 22. In § 3.402, remove the word ''reopened'' and add in its place the word ''supplemental''.

§ 3.404 [Amended]

■ 23a. In § 3.404, remove the word ''reopened'' and add in its place the word ''supplemental''.

§ 3.655 [Amended]

■ 23b. In § 3.655, remove the word ''reopened'' and add in its place the word ''supplemental''.

§ 3.814 [Amended]

■ 24. Amend § 3.814 in paragraph (e) introductory text by removing the words ''original claim, a claim reopened after final disallowance, or a claim for increase'' and adding in their place the words ''initial claim or supplemental claim''.

§ 3.815 [Amended]

■ 25. Amend § 3.815 in paragraph (i) introductory text by removing the words ''original claim, a claim reopened after final disallowance, or a claim for increase,'' and adding in their place the words ''initial claim or supplemental claim''.

Subpart D—Universal Adjudication Rules That Apply to Benefit Claims Governed by Part 3 of This Title

■ 26. The authority citation for part 3, subpart D continues to read as follows:

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

■ 27. Add § 3.2400 to read as follows:

§ 3.2400 Applicability of modernized review system.

(a) *Applicability.* The modernized review system defined in 38 CFR 19.2(b) applies to all claims, requests for reopening of finally adjudicated claims, and requests for revision based on clear and unmistakable error:

(1) For which VA issues notice of an initial decision on or after the effective date of the modernized review system as provided in 38 CFR 19.2(a); or

(2) Where a claimant has elected review of a legacy claim under the modernized review system as provided in paragraph (c) of this section.

(b) *Legacy claims.* A legacy claim is a claim, or request for reopening or revision of a finally adjudicated claim, for which VA provided notice of a decision prior to the effective date of the modernized review system and the claimant has not elected to participate in the modernized review system as provided in paragraph (c) of this section.

(c) *Election into the modernized review system.* For claims governed by this part, pursuant to election by a claimant, the modernized review system applies where:

(1) *Rapid appeals modernization program election.* A claimant with a legacy appeal elects to opt-in to the modernized review system on or after November 1, 2017, as part of a program authorized by the Secretary pursuant to section 4 of Public Law 115–55; or

(2) *Election after receiving a statement of the case.* A claimant with a legacy appeal elects to opt-in to the modernized review system, following issuance, on or after the effective date of the modernized system, of a VA Statement of the Case or Supplemental Statement of the Case, by filing for a review option under the new system in accordance with § 3.2500 on a form prescribed by the Secretary within the time allowed for filing a substantive appeal under 38 CFR 19.52(b) and other applicable provisions in part 19 of this chapter.

(d) *Effect of election.* Once an eligible claimant elects the modernized review system with respect to a particular claim, the provisions of 38 CFR parts 3, 19, and 20 applicable to legacy claims and appeals no longer apply to that claim.

■ 28. Add § 3.2500 to read as follows:

§ 3.2500 Review of decisions.

(a) *Reviews available.* (1) Within one year from the date on which the agency of original jurisdiction issues a notice of a decision on a claim or issue as defined in § 3.151(c), except as otherwise provided in paragraphs (c), (e), and (f) of this section, a claimant may elect one of the following administrative review options by timely filing the appropriate form prescribed by the Secretary:

(i) A request for higher-level review under § 3.2601 or

(ii) An appeal to the Board under § 20.202 of this chapter.

(2) At any time after VA issues notice of a decision on an issue within a claim, a claimant may file a supplemental claim under § 3.2501.

(b) *Concurrent election prohibited.* With regard to the adjudication of a claim or an issue as defined in § 3.151(c), a claimant who has filed for review under one of the options available under paragraph (a) of this section may not, while that review is pending final adjudication, file for review under a different available option While the adjudication of a specific benefit is pending on appeal before a federal court, a claimant may not file for administrative review of the claim under any of options listed in paragraph (a) of this section.

(c) *Continuously pursued issues.* A claimant may continuously pursue a claim or an issue by timely and properly filing one of the following administrative review options, as specified (except as otherwise provided in paragraphs (c), (e), and (f) of this section), after any decision by the agency of original jurisdiction, Board of Veterans' Appeals, or entry of judgment by the U.S. Court of Appeals for Veterans Claims, provided that any appeal to the U.S. Court of Appeals for Veterans Claims is timely filed as determined by the court:

(1) Following notice of a decision on an initial claim or a supplemental claim, the claimant may file a supplemental claim, request a higher-level review, or appeal to the Board of Veterans' Appeals.

(2) Following notice of a decision on a higher-level review, the claimant may file a supplemental claim or appeal to the Board of Veterans' Appeals. (See appeal to the Board, 38 CFR 20.202).

(3) Following notice of a decision on an appeal to the Board of Veterans' Appeals, the claimant may file a supplemental claim or file a notice of appeal to the Court of Appeals for Veterans Claims.

(4) Following a decision on an appeal to the Court of Appeals for Veterans Claims, the claimant may file a supplemental claim.

(d) *Voluntary withdrawal.* A claimant may withdraw a supplemental claim or a request for a higher-level review at any time before VA renders a decision on the issue. A claimant must submit in writing or through electronic submission in a manner prescribed by the Secretary any notice of withdrawal of an issue under the selected review option to the agency of original

jurisdiction. The withdrawal will be effective the date VA receives it. A claimant may withdraw an appeal to the Board of Veteran's Appeals as prescribed in § 20.205.

(e) *Changing review options while a review is pending adjudication*—(1) *Within one year of prior decision notice.* A claimant may change the review option selected by withdrawing the request as prescribed in § 3.2500(d) and filing the appropriate application for the requested review option within one year from the date on which VA issued notice of a decision on an issue.

(2) *More than one year after notice of a decision.* A claimant may change the review option selected to a supplemental claim after expiration of one-year following the date on which VA issued a notice of decision on an issue by following the procedure specified in paragraph (e)(1) of this section. Where VA receives the supplemental claim application after expiration of the one-year period, continuous pursuit of the claim will be broken and VA will apply the effective date provisions under paragraph (h)(2) of this section, unless VA grants an extension of the one-year period for good cause shown under § 3.109(b) and the supplemental claim application is received within the extension period allowed.

(f) *Applicability.* This section applies to claims and requests under the modernized review system as set forth in § 3.2400, with the exception that a supplemental claim may not be filed in connection with a denial of a request to revise a final decision of the agency of original jurisdiction based on clear and unmistakable error.

(g) *Review of simultaneously contested claims.* Notwithstanding other provisions of this part, a party to a simultaneously contested claim may only seek administrative review of a decision by the agency of original jurisdiction on such claim by filing an appeal to the Board as prescribed in § 20.402 of this chapter within 60 days of the date VA issues notice of the decision on the claim. (See contested claims, 38 CFR 20.402).

(h) *Effective dates*—(1) *Continuously pursued claims.* Except as otherwise provided by other provisions of this part, including § 3.400, the effective date will be fixed in accordance with the date of receipt of the initial claim or date entitlement arose, whichever is later, if a claimant continuously pursues an issue by timely filing in succession any of the available review options as specified in paragraph (c) of this section within one year of the issuance of the decision (or the time period specified in paragraph (f) of this section, as applicable to simultaneously contested claims), provided that any appeal to the U.S. Court of Appeals for Veterans Claims must be accepted as timely by that court.

(2) *Supplemental claims received more than one year after notice of decision.* Except as otherwise provided in this section, for supplemental claims received more than one year after the date on which the agency of original jurisdiction issues notice of a decision or the Board of Veterans' Appeals issued notice of a decision, the effective date will be fixed in accordance with the date entitlement arose, but will not be earlier than the date of receipt of the supplemental claim.

■ 29. Add § 3.2501 to read as follows:

§ 3.2501 Supplemental claims.

Except as otherwise provided, a claimant or his or her authorized representative, if any, who disagrees with a prior VA decision may file a supplemental claim (see § 3.1(p)(2)) by submitting in writing or electronically a complete application (see § 3.160(a)) on a form prescribed by the Secretary any time after the agency of original jurisdiction issues notice of a decision, regardless of whether the claim is pending (see § 3.160(c)) or has become finally adjudicated (see § 3.160(d)). If new and relevant evidence is presented or secured with respect to the supplemental claim, the agency of original jurisdiction will readjudicate the claim taking into consideration all of the evidence of record. If new and relevant evidence is not presented or secured, the agency of original jurisdiction will issue a decision finding that there was insufficient evidence to readjudicate the claim. In determining whether new and relevant evidence is presented or secured, VA will consider any VA treatment records reasonably identified by the claimant and any evidence received by VA after VA issued notice of a decision on the claim and while the evidentiary record was closed (see 3.103(c)).

(a) *New and relevant evidence.* The new and relevant standard will not impose a higher evidentiary threshold than the previous new and material evidence standard under § 3.156(a).

(1) *Definition.* New evidence is evidence not previously part of the actual record before agency adjudicators. Relevant evidence is information that tends to prove or disprove a matter at issue in a claim. Relevant evidence includes evidence that raises a theory of entitlement that was not previously addressed.

(2) *Receipt prior to notice of a decision.* New and relevant evidence received before VA issues its decision on a supplemental claim will be considered as having been filed in connection with the claim.

(b) *Evidentiary record.* The evidentiary record for a supplemental claim includes all evidence received by VA before VA issues notice of a decision on the supplemental claim. For VA to readjudicate the claim, the evidentiary record must include new and relevant evidence that was not of record as of the date of notice of the prior decision.

(c) *Duty to assist.* Upon receipt of a substantially complete supplemental claim, VA's duty to assist in the gathering of evidence under § 3.159 of this part is triggered and includes any such assistance that may help secure new and relevant evidence as defined in paragraph (a) of this section to complete the supplemental claim application.

(d) *Date of filing.* The filing date of a supplemental claim is determined according to § 3.155, with the exception of the intent to file rule found in § 3.155(b) which applies to initial claims.

(Authority: 38 U.S.C. 501, 5103A(h), 5108)

■ 30. Add § 3.2502 to read as follows:

§ 3.2502 Return by higher-level adjudicator or remand by the Board of Veterans' Appeals.

Upon receipt of a returned claim from a higher-level adjudicator or remand by the Board of Veterans' Appeals, the agency of original jurisdiction will expeditiously readjudicate the claim in accordance with 38 U.S.C. 5109B. The agency of original jurisdiction retains jurisdiction of the claim. In readjudicating the claim, the agency of original jurisidction will correct all identified duty to assist errors, complete a new decision and issue notice to the claimant and or his or her legal representative in accordance with 3.103(f). The effective date of any evaluation and award of pension, compensation or dependency and indemnity compensation will be determined in accordance with the date of receipt of the initial claim as prescribed under § 3.2500(g).

■ 31. Amend § 3.2600 by revising the section heading, adding introductory text, and removing paragraph (g).

The revisions and additions read as follows:

§ 3.2600 Legacy review of benefit claims decisions.

This section applies only to legacy claims as defined in § 3.2400 in which a Notice of Disagreement is timely filed

on or after June 1, 2001, under regulations applicable at the time of filing.

* * * * *

■ 32. Add § 3.2601 to read as follows:

§ 3.2601 Higher-level review.

(a) *Applicability.* This section applies to all claims under the modernized review system, with the exception of simultaneously contested claims.

(b) *Requirements for election.* A claimant who is dissatisfied with a decision by the agency of original jurisdiction may file a request for higher-level review in accordance with § 3.2500, by submitting a complete request for review on a form prescribed by the Secretary.

(c) *Complete request.* A complete request for higher-level review is a submission of a request on a form prescribed by the Secretary, whether paper or electronic, that meets the following requirements:

(1) A complete request must provide the name of the claimant and the relationship to the veteran, if applicable;

(2) A complete request must be signed by the claimant or a person legally authorized to sign for the claimant; and

(3) A complete request must specify the date of the underlying decision for which review is requested and specify the issues for which review is requested.

(d) *Filing period.* A complete request for higher-level review must be received by VA within one year of the date of VA's issuance of the notice of the decision. If VA receives an incomplete request form, VA will notify the claimant and the claimant's representative, if any, of the information necessary to complete the request form prescribed by the Secretary. If a complete request is submitted within 60 days of the date of the VA notification of such incomplete request or prior to the expiration of the one-year filing period, VA will consider it filed as of the date VA received the incomplete application form that did not meet the standards of a complete request.

(e) *Who may conduct a higher-level review.* Higher-level review will be conducted by an experienced adjudicator who did not participate in the prior decision. Selection of a higher-level adjudicator to conduct a higher-level review is at VA's discretion. As a general rule, an adjudicator in an office other than the office that rendered the prior decision will conduct the higher-level review. An exception to this rule applies for claims requiring specialized processing, such as where there is only one office that handles adjudication of a particular type of entitlement. A claimant may request that the office that rendered the prior decision conduct the higher-level review, and VA will grant the request in the absence of good cause to deny such as when processing is centralized at one office within the agency of original jurisdiction or when the office that rendered the prior decision does not have higher-level review personnel available to conduct the review.

(f) *Evidentiary record.* The evidentiary record in a higher-level review is limited to the evidence of record as of the date the agency of original jurisdiction issued notice of the prior decision under review and the higher-level adjudicator may not consider additional evidence. The higher-level adjudicator may not order development of additional evidence that may be relevant to the claim under review, except as provided in paragraph (g) of this section.

(g) *Duty to assist errors.* The higher-level adjudicator will ensure that VA complied with its statutory duty to assist (see § 3.159) in gathering evidence applicable prior to issuance of the decision being reviewed. If the higher-level adjudicator both identifies a duty to assist error that existed at the time of VA's decision on the claim under review and cannot grant the maximum benefit for the claim, the higher-level adjudicator must return the claim for correction of the error and readjudication. Upon receipt, the agency of jurisdiction will expeditiously readjudicate the claim in accordance with 38 U.S.C. 5109B.

(1) For disability evaluations, the *maximum benefit* means the highest schedular evaluation allowed by law and regulation for the issue under review.

(2) For ancillary benefits, the *maximum benefit* means the granting of the benefit sought.

(3) For pension benefits or dependents indemnity compensation, the *maximum benefit* means granting the highest benefit payable.

(h) *Informal conferences.* A claimant or his or her representative may include a request for an informal conference with a request for higher-level review. For purposes of this section, *informal conference* means contact with a claimant's representative or, if not represented, with the claimant, telephonically, or as otherwise determined by VA, for the sole purpose of allowing the claimant or representative to identify any errors of law or fact in a prior decision based on the record at the time the decision was issued. If requested, VA will make reasonable efforts to contact the claimant and/or the authorized representative to conduct one informal conference during a higher-level review, but if such reasonable efforts are not successful, a decision may be issued in the absence of an informal conference. The higher-level adjudicator with determinative authority over the issue will conduct the informal conference, absent exceptional circumstances. VA will not receive any new evidence or introduction of facts not present at the time of the prior decision or apart of the evidentiary record in support of the higher-level review during the informal conference in accordance with paragraph (d) of this section. Any expenses incurred by the claimant in connection with the informal conference are the responsibility of the claimant.

(i) *De novo review.* The higher-level adjudicator will consider only those decisions and claims for which the claimant has requested higher-level review, and will conduct a de novo review giving no deference to the prior decision, except as provided in § 3.104(c).

(j) *Difference of opinion.* The higher-level adjudicator may grant a benefit sought in the claim under review based on a difference of opinion (see § 3.105(b)). However, any finding favorable to the claimant is binding except as provided in § 3.104(c) of this part. In addition, the higher-level adjudicator will not revise the outcome in a manner that is less advantageous to the claimant based solely on a difference of opinion. The higher-level adjudicator may reverse or revise (even if disadvantageous to the claimant) prior decisions by VA (including the decision being reviewed or any prior decision) on the grounds of clear and unmistakable error under § 3.105(a)(1) or (a)(2), as applicable, depending on whether the prior decision is finally adjudicated.

(k) *Notice requirements.* Notice of a decision made under this section will include all of the elements described in § 3.103(f), a general statement indicating whether evidence submitted while the record was closed was not considered, and notice of the options available to have such evidence considered.

(Authority: 38 U.S.C. 5109A and 7105(d))

PART 8—NATIONAL SERVICE LIFE INSURANCE

■ 33. The authority citation for part 8 continues to read as follows:

Authority: 38 U.S.C. 501, 1901–1929, 1981–1988, unless otherwise noted.

■ 34. Revise § 8.30 to read as follows:

§ 8.30 Review of Decisions and Appeal to Board of Veterans' Appeals.

(a) *Decisions.* This section pertains to insurance decisions involving questions arising under parts 6, 7, 8, and 8a of this chapter, to include the denial of applications for insurance, total disability income provision, or reinstatement; disallowance of claims for insurance benefits; and decisions holding fraud or imposing forfeiture. The applicant or claimant and his or her representative, if any, will be notified in writing of such a decision, which must include, in the notice letter or enclosures or a combination thereof, all of the following elements:

(1) Identification of the issues adjudicated.

(2) A summary of the evidence considered.

(3) A summary of the applicable laws and regulations relevant to the decision.

(4) Identification of findings that are favorable to the claimant.

(5) For denials, identification of the element(s) not satisfied that led to the denial.

(6) An explanation of how to obtain or access the evidence used in making the decision.

(7) A summary of the applicable review options available for the claimant to seek further review of the decision.

(b) *Favorable findings.* Any finding favorable to the claimant or applicant is binding on all subsequent agency of original jurisdiction and Board of Veterans' Appeals adjudicators, unless rebutted by evidence that identifies a clear and unmistakable error in the favorable finding.

(c) *Review of decisions.* Within one year from the date on which the agency of original jurisdiction issues notice of an insurance decision as outlined in paragraph (a) of this section, applicants or claimants may elect one of the following administrative review options by timely filing the appropriate form prescribed by the Secretary:

(1) *Supplemental claim review.* The nature of this review will accord with § 3.2501 of this title to the extent the terms used therein apply to insurance matters.

(2) *Request for a higher-level review.* The nature of this review will accord with § 3.2601 of this title to the extent the terms used therein apply to insurance matters. Higher-level reviews will be conducted by an experienced adjudicator who did not participate in the prior decision. Selection of a higher-level adjudicator to conduct a higher-level review is at VA's discretion.

(3) Appeal to *Board of Veterans' Appeals.* See 38 CFR part 20.

(d) *Part 3 provisions.* See § 3.2500(b) through (d) of this chapter for principles that generally apply to a veteran's election of review of an insurance decision.

(e) *Applicability.* This section applies where notice of an insurance decision was provided to an applicant or claimant on or after the effective date of the modernized review system as provided in § 19.2(a) of this chapter, or where an applicant or claimant has elected review of a legacy claim under the modernized review system as provided in § 3.2400(c) of this title.

(f) *Unpaid premiums.* When a claimant or applicant elects a review option under paragraph (c) of this section, any unpaid premiums, normally due under the policy from effective date of issue or reinstatement (as appropriate), will become an interest-bearing lien, enforceable as a legal debt due the United States and subject to all available collection procedures in the event of a favorable result for the claimant or applicant.

(g) *Premium payments.* Despite a claimant's or applicant's election of a review option under paragraph (c) of this section, where the agency of original jurisdiction's decision involved a change in or addition to insurance currently in force, premium payments must be continued on the existing contract.

(h) *Section 1984.* Nothing in this section shall limit an applicant's or claimant's right to pursue actions under 38 U.S.C. 1984.

(Authority: 38 U.S.C. 501, 1901–1929, 1981–1988)

PART 14—LEGAL SERVICES, GENERAL COUNSEL, AND MISCELLANEOUS CLAIMS

■ 35. The authority citation for part 14 continues to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 2671–2680; 38 U.S.C. 501(a), 512, 515, 5502, 5901–5905; 28 CFR part 14, appendix to part 14, unless otherwise noted.

■ 36. Amend § 14.629:

■ a. By removing the introductory text;

■ b. In paragraph (b)(5), by removing the words ''General Counsel or his or her designee'' and adding in their place the words ''Chief Counsel with subject-matter jurisdiction''; and

■ c. Adding paragraph (d).

The additions reads as follows:

§ 14.629 Requirements for accreditation of service organization representatives; agents; and attorneys.

* * * * *

(d) *Decisions on applications for accreditation.* The Chief Counsel with subject-matter jurisdiction will conduct an inquiry and make an initial determination regarding any question relating to the qualifications of a prospective service organization representative, agent, or attorney.

(1) If the Chief Counsel determines that the prospective service organization representative, agent, or attorney meets the requirements for accreditation in paragraph (a) or (b) of this section, notification of accreditation will be issued by the Chief Counsel and will constitute authority to prepare, present, and prosecute claims before an agency of original jurisdiction or the Board of Veterans' Appeals.

(2)(i) If the Chief Counsel determines that the prospective representative, agent, or attorney does not meet the requirements for accreditation, notification will be issued by the Chief Counsel concerning the reasons for disapproval, an opportunity to submit additional information, and any restrictions on further application for accreditation. If an applicant submits additional evidence, the Chief Counsel will consider such evidence and provide further notice concerning his or her final decision.

(ii) The determination of the Chief Counsel regarding the qualifications of a prospective service organization representative, agent, or attorney is a final adjudicative determination of an agency of original jurisdiction that may only be appealed to the Board of Veterans' Appeals.

* * * * *

■ 37. In § 14.631, in paragraph (c), revise the second sentence to read as follows:

§ 14.631 Powers of attorney; disclosure of claimant information.

* * * * *

(c) * * * This section is applicable unless 38 CFR 20.6 governs withdrawal from the representation. * * *

* * * * *

§ 14.632 [Amended]

■ 38. In § 14.632, in paragraph (c)(6), remove the words ''representation provided before an agency of original jurisdiction has issued a decision on a claim or claims and a Notice of Disagreement has been filed with respect to that decision'' and add in their place the words ''services for which a fee could not lawfully be charged''.

■ 39. Amend § 14.633:

■ a. In paragraph (e)(2)(i), by adding the words ''before the Office of the General Counsel'' after the words ''close the record'' in the last sentence;

■ b. In paragraph (e)(2)(ii), by adding the words ''before the Office of the General Counsel'' after the words ''close the record'';
■ c. By revising paragraph (h);
■ d. In paragraph (i), by adding the words ''suspended or'' before the word ''cancelled''; and
■ e. By adding paragraph (j).

The revision and addition read as follows:

§ 14.633 Termination of accreditation or authority to provide representation under § 14.630.

* * * * *

(h) The decision of the General Counsel is a final adjudicative determination of an agency of original jurisdiction that may only be appealed to the Board of Veterans' Appeals.

(1) *Decisions issued before the effective date of the modernized review system.* Notwithstanding provisions in this section for closing the record before the Office of the General Counsel at the end of the 30-day period for filing an answer or 10 days after a hearing, appeals of decisions issued before the effective date of the modernized review system as provided in § 19.2(a) of this chapter shall be initiated and processed using the procedures in 38 CFR parts 19 and 20 applicable to legacy appeals. Nothing in this section shall be construed to limit the Board's authority to remand a matter to which this paragraph (h)(1) applies to the General Counsel under 38 CFR 20.904 for any action that is essential for a proper appellate decision or the General Counsel's ability to issue a Supplemental Statement of the Case under 38 CFR 19.31.

(2) *Decisions issued on or after the effective date of the modernized review system.* Notwithstanding provisions in this section for closing the record before the Office of the General Counsel at the end of the 30-day period for filing an answer or 10 days after a hearing, appeals of decisions issued on or after the effective date of the modernized review system as provided in § 19.2(a) of this chapter shall be initiated and processed using the procedures in 38 CFR part 20 applicable to appeals under the modernized system.

* * * * *

(j) The effective date for suspension or cancellation of accreditation or authority to provide representation on a particular claim shall be the date upon which the General Counsel's final decision is rendered.

* * * * *

■ 40. Amend § 14.636:
■ a. Revising paragraph (c);
■ b. In paragraph (e)(7), by removing ''and'';
■ c. By revising paragraph (e)(8);
■ d. By adding paragraph (e)(9);
■ e. By revising paragraph (f);
■ f. By removing the references to ''reopened'' in paragraph (h)(3) introductory text and in the first sentence in paragraph (h)(3)(i) and adding in their place the word ''readjudicated''; and
■ g. By revising paragraphs (i)(3) and (k).

The revisions and addition read as follows:

§ 14.636 Payment of fees for representation by agents and attorneys in proceedings before Agencies of Original Jurisdiction and before the Board of Veterans' Appeals.

* * * * *

(c) *Circumstances under which fees may be charged.* Except as noted in paragraph (d) of this section, agents and attorneys may only charge fees as follows:

(1)(i) Agents and attorneys may charge claimants or appellants for representation provided after an agency of original jurisdiction has issued notice of an initial decision on the claim or claims if the notice of the initial decision was issued on or after the effective date of the modernized review system as provided in § 19.2(a) of this chapter, and the agent or attorney has complied with the power of attorney requirements in § 14.631 and the fee agreement requirements in paragraph (g) of this section. For purposes of this paragraph (c)(1)(i), an initial decision on a claim would include an initial decision on an initial claim for an increase in rate of benefit, an initial decision on a request to revise a prior decision based on clear and unmistakable error (unless fees are permitted at an earlier point pursuant to paragraph (c)(1)(ii) or paragraph (c)(2)(ii) of this section), and an initial decision on a supplemental claim that was presented after the final adjudication of an earlier claim. However, a supplemental claim will be considered part of the earlier claim if the claimant has continuously pursued the earlier claim by filing any of the following, either alone or in succession: A request for higher-level review, on or before one year after the date on which the agency of original jurisdiction issued a decision; a supplemental claim, on or before one year after the date on which the agency of original jurisdiction issued a decision; a Notice of Disagreement, on or before one year after the date on which the agency of original jurisdiction issued a decision; a supplemental claim, on or before one year after the date on which the Board of Veterans' Appeals issued a decision; or a supplemental claim, on or before one year after the date on which the Court of Appeals for Veterans Claims issued a decision.

(ii) Agents and attorneys may charge fees for representation provided with respect to a request for revision of a decision of an agency of original jurisdiction under 38 U.S.C. 5109A or the Board of Veterans' Appeals under 38 U.S.C. 7111 based on clear and unmistakable error if notice of the challenged decision on a claim or claims was issued on or after the effective date of the modernized review system as provided in § 19.2(a), and the agent or attorney has complied with the power of attorney requirements in § 14.631 and the fee agreement requirements in paragraph (g) of this section.

(2)(i) Agents and attorneys may charge claimants or appellants for representation provided: After an agency of original jurisdiction has issued a decision on a claim or claims, including any claim to reopen under 38 CFR 3.156(a) or for an increase in rate of a benefit; the agency of original jurisdiction issued notice of that decision before the effective date of the modernized review system as provided in § 19.2(a) of this chapter; a Notice of Disagreement has been filed with respect to that decision on or after June 20, 2007; and the agent or attorney has complied with the power of attorney requirements in § 14.631 and the fee agreement requirements in paragraph (g) of this section.

(ii) Agents and attorneys may charge fees for representation provided with respect to a request for revision of a decision of an agency of original jurisdiction under 38 U.S.C. 5109A or the Board of Veterans' Appeals under 38 U.S.C. 7111 based on clear and unmistakable error if notice of the challenged decision was issued before the effective date of the modernized review system as provided in § 19.2(a); a Notice of Disagreement was filed with respect to the challenged decision on or after June 20, 2007; and the agent or attorney has complied with the power of attorney requirements in § 14.631 and the fee agreement requirements in paragraph (g) of this section.

(3) In cases in which a Notice of Disagreement was filed on or before June 19, 2007, agents and attorneys may charge fees only for services provided after both of the following conditions have been met:

(i) A final decision was promulgated by the Board with respect to the issue, or issues, involved in the appeal; and

(ii) The agent or attorney was retained not later than 1 year following the date that the decision by the Board was promulgated. (This condition will be considered to have been met with respect to all successor agents or attorneys acting in the continuous prosecution of the same matter if a predecessor was retained within the required time period.)

(4) Except as noted in paragraph (i) of this section and § 14.637(d), the agency of original jurisdiction that issued the decision referenced in paragraph (c)(1) or (2) of this section shall determine whether an agent or attorney is eligible for fees under this section. The agency of original jurisdiction's eligibility determination is a final adjudicative action that may only be appealed to the Board.

* * * * *

(e) * * *

(8) Whether, and to what extent, the payment of fees is contingent upon the results achieved; and

(9) If applicable, the reasons why an agent or attorney was discharged or withdrew from representation before the date of the decision awarding benefits.

(f) *Presumptions and discharge.* (1) Fees which do not exceed 20 percent of any past-due benefits awarded as defined in paragraph (h)(3) of this section shall be presumed to be reasonable if the agent or attorney provided representation that continued through the date of the decision awarding benefits. Fees which exceed 33⅓ percent of any past-due benefits awarded shall be presumed to be unreasonable. These presumptions may be rebutted through an examination of the factors in paragraph (e) of this section establishing that there is clear and convincing evidence that a fee which does not exceed 20 percent of any past-due benefits awarded is not reasonable or that a fee which exceeds 33⅓ percent is reasonable in a specific circumstance.

(2) With regard to a fee agreement in which the amount of the fee is contingent on the claimant receiving an award of benefits, a reasonable fee for an agent or attorney who is discharged by the claimant or withdraws from representation before the date of the decision awarding benefits is one that fairly and accurately reflects his or her contribution to and responsibility for the benefits awarded. The amount of the fee is informed by an examination of the factors in paragraph (e) of this section.

* * * * *

(i) * * *

(3) The Office of the General Counsel shall close the record before the Office of the General Counsel in proceedings to review fee agreements 15 days after the date on which the agent or attorney served a response on the claimant or appellant, or 30 days after the claimant, appellant, or the Office of the General Counsel served the motion on the agent or attorney if there is no response. The Deputy Chief Counsel with subject-matter jurisdiction may, for a reasonable period upon a showing of sufficient cause, extend the time for an agent or attorney to serve an answer or for a claimant or appellant to serve a reply. The Deputy Chief Counsel shall forward the record and a recommendation to the General Counsel or his or her designee for a final decision. Unless either party files a Notice of Disagreement, the agent or attorney must refund any excess payment to the claimant or appellant not later than the expiration of the time within which the Office of the General Counsel's decision may be appealed to the Board of Veterans' Appeals.

* * * * *

(k)(1) *Decisions issued before the effective date of the modernized review system.* Notwithstanding provisions in this section for closing the record before the Office of the General Counsel at the end of the 30-day period for serving a response or 15 days after the date on which the agent or attorney served a response, appeals of decisions issued before the effective date of the modernized review system as provided in § 19.2(a) of this chapter, shall be initiated and processed using the procedures in 38 CFR parts 19 and 20 applicable to legacy appeals. Nothing in this section shall be construed to limit the Board's authority to remand a matter to the General Counsel under 38 CFR 20.904 for any action that is essential for a proper appellate decision or the General Counsel's ability to issue a Supplemental Statement of the Case under 38 CFR 19.31.

(2) *Decisions issued on or after the effective date of the modernized review system.* Notwithstanding provisions in this section for closing the record before the Office of the General Counsel at the end of the 30-day period for serving a response or 15 days after the date on which the agent or attorney served a response, appeals of decisions issued on or after the effective date of the modernized review system as provided in § 19.2(a) of this chapter, shall be initiated and processed using the procedures in 38 CFR part 20 applicable to appeals under the modernized system.

* * * * *

■ 41. Amend § 14.637 by revising paragraphs (d)(3) and (f) to read as follows:

§ 14.637 Payment of the expenses of agents and attorneys in proceedings before Agencies of Original Jurisdiction and before the Board of Veterans' Appeals.

* * * * *

(d) * * *

(3) The Office of the General Counsel shall close the record before the Office of the General Counsel in proceedings to review expenses 15 days after the date on which the agent or attorney served a response on the claimant or appellant, or 30 days after the claimant, appellant, or the Office of the General Counsel served the motion on the agent or attorney if there is no response. The Deputy Chief Counsel with subject-matter jurisdiction may, for a reasonable period upon a showing of sufficient cause, extend the time for an agent or attorney to serve an answer or for a claimant or appellant to serve a reply. The Deputy Chief Counsel shall forward the record and a recommendation to the General Counsel or his or her designee for a final decision. Unless either party files a Notice of Disagreement, the agent or attorney must refund any excess payment to the claimant or appellant not later than the expiration of the time within which the Office of the General Counsel's decision may be appealed to the Board of Veterans' Appeals.

* * * * *

(f)(1) *Decisions issued before the effective date of the modernized review system.* Notwithstanding provisions in this section for closing the record before the Office of the General Counsel at the end of the 30-day period for serving a response or 15 days after the date on which the agent or attorney served a response, appeals of decisions issued before the effective date of the modernized review system as provided in § 19.2(a) of this chapter, shall be initiated and processed using the procedures in 38 CFR parts 19 and 20 applicable to legacy appeals. Nothing in this section shall be construed to limit the Board's authority to remand a matter to the General Counsel under 38 CFR 20.904 for any action that is essential for a proper appellate decision or the General Counsel's ability to issue a Supplemental Statement of the Case under 38 CFR 19.31.

(2) *Decisions issued on or after the effective date of the modernized review system.* Notwithstanding provisions in this section for closing the record before the Office of the General Counsel at the

end of the 30-day period for serving a response or 15 days after the date on which the agent or attorney served a response, appeals of decisions issued on or after the effective date of the modernized review system as provided in § 19.2(a) of this chapter, shall be initiated and processed using the procedures in 38 CFR part 20 applicable to appeals under the modernized system.

* * * * *

PART 19—BOARD OF VETERANS' APPEALS: LEGACY APPEALS REGULATIONS

■ 42. The authority citation for part 19 continues to read as follows:

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

PART 20—BOARD OF VETERANS' APPEALS: RULES OF PRACTICE

■ 43. The authority citation for part 20 continues to read as follows:

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

PART 19—[AMENDED]

■ 45. The heading for part 19 is revised as set forth above.

Subpart A—Applicability

■ 46. The heading for subpart A is revised as set forth above.

PART 20—[AMENDED]

§ 20.102 [Removed]

■ 47. Remove § 20.102.

§ 20.100 [Redesignated as § 20.102]

■ 48. Redesignate § 20.100 as § 20.102.

§ 20.101 [Redesignated as § 20.104]

■ 49–50. Redesignate § 20.101 as § 20.104.

§ 20.903 [Redesignated as § 20.908]

■ 51. Redesignate § 20.903 as § 20.908.

§ 20.904 [Redesignated as § 20.1000]

■ 52. Redesignate § 20.904 as § 20.1000.

PARTS 19 AND 20—[AMENDED]

§§ 19.1 through 19.5, 19.7 through 19.9, and 19.11 through 19.14 [Transferred to Part 20 and Redesignated as §§ 20.100, 20.101, 201.106, 20.103, 20.105, 20.903, 20.905, 20.904, 20.1004, 20.107, 20.108, and 20.109]

■ 53. As displayed in the following table, transfer and redesignate the part 19 sections in the left column to the corresponding part 20 sections in the right column.

Part 19 sections	Part 20 sections
19.1	20.100
19.2	20.101
19.3	20.106
19.4	20.103
19.5	20.105
19.7	20.903
19.8	20.905
19.9	20.904
19.11	20.1004
19.12	20.107
19.13	20.108
19.14	20.109

PART 19—[AMENDED]

§§ 19.50 through 19.53 [Removed]

■ 54. Remove §§ 19.50 through 19.53.

PARTS 19 AND 20—[AMENDED]

§§ 20.200, 20.201, 20.202, 20.204, and 20.300 through 20.304 [Transferred to Part 19 and Redesignated as §§ 19.20, 19.21, 19.22, 19.55, 19.51, 19.50, and 19.52 through 19.54]

■ 55. As displayed in the following table, transfer and redesignate the part 20 sections in the left column to the corresponding part 19 sections in the right column.

Part 20 sections	Part 19 sections
20.200	19.20 (in subpart B)
20.201	19.21 (in subpart B)
20.202	19.22 (in subpart B)
20.204	19.55
20.300	19.51
20.301	19.50
20.302	19.52
20.303	19.53

PART 19—[AMENDED]

■ 56. Add new §§ 19.1 and 19.2 to read as follows:

§ 19.1. Provisions applicable to legacy appeals.

Part 19 and subparts F, G, and J of part 20 apply only to the processing and adjudication of legacy appeals, as defined in § 19.2. Except as otherwise provided in specific sections, subparts A, B, H, K, L, M, N, and O of part 20 apply to the processing and adjudication of both appeals and legacy appeals. For applicability provisions concerning appeals in the modernized review system, see § 20.4 of this chapter.

§ 19.2. Appellant's election for review of a legacy appeal in the modernized system.

(a) *Effective date.* As used in this section, *the effective date* means February 19, 2019.

(b) *Modernized review system.* The modernized review system refers to the current statutory framework for claims and appeals processing, set forth in Public Law 115–55, and any amendments thereto, applicable on the effective date. The modernized review system applies to all claims, requests for reopening of finally adjudicated claims, and requests for revision based on clear and unmistakable error for which VA issues notice of an initial decision on or after the effective date, or as otherwise provided in paragraph (d) of this section.

(c) *Legacy appeals.* A legacy appeal is an appeal of a legacy claim, as defined in 38 CFR 3.2400(b), where a claimant has not elected to participate in the modernized review system as provided in paragraph (d) of this section. A legacy appeal is initiated by the filing of a Notice of Disagreement and is perfected to the Board with the filing of a Substantive Appeal pursuant to applicable regulations in accordance with 38 CFR parts 19 and 20.

(d) *Election into the modernized review system.* The modernized review system applies to legacy claims and appeals where:

(1) A claimant with a legacy claim or appeal elects the modernized review system pursuant to 38 CFR 3.2400(c)(1);

(2) A claimant with a legacy claim or appeal elects the modernized review system, following issuance, on or after the effective date, of a VA Statement of the Case or Supplemental Statement of the Case. The election is made by filing, on a form prescribed by the Secretary, an appeal in accordance with 38 CFR 20.202, or a review option in accordance with 38 U.S.C. 5108 or 5104B, as implemented by 38 CFR 3.2500 and other applicable regulations. The election must be filed within the time allowed for filing a substantive appeal under § 19.52(b); or

(3) VA issued notice of a decision prior to the effective date, and, pursuant to the Secretary's authorization to participate in a test program, the claimant elects the modernized review system by filing an appeal in accordance with 38 U.S.C. 7105, or a review option in accordance with 38 U.S.C. 5108 or 5104B.

(Authority: Pub. L. 115–55; 131 Stat. 1105; 38 U.S.C. 5104B, 5104C(a); 5108; 38 U.S.C. 7105)

§§ 19.3 through 19.5, 19.7 through 19.9, and 19.11 through 19.14 [Reserved]

■ 57. Add reserved §§ 19.3 through 19.5, 19.7 through 19.9, and 19.11 through 19.14 to subpart A.

Subpart B—Legacy Appeals and Legacy Appeals Processing by Agency of Original Jurisdiction

■ 58. Revise the subpart B heading as set forth above.

■ 59. Amend newly redesignated § 19.20:

■ a. By revising the section heading;

■ b. In the introductory text, by removing the text ''§ 20.201'' and adding in its place the text ''§ 19.21'', by removing the text ''§ 20.302(a)'' and adding in its place the text ''§ 19.52(a)'', and by adding the text ''of this chapter'' after the text ''of § 20.501(a)''; and

■ c. Revising the authority citation at the end of the section.

The revisions read as follows:

§ 19.20 What constitutes an appeal.

* * * * *

(Authority: 38 U.S.C. 7105 (2016))

■ 60. Amend newly redesignated § 19.21:

■ a. By revising the section heading;

■ b. In paragraph (a)(5), by removing the text ''§ 20.302(a)'' and adding in its place the text ''§ 19.52(a)'';

■ c. In paragraph (c), by removing the text ''§§ 20.500 and 20.501'' and adding in its place the text ''Rules 500 and 501 (§§ 20.500 and 20.501 of this chapter)''; and

■ d. Revising the authority citation at the end of the section.

The revisions to read as follows:

§ 19.21 Notice of Disagreement.

* * * * *

(Authority: 38 U.S.C. 7105 (2016))

■ 61. Amend newly redesignated § 19.22 by revising the section heading and authority citation at the end of the section to read as follows:

§ 19.22 Substantive Appeal.

* * * * *

(Authority: 38 U.S.C. 7105(d)(3)–(5) (2016))

§ 19.23 [Amended]

■ 62. Amend § 19.23:

■ a. In paragraph (a), by removing the words ''§ 20.201(a) of this chapter'' and adding in their place the text ''§ 19.21(a)'' both places they appear, and by removing the text '', § 19.27'';

■ b. In paragraph (b), by removing the words ''§ 20.201(b) of this chapter'' and adding in their place the text ''§ 19.21(b)'', and by removing the text '', § 19.27''.

§ 19.24 [Amended]

■ 63. Amend § 19.24 by:

■ a. In paragraph (a), by removing the text ''§ 20.201(a) of this chapter'' and adding in its place the text ''§ 19.21(a)'';

■ b. In paragraph (b)(1), by removing the text ''paragraph (a) of § 20.201 of this chapter'' and adding in its place the text ''§ 19.21(a)''; and

■ c. In paragraph (b)(3) introductory text, by removing the text ''§ 20.302(a) of this chapter'' and adding in its place the text ''§ 19.52(a)''.

■ 64. Amend § 19.25 by revising the authority citation at the end of the section to read as follows:

§ 19.25 Notification by agency of original jurisdiction of right to appeal.

* * * * *

(Authority: 38 U.S.C. 7105(a) (2016))

■ 65. Amend § 19.26 by revising the authority citation at the end of the section to read as follows:

§ 19.26 Action by agency of original jurisdiction on Notice of Disagreement.

* * * * *

(Authority: 38 U.S.C. 501; 38 U.S.C. 7105, 7105A (2016))

§ 19.27 [Removed and Reserved]

■ 66. Remove and reserve § 19.27.

■ 67. Amend § 19.28 by revising the authority citation at the end of the section to read as follows:

§ 19.28 Determination that a Notice of Disagreement is inadequate protested by claimant or representative.

* * * * *

(Authority: 38 U.S.C. 7105 (2016))

■ 68. Amend § 19.29 by revising the authority citation at the end of the section to read as follows:

§ 19.29 Statement of the Case.

* * * * *

(Authority: 38 U.S.C. 7105(d)(1) (2016))

■ 69. Amend § 19.30 by revising paragraph (b) and the authority citation at the end of the section to read as follows:

§ 19.30 Furnishing the Statement of the Case and instructions for filing a Substantive Appeal.

* * * * *

(b) *Information furnished with the Statement of the Case.* With the Statement of the Case, the appellant and the representative will be furnished information on the right to file, and time limit for filing, a substantive appeal; information on hearing and representation rights; and a VA Form 9, ''Appeal to Board of Veterans' Appeals'', and a statement describing the available review options if the appellant elects review of the issue or issues on appeal in the modernized review system.

(Authority: Sec. 2, Pub. L. 115–55; 131 Stat. 1105; 38 U.S.C. 7105 (2016))

■ 70. Amend § 19.31 by adding a second sentence to paragraph (a) and revising the authority citation at the end of the section to read as follows: ''

§ 19.31 Supplemental statement of the case.

(a) * * * The information furnished with the Supplemental Statement of the Case shall include a statement describing the available review options if the appellant elects review of the issue or issues on appeal in the modernized system. * * *

* * * * *

(Authority: 38 U.S.C. 5902, 5903, 5904; 38 U.S.C. 7105(d) (2016))

■ 71. Amend § 19.32 by revising the authority citation at the end of the section to read as follows:

§ 19.32 Closing of appeal for failure to respond to Statement of the Case.

* * * * *

(Authority: 38 U.S.C. 7105(d)(3) (2016))

§ 19.33 [Removed and Reserved]

■ 72. Remove and reserve § 19.33.

■ 73. Amend § 19.34 by revising the authority citation at the end of the section to read as follows:

§ 19.34 Determination that Notice of Disagreement or Substantive Appeal was not timely filed protested by claimant or representative.

* * * * *

(Authority: 38 U.S.C. 7105 (2016))

■ 74. Amend § 19.35 by removing the second sentence and revising the authority citation at the end of the section.

The revision reads as follows:

§ 19.35 Certification of appeals.

* * * * *

(Authority: 38 U.S.C. 7105 (2016))

■ 75. Amend § 19.36 by:

■ a. Removing the text ''Rule of Practice 1304 (§ 20.1304 of this chapter)'' from the first sentence and adding in its place the text ''Rule 1305 (§ 20.1305 of this chapter)''; and by removing the text ''§ 20.1304'' from the second sentence and adding in its place the text ''§ 20.1305''; and

■ b. Revising the authority citation at the end of the section.

The revision reads as follows:

§ 19.36 Notification of certification of appeal and transfer of appellate record.

* * * * *

(Authority: 38 U.S.C. 5902, 5903; 38 U.S.C. 5904, 7105 (2016))

■ 76. Amend § 19.37 by revising the authority citation at the end of the section to read as follows:

§ 19.37 Consideration of additional evidence received by the agency of original jurisdiction after an appeal has been initiated.

* * * * *

(Authority: 38 U.S.C. 5902, 5903, 5904; 38 U.S.C. 7105(d)(1) (2016))

■ 77. Amend § 19.38 by:
■ a. Removing the text ''Rule of Practice 302, paragraph (c) (§ 20.302(c) of this chapter)'' and adding in its place the text ''§ 19.52(c)''; and
■ b. Revising the authority citation at the end of the section.

The revision reads as follows:

§ 19.38 Action by agency of original jurisdiction when remand received.

* * * * *

(Authority: 38 U.S.C. 7105(d)(1) (2016))

Subpart C—Claimant Action in a Legacy Appeal

■ 78. Revise the subpart C heading to read as set forth above.

■ 79. Amend newly redesignate § 19.50 by revising the section heading and the authority citation at the end of the section to read as follows:

§ 19.50 Who can file an appeal.

* * * * *

(Authority: 38 U.S.C. 7105(b)(2) (2016))

■ 80. Amend newly redesignate § 19.52 by revising the section heading and the authority citations to paragraphs (a) through (c) to read as follows:

§ 19.52 Time limit for filing Notice of Disagreement, Substantive Appeal, and response to Supplemental Statement of the Case.

(a) * * *

(Authority: 38 U.S.C. 7105(b)(1) (2016))

(b) * * *

(Authority: 38 U.S.C. 7105(b)(1), (d)(3) (2016))

(c) * * *

(Authority: 38 U.S.C. 7105(d)(3) (2016))

■ 81. Amend newly redesignated § 19.53 by revising the section heading and the authority citation at the end of the section to read as follows:

§ 19.53 Extension of time for filing Substantive Appeal and response to Supplemental Statement of the Case.

* * * * *

(Authority: 38 U.S.C. 7105(d)(3) (2016))

■ 82. Amend newly redesignated § 19.54:
■ a. By revising the section heading;
■ b. In the introductory text, by removing the text ''Rule 302(b) (§ 20.302(b) of this part)'' and adding in its place the text ''§ 19.52(b)''; and
■ c. Revising the authority citation at the end of the section.

The revisions to read as follows:

§ 19.54 Filing additional evidence does not extend time limit for appeal.

* * * * *

(Authority: 38 U.S.C. 7105 (2016))

■ 83. Amend newly redesignated § 19.55:
■ a. By revising the section heading;
■ b. By revising the paragraph (b)(1) subject heading to read ''*Content*'', by removing the first sentence, and by removing the word ''They'' from the second sentence and adding in its place the words ''Appeal withdrawals'';
■ c. In paragraph (b)(2), by revising the last sentence;
■ d. In paragraph (b)(3), by removing the word ''part'' and adding in its place the word ''chapter'' in the second sentence; and
■ e. Revising the authority citation at the end of the section.

The revisions read as follows:

§ 19.55 Withdrawal of Appeal.

* * * * *

(b) * * *

(2) * * * Thereafter, file the withdrawal at the Board.

* * * * *

(Authority 38 U.S.C. 7105(b), (d) (2016))

Subpart D—[Removed and Reserved]

■ 84. Remove and reserve subpart D, consisting of §§ 19.75 through 19.99.

Subpart E—Simultaneously Contested Claims

■ 85. Amend § 19.100 by revising the authority citation at the end of the section to read as follows:

§ 19.100 Notification of right to appeal in simultaneously contested claims.

* * * * *

(Authority: 38 U.S.C. 7105A(a) (2016))

■ 86. Amend § 19.101 by revising the authority citation at the end of the section to read as follows:

§ 19.101 Notice to contesting parties on receipt of Notice of Disagreement in simultaneously contested claims.

* * * * *

(Authority: 38 U.S.C. 7105A(b) (2016))

■ 88. Amend § 19.102 by revising the authority citation at the end of the section to read as follows:

§ 19.102 Notice of appeal to other contesting parties in simultaneously contested claims.

* * * * *

(Authority: 38 U.S.C. 7105A(b) (2016))

§§ 19.103–19.199 [Added and Reserved]

■ 80. Add reserved §§ 19.103 through 19.199 to subpart E.

Appendix A to Part 19 [Removed]

■ 90. Remove appendix A to part 19.

PART 20—[AMENDED]

Subpart A—General

§ 20.1 [Amended]

■ 91. Amend § 20.1 in paragraph (a) by adding the text ''(Board)'' after the text ''Board of Veterans' Appeals''.

■ 92. Amend § 20.3 by:
■ a. Revising paragraphs (b), (c) and (f);
■ b. Removing paragraph (h);
■ c. Redesignating paragraph (i) as paragraph (h);
■ d. In newly redesignated paragraph (h), revising the subject heading and removing the text ''argument and/or'';
■ d. Removing paragraphs (j) and (k);
■ e. Redesignating paragraph (l) as paragraph (i) and revising the second sentence;
■ f. Removing paragraph (m);
■ g. Redesignating paragraph (n) as paragraph (j) and removing the word ''reopened'' and adding in its place the word ''readjudicated''.
■ h. Redesignating paragraph (o) as paragraph (k);
■ i. Redesignating paragraph (p) as paragraph (l);
■ j. Redesignating paragraph (q) as paragraph (m);

The revisions read as follows:

§ 20.3 Rule 3. Definitions.

* * * * *

(b) *Agent* means a person who has met the standards and qualifications for accreditation outlined in § 14.629(b) of this chapter and who has been properly designated under the provisions of § 14.631 of this chapter. It does not include representatives accredited under § 14.629(a) of this chapter, attorneys accredited under § 14.629(b) of this chapter, or a person authorized to represent a claimant for a particular claim under § 14.630 of this chapter.

(c) *Appellant* means a claimant who has filed an appeal to the Board of Veterans' Appeals either as a legacy appeal or in the modernized review system, as those terms are defined in § 19.2 of this chapter, and Rule 4 (§ 20.4 of this part), respectively.

* * * * *

(f) *Claim* means a written communication requesting a determination of entitlement or evidencing a belief in entitlement, to a specific benefit under the laws administered by the Department of Veterans Affairs submitted on an application form prescribed by the Secretary.

* * * * *

(h) *Hearing on appeal* or *Board hearing* * * *

(i) * * * For example, a request to correct a hearing transcript (see Rule 714 (§ 20.714)) is raised by motion.

* * *

* * * * *

■ 93. Add § 20.4 to read as follows:

§ 20.4 Rule 4. Appeal systems definitions and applicability provisions.

(a) *Appeal*—(1) *In general.* An appeal consists of a Notice of Disagreement timely filed to the Board on any issue or issues for which VA provided notice of a decision under 38 U.S.C. 5104 on or after the effective date, as defined in § 19.2(a) of this chapter.

(2) *Appellant's election for review of a legacy claim or appeal in the modernized review system.* The regulations applicable to appeals are also applicable to legacy claims and appeals, as those terms are defined in §§ 3.2400(b) and 19.2(c) of this chapter, where the claimant elects the modernized review system pursuant to § 19.2(d) of this chapter, and upon the timely filing to the Board of a Notice of Disagreement.

(b) *Applicability of parts 19 and 20*—(1) *Appeals.* Subparts C, D, E, and I of part 20 apply only to the processing and adjudication of appeals in the modernized review system.

(2) *Legacy claims and appeals.* Part 19 and subparts F, G, and J of part 20 apply only to the processing and adjudication of legacy claims and appeals.

(3) *Both appeals systems.* Except as otherwise provided in specific sections, subparts A, B, H, K, L, M, N, and O of part 20 apply to the processing and adjudication of both appeals and legacy claims and appeals.

(Authority: Sec. 2, Pub. L. 115–55; 131 Stat. 1105)

Subpart B—The Board

■ 94. Amend newly redesignated § 20.100 by revising the section heading to read as follows:

§ 20.100 Rule 100. Establishment of the Board.

* * * * *

■ 95. In newly redesignated § 20.102, revise the section heading and paragraph (c) to read as follows:

§ 20.102 Rule 102. Name, business hours, and mailing address of the Board.

* * * * *

(c) *Mailing address.* The mailing address of the Board is: Board of Veterans' Appeals, P.O. Box 27063, Washington, DC 20038. Mail to the Board that is not related to an appeal must be addressed to: Board of Veterans' Appeals, 810 Vermont Avenue NW, Washington, DC 20420.

* * * * *

■ 96. Amend newly redesignated § 20.104 by:

■ a. Removing the third sentence of paragraph (a);

■ b. Revising paragraphs (c) and (d);

■ c. Removing paragraph (e); and

■ d. Revising the authority citation at the end of the section.

The revisions read as follows:

§ 20.104 Rule 104. Jurisdiction of the Board.

* * * * *

(c) *Authority to determine jurisdiction.* The Board shall decide all questions pertaining to its jurisdictional authority to review a particular case. When the Board, on its own initiative, raises a question as to a potential jurisdictional defect, all parties to the proceeding and their representative(s), if any, will be given notice of the potential jurisdictional defect(s) and granted a period of 60 days following the date on which such notice is mailed to present written argument and additional evidence relevant to jurisdiction and to request a hearing to present oral argument on the jurisdictional question(s). The date of mailing of the notice will be presumed to be the same as the date stamped on the letter of notification. The Board may dismiss any case over which it determines it does not have jurisdiction.

(d)(1) *Appeals as to jurisdiction in legacy claims and appeals.* All claimants in legacy appeals, as defined in § 19.2 of this chapter, have the right to appeal a determination made by the agency of original jurisdiction that the Board does not have jurisdictional authority to review a particular case. Jurisdictional questions which a claimant may appeal, include, but are not limited to, questions relating to the timely filing and adequacy of the Notice of Disagreement and the Substantive Appeal.

(Authority: Sec. 2, Pub. L. 115–55; 131 Stat. 1105)

(2) *Application of 20.904 and 20.1305.* Section 20.904 of this part shall not apply to proceedings to determine the Board's own jurisdiction. However, the Board may remand a case to an agency of original jurisdiction in order to obtain assistance in securing evidence of jurisdictional facts. The time restrictions on requesting a hearing and submitting additional evidence in § 20.1305 of this part do not apply to a hearing requested, or evidence submitted, under paragraph (c) of this section.

(Authority: 38 U.S.C. 511(a), 7104, 7105, 7108)

■ 97. Revise subpart C to read as follows:

Subpart C—Commencement and Filing of Appeals

Sec.

20.200 Rule 200. Notification by agency of original jurisdiction of right to appeal.
20.201 Rule 201. What constitutes an appeal.
20.202 Rule 202. Notice of Disagreement.
20.203 Rule 203. Place and time of filing of Notice of Disagreement.
20.204 Rule 204. Who can file a Notice of Disagreement.
20.205 Rule 205. Withdrawal of appeal.
20.206–20.299 [Reserved]

§ 20.200 Rule 200. Notification by agency of original jurisdiction of right to appeal.

The claimant and his or her representative, if any, will be informed of appellate rights provided by 38 U.S.C. chapters 71 and 72, including the right to a personal hearing and the right to representation. The agency of original jurisdiction will provide this information in each notification of a determination of entitlement or nonentitlement to Department of Veterans Affairs benefits, pursuant to 38 U.S.C. 5104, 5104B, and 5108.

(Authority: 38 U.S.C. 7105(a))

§ 20.201 Rule 201. What constitutes an appeal.

An appeal of a decision by the agency of original jurisdiction consists of a Notice of Disagreement submitted to the Board in accordance with the provisions of §§ 20.202–20.204.

(Authority: 38 U.S.C. 7105)

§ 20.202 Rule 202. Notice of Disagreement.

(a) *In general.* A Notice of Disagreement must be properly completed on a form prescribed by the Secretary. If the agency of original jurisdiction decision addressed several issues, the Notice of Disagreement must identify the specific decision and issue or issues therein with which the claimant disagrees. The term issue means an adjudication of a specific entitlement as described in 38 CFR 3.151(c). The Board will construe such arguments in a liberal manner for purposes of determining whether they raise issues on appeal, but the Board may dismiss any appeal which fails to identify the specific decision and issue or issues therein with which the claimant disagrees.

(b) *Review options.* Upon filing the Notice of Disagreement, a claimant must indicate whether the claimant requests:

(1) Direct review by the Board of the record before the agency of original jurisdiction at the time of its decision, without submission of additional evidence or a Board hearing;

(2) A Board hearing, to include an opportunity to submit additional evidence at the hearing and within 90 days following the hearing; or

(3) An opportunity to submit additional evidence without a Board hearing with the Notice of Disagreement and within 90 days following receipt of the Notice of Disagreement.

(c)(1) The information indicated by the claimant in paragraph (b) of this section determines the evidentiary record before the Board as described in subpart D of this part, and the docket on which the appeal will be placed, as described in Rule 800 (§ 20.800). Except as otherwise provided in paragraph (2) of this section, the Board will not consider evidence as described in Rules 302 or 303 (§§ 20.302 and 20.303) unless the claimant requests a Board hearing or an opportunity to submit additional evidence on the Notice of Disagreement.

(2) A claimant may modify the information identified in the Notice of Disagreement for the purpose of selecting a different evidentiary record option as described in paragraph (b) of this section. Requests to modify a Notice of Disagreement must be made by completing a new Notice of Disagreement on a form prescribed by the Secretary, and must be received at the Board within one year from the date that the agency of original jurisdiction mails notice of the decision on appeal, or within 60 days of the date that the Board receives the Notice of Disagreement, whichever is later. Requests to modify a Notice of Disagreement will not be granted if the appellant has submitted evidence or testimony as described in §§ 20.302 and 20.303.

(d) *Standard form required.* The Board will not accept as a Notice of Disagreement an expression of dissatisfaction or disagreement with an adjudicative determination by the agency of original jurisdiction and a desire to contest the result that is submitted in any format other than the form prescribed by the Secretary, including on a different VA form.

(e) *Alternate form or other communication.* The filing of an alternate form or other communication will not extend, toll, or otherwise delay the time limit for filing a Notice of Disagreement, as provided in § 20.203(b). In particular, returning the incorrect VA form does not extend, toll, or otherwise delay the time limit for filing the correct form.

(f) *Unclear Notice of Disagreement.* If within one year after mailing an adverse decision (or 60 days for simultaneously contested claims), the Board receives a Notice of Disagreement completed on the form prescribed by the Secretary, but the Board cannot identify which denied issue or issues the claimant wants to appeal or which option the claimant intends to select under paragraph (b) of this section, then the Board will contact the claimant to request clarification of the claimant's intent.

(g) *Response required from claimant*—(1) *Time to respond.* The claimant must respond to the Board's request for clarification on or before the later of the following dates:

(i) 60 days after the date of the Board's clarification request; or

(ii) One year after the date of mailing of notice of the adverse decision being appealed (60 days for simultaneously contested claims).

(2) *Failure to respond.* If the claimant fails to provide a timely response, the previous communication from the claimant will not be considered a Notice of Disagreement as to any claim for which clarification was requested. The Board will not consider the claimant to have appealed the decision(s) on any claim(s) as to which clarification was requested and not received.

(h) *Action following clarification.* The unclear Notice of Disagreement is properly completed, and thereby filed, under paragraph (a) of this section when the Board receives the clarification.

(i) *Representatives and fiduciaries.* For the purpose of the requirements in paragraphs (f) through (h) of this section, references to the ''claimant'' include reference to the claimant or his or her representative, if any, or to his or her fiduciary, if any, as appropriate.

(Authority: 38 U.S.C. 7105)

[Approved by the Office of Management and Budget under control number 2900–0674]

§ 20.203 Rule 203. Place and time of filing of Notice of Disagreement.

(a) *Place of filing.* The Notice of Disagreement must be filed with the Board of Veterans' Appeals, P.O. Box 27063, Washington, DC 20038.

(b) *Time of filing.* Except as provided in § 20.402 for simultaneously contested claims, a claimant, or his or her representative, must file a properly completed Notice of Disagreement with a decision by the agency of original jurisdiction within one year from the date that the agency mails the notice of the decision. The date of mailing the letter of notification of the decision will be presumed to be the same as the date of that letter for purposes of determining whether an appeal has been timely filed.

(c) *Extension of time of filing.* An extension of the period for filing a Notice of Disagreement or a request to modify a Notice of Disagreement may be granted for good cause. A request for such an extension must be in writing and must be filed with the Board. Whether good cause for an extension has been established will be determined by the Board.

(Authority: 38 U.S.C. 7105)

§ 20.204 Rule 204. Who can file a Notice of Disagreement.

(a) *Persons authorized.* A Notice of Disagreement may be filed by a claimant personally, or by his or her representative if a proper Power of Attorney is on record or accompanies such Notice of Disagreement.

(b) *Claimant rated incompetent by Department of Veterans Affairs or under disability and unable to file.* If an appeal is not filed by a person listed in paragraph (a) of this section, and the claimant is rated incompetent by the Department of Veterans Affairs or has a physical, mental, or legal disability which prevents the filing of an appeal on his or her own behalf, a Notice of Disagreement may be filed by a fiduciary appointed to manage the claimant's affairs by the Department of Veterans Affairs or a court, or by a person acting as next friend if the appointed fiduciary fails to take needed action or no fiduciary has been appointed.

(c) *Claimant under disability and able to file.* Notwithstanding the fact that a fiduciary may have been appointed for a claimant, an appeal filed by a claimant will be accepted.

(Authority: 38 U.S.C. 7105(b)(2)(A))

§ 20.205 Rule 205. Withdrawal of appeal.

(a) *When and by whom filed.* Only an appellant, or an appellant's authorized representative, may withdraw an appeal. An appeal may be withdrawn as to any or all issues involved in the appeal.

(b) *Filing*—(1) *Content.* Appeal withdrawals must include the name of the veteran, the name of the claimant or appellant if other than the veteran (*e.g.,* a veteran's survivor, a guardian, or a fiduciary appointed to receive VA benefits on an individual's behalf), the applicable Department of Veterans Affairs file number, and a statement that the appeal is withdrawn. If the appeal involves multiple issues, the withdrawal must specify that the appeal

is withdrawn in its entirety, or list the issue(s) withdrawn from the appeal.

(2) *Where to file.* Appeal withdrawals should be filed with the Board.

(3) *When effective.* An appeal withdrawal is effective when received by the Board. A withdrawal received after the Board issues a final decision under Rule 1100(a) (§ 20.1100(a)) will not be effective.

(c) *Effect of filing.* Withdrawal of an appeal will be deemed a withdrawal of the Notice of Disagreement as to all issues to which the withdrawal applies. Withdrawal does not preclude filing a new Notice of Disagreement pursuant to this subpart, a request for higher-level review under 38 U.S.C. 5104B, or a supplemental claim under 38 U.S.C. 5108, as to any issue withdrawn, provided such filing would be timely under these rules if the withdrawn appeal had never been filed.

(Authority: 38 U.S.C. 7105)

§§ 20.206–20.299 [Reserved]

Subpart D—Evidentiary Record

■ 98. Revise the subpart D heading to read as set forth above.

§ 20.305 [Redesignated as § 20.110]

■ 99. Redesignate § 20.305 as § 20.110.

■ 100. Amend newly redesignated § 20.110 by revising the section heading to read as follows:

§ 20.110 Rule 110. Computation of time limit for filing.

* * * * *

§ 20.306 [Redesignated as § 20.111]

■ 101. Redesignate § 20.306 as § 20.111.

■ 102. Amend newly redesignated 20.111 by:

■ a. Revising the section heading; and

■ b. Removing the words ''Rule 305 (§ 20.305)'' and adding in their place the words ''Rule 110 (§ 20.110)''.

The revision reads as follows:

§ 20.111 Rule 111. Legal holidays.

* * * * *

■ 103. Add new §§ 20.300 through 20.303 to read as follows:

Sec.

* * * * *

20.300 Rule 300. General.

20.301 Rule 301. Appeals with no request for a Board hearing and no additional evidence.

20.302 Rule 302. Appeals with a request for a Board hearing.

20.303 Rule 303. Appeals with no request for a Board hearing, but with a request for submission of additional evidence.

* * * * *

§ 20.300 Rule 300. General.

(a) Decisions of the Board will be based on a de novo review of the evidence of record at the time of the agency of original jurisdiction decision on the issue or issues on appeal, and any additional evidence or testimony submitted pursuant to this subpart, as provided in § 20.801.

(b) *Waiver of appellant's right to submit evidence.* For appeals described in 20.302 and 20.303, an appellant has a right to submit evidence during a period of 90 days, unless this right is waived by the appellant or representative at any time prior to the expiration of the applicable 90-day period. Such a waiver must be in writing or, if a hearing on appeal is conducted pursuant to 20.302, the waiver must be formally and clearly entered on the record orally at the time of the hearing.

(Authority: 38 U.S.C. 7104)

§ 20.301 Rule 301. Appeals with no request for a Board hearing and no additional evidence.

For appeals in which the appellant requested, on the Notice of Disagreement, direct review by the Board without submission of additional evidence and without a Board hearing, the Board's decision will be based on a review of the evidence of record at the time of the agency of original jurisdiction decision on the issue or issues on appeal.

(Authority: 38 U.S.C. 7105, 7107, 7113(a))

§ 20.302 Rule 302. Appeals with a request for a Board hearing.

(a) Except as described in paragraphs (b) and (c) of this section, for appeals in which the appellant requested, on the Notice of Disagreement, a Board hearing, the Board's decision will be based on a review of the following:

(1) Evidence of record at the time of the agency of original jurisdiction's decision on the issue or issues on appeal;

(2) Evidence submitted by the appellant or his or her representative at the hearing, to include testimony provided at the hearing; and

(3) Evidence submitted by the appellant or his or her representative within 90 days following the hearing.

(b) In the event that the hearing request is withdrawn pursuant to § 20.704(e), the Board's decision will be based on a review of evidence described in paragraph (a)(1) of this section, and evidence submitted by the appellant or his or her representative within 90 days following receipt of the withdrawal.

(c) In the event that the appellant does not appear for a scheduled hearing, and the hearing is not rescheduled subject to § 20.704(d), the Board's decision will be based on a review of evidence described in paragraph (a)(1) of this section, and evidence submitted by the appellant or his or her representative within 90 days following the date of the scheduled hearing.

(Authority: 38 U.S.C. 7105, 7107, 7113(b))

§ 20.303 Rule 303. Appeals with no request for a Board hearing, but with a request for submission of additional evidence.

For appeals in which the appellant requested, on the Notice of Disagreement, an opportunity to submit additional evidence without a Board hearing, the Board's decision will be based on a review of the following:

(a) Evidence of record at the time of the agency of original jurisdiction's decision on the issue or issues on appeal; and

(b) Evidence submitted by the appellant or his or her representative:

(1) With the Notice of Disagreement or within 90 days following receipt of the Notice of Disagreement; or,

(2) If the appellant did not request an opportunity to submit additional evidence on the Notice of Disagreement, but subsequently requested to submit additional evidence pursuant to Rule 202, (§ 20.202(c)(2)(ii)), within 90 days following VA's notice that the appeal has been moved to the docket described in § 20.800(a)(ii).

(Authority: 38 U.S.C. 7105, 7107, 7113(c))

§§ 20.304 through 20.306 [Added and Reserved]

■ 104. Add reserved §§ 20.304 through 20.306.

■ 105. Revise subpart E to read as follows:

Subpart E—Appeal in Simultaneously Contested Claims

Sec.

20.400 Rule 400. Notification of the right to appeal in a simultaneously contested claim.

20.401 Rule 401. Who can file an appeal in simultaneously contested claims.

20.402 Rule 402. Time limits for filing Notice of Disagreement in simultaneously contested claims.

20.403 Rule 403. Notice to contesting parties on receipt of Notice of Disagreement in simultaneously contested claims.

20.404 Rule 404. Time limit for response to appeal by another contesting party in a simultaneously contested claim.

20.405 Rule 405. Docketing of simultaneously contested claims at the Board.

20.406 Rule 406. Notices sent to last addresses of record in simultaneously contested claims.

20.407 Rule 407. Favorable Findings are not binding in Contested Claims.
20.408–20.499 [Reserved]

§ 20.400 Rule 400. Notification of the right to appeal in a simultaneously contested claim.

All interested parties will be specifically notified of the action taken by the agency of original jurisdiction in a simultaneously contested claim and of the right and time limit for submitting a Notice of Disagreement to the Board, as well as hearing and representation rights.

§ 20.401 Rule 401. Who can file an appeal in simultaneously contested claims.

In simultaneously contested claims, any claimant or representative of a claimant may file a Notice of Disagreement within the time limits set out in Rule 402 (§ 20.402).

(Authority: 38 U.S.C. 7105(b)(2), 7105A)

§ 20.402 Rule 402. Time limits for filing Notice of Disagreement in simultaneously contested claims.

In simultaneously contested claims, the Notice of Disagreement from the person adversely affected must be filed within 60 days from the date of mailing of the notification of the determination to him or her; otherwise, that determination will become final. The date of mailing of the letter of notification will be presumed to be the same as the date of that letter for purposes of determining whether a Notice of Disagreement has been timely filed.

(Authority: 38 U.S.C. 7105A)

§ 20.403 Rule 403. Notice to contesting parties on receipt of Notice of Disagreement in simultaneously contested claims.

Upon the filing of a Notice of Disagreement in a simultaneously contested claim, all interested parties and their representatives will be furnished a copy of the substance of the Notice of Disagreement. The notice will inform the contesting party or parties of what type of review the appellant who initially filed a Notice of Disagreement selected under § 20.202(b), including whether a hearing was requested.

(Authority: 38 U.S.C. 7105A)

§ 20.404 Rule 404. Time limit for response to appeal by another contesting party in a simultaneously contested claim.

A party to a simultaneously contested claim may file a brief, argument, or request for a different type of review under § 20.202(b) in answer to a Notice of Disagreement filed by another contesting party. Any such brief, argument, or request must be filed with the Board within 30 days from the date the content of the Notice of Disagreement is furnished as provided in § 20.403. Such content will be presumed to have been furnished on the date of the letter that accompanies the content.

(Authority: 38 U.S.C. 7105A(b)(1))

§ 20.405 Rule 405. Docketing of simultaneously contested claims at the Board.

After expiration of the 30 day period for response in § 20.404, the Board will place all parties of the simultaneously contested claim on the docket for the type of review requested under § 20.202(b). In the event the parties request different types of review, if any party requests a hearing the appeal will be placed on the docket described in § 20.800(a)(iii), and VA will notify the parties that a hearing will be scheduled. If no party requested a hearing, but any party requested the opportunity to submit additional evidence, the appeal will be placed on the docket described in § 20.800(a)(ii), and the parties will be notified of their opportunity to submit additional evidence within 90 days of the date of such notice.

(Authority: 38 U.S.C. 7105A(b)(1))

§ 20.406 Rule 406. Notices sent to last addresses of record in simultaneously contested claims.

Notices in simultaneously contested claims will be forwarded to the last address of record of the parties concerned and such action will constitute sufficient evidence of notice.

§ 20.407 Rule 407. Favorable Findings are not binding in Contested Claims.

Where a claim is contested, findings favorable to either party, as described in Rule 801 (§ 20.801), are no longer binding on all agency of original jurisdiction and Board of Veterans' Appeals adjudicators during the pendency of the contested appeal.

(Authority: 38 U.S.C. 7105A(b)(2))

§§ 20.404–20.499 [Reserved]

Subpart F—Legacy Appeal in Simultaneously Contested Claims

■ 106. Revise the subpart F heading to read as set forth above.

§§ 20.500 through 20.504 [Redesignated as §§ 20.501 through 20.505]

■ 107. Redesignate §§ 20.500 through 20.504 as §§ 20.501 through 20.505.

■ 108. Add new § 20.500 to read as follows:

§ 20.500 Rule 500. Applicability.

The provisions of this subpart apply to legacy appeals, as defined in § 19.2 of this chapter.

■ 109. Amend newly redesignated § 20.501 by:

■ a. Revising the section heading;

■ b. Removing the words ''Rule 501 (§ 20.501 of this part)'' and adding in their place the words ''Rule 502 (§ 20.502)''; and

■ c. Revising the authority citation at the end of the section.

The revisions read as follows:

§ 20.501 Rule 501. Who can file an appeal in simultaneously contested claims.

* * * * *

(Authority: 38 U.S.C. 7105(b)(2), 7105A (2016))

■ 110. Amend newly redesignated § 20.502 by revising the section heading and the authority citations following paragraphs (a) through (c) to read as follows:

§ 20.502 Rule 502. Time limits for filing Notice of Disagreement, Substantive Appeal, and response to Supplemental Statement of the Case in simultaneously contested claims.

(a) * * *

(Authority: 38 U.S.C. 7105A(a) (2016))

(b) * * *

(Authority: 38 U.S.C. 7105A(b) (2016))

(c) * * *

(Authority: 38 U.S.C. 38 U.S.C. 7105(d)(3), 7105A(b) (2016))

■ 111. Amend newly redesignated § 20.503 by revising the section heading and the authority citation at the end of the section to read as follows:

§ 20.503 Rule 503. Time limit for response to appeal by another contesting party in a simultaneously contested claim.

* * * * *

(Authority: 38 U.S.C. 7105A(b) (2016))

■ 112. Amend newly redesignated § 20.504, and amend by revising the section heading and the authority citation at the end of the section to read as follows:

§ 20.504 Rule 504. Extension of time for filing a Substantive Appeal in simultaneously contested claims.

* * * * *

(Authority: 38 U.S.C. 7105A(b) (2016))

■ 113. Amend newly redesignated § 20.505, and amend by revising the section heading and the authority citation at the end of the section to read as follows:

§ 20.505 Rule 505. Notices sent to last addresses of record in simultaneously contested claims.

* * * * *

(Authority: 38 U.S.C. 7105A(b) (2016))

Subpart G—Legacy Hearings on Appeal

■ 114. Revise the subpart G heading to read as set forth above.

§ 20.600 [Redesignated as § 20.5]

■ 115. Redesignate § 20.600 as § 20.5.

■ 116. Amend newly redesignated § 20.5 by revising the section heading to read as follows:

§ 20.5 Rule 5. Right to representation.

* * * * *

§ 20.608 [Redesignated as § 20.6]

■ 117. Redesignate § 20.608 as § 20.6 and revise it to read as follows:.

§ 20.6 Rule 6. Withdrawal of services by a representative.

(a)(1) *Applicability.* The restrictions on a representative's right to withdraw contained in this paragraph apply only to those cases in which the representative has previously agreed to act as representative in an appeal. In addition to express agreement, orally or in writing, such agreement shall be presumed if the representative makes an appearance in the case by acting on an appellant's behalf before the Board in any way after the appellant has designated the representative as such as provided in ''§ 14.630 or § 14.631 of this chapter. The preceding sentence notwithstanding, an appearance in an appeal solely to notify the Board that a designation of representation has not been accepted will not be presumed to constitute such consent.

(2) *Procedures.* Except as otherwise provided in paragraph (b) of this section, after an appeal to the Board of Veterans' Appeals has been filed, a representative may not withdraw services as representative in the appeal unless good cause is shown on motion. Good cause for such purposes is the extended illness or incapacitation of an agent admitted to practice before the Department of Veterans Affairs, an attorney-at-law, or other individual representative; failure of the appellant to cooperate with proper preparation and presentation of the appeal; or other factors which make the continuation of representation impossible, impractical, or unethical. Such motions must be in writing and must include the name of the veteran, the name of the claimant or appellant if other than the veteran (*e.g.,* a veteran's survivor, a guardian, or a fiduciary appointed to receive VA benefits on an individual's behalf), the applicable Department of Veterans Affairs file number, and the reason why withdrawal should be permitted, and a signed statement certifying that a copy of the motion was sent by first-class mail, postage prepaid, to the appellant, setting forth the address to which the copy was mailed. Such motions should not contain information which would violate privileged communications or which would otherwise be unethical to reveal. Such motions must be filed at the following address: Board of Veterans' Appeals, P.O. Box 27063, Washington, DC 20038. The appellant may file a response to the motion with the Board at the same address not later than 30 days following receipt of the copy of the motion and must include a signed statement certifying that a copy of the response was sent by first-class mail, postage prepaid, to the representative, setting forth the address to which the copy was mailed.

(b) *Withdrawal of services prior to certification of a legacy appeal.* A representative may withdraw services as representative in a legacy appeal at any time prior to certification of the appeal to the Board of Veterans' Appeals by the agency of original jurisdiction by complying with the requirements of § 14.631 of this chapter.

(Approved by the Office of Management and Budget under control number 2900–0085)

(Authority: 38 U.S.C. 5901–5904, 7105(a))

Subpart G—[Amended]

■ 118. Remove the note to subpart G.

■ 119. Add new § 20.600 to read as follows:

§ 20.600 Rule 600. Applicability.

(a) The provisions in this subpart apply to Board hearings conducted in legacy appeals, as defined in § 19.2 of this chapter.

(b) Except as otherwise provided, Rules 700, 701, 704, 705, and 707–715 (§§ 20.700, 20.701, 20.704, 20.705, and 20.707–20.715) are also applicable to Board hearings conducted in legacy appeals.

§ 20.608 [Reserved]

■ 120. Add reserved § 20.606.

Subpart H—Hearings on Appeal

■ 121. Amend § 20.700 by revising paragraphs (a) and (b) and removing paragraphs (d) and (e).

The revisions read as follows:

§ 20.700 Rule 700. General.

(a) *Right to a hearing.* A hearing on appeal will be granted if an appellant, or an appellant's representative acting on his or her behalf, expresses a desire to testify before the Board. An appellant is limited to one Board hearing following the filing of a Notice of Disagreement with a decision of the agency of original jurisdiction. Requests for additional Board hearings may be granted for good cause shown.

(b) *Purpose of hearing.* The purpose of a hearing is to receive argument and testimony relevant and material to the appellate issue or issues. It is contemplated that the appellant and witnesses, if any, will be present. A hearing will not normally be scheduled solely for the purpose of receiving argument by a representative. Such argument may be submitted in the form of a written brief. Requests for appearances by representatives alone to personally present argument to Members of the Board may be granted if good cause is shown. Whether good cause has been shown will be determined by the presiding Member assigned to conduct the hearing.

* * * * *

§ 20.704 [Redesignated as § 20.603]

■ 122. Redesignate § 20.704 as § 20.603 and revise it to read as follows:

§ 20.603 Rule 603. Scheduling and notice of hearings conducted by the Board of Veterans' Appeals at Department of Veterans Affairs field facilities in a legacy appeal.

(a) *General.* Hearings may be conducted by a Member or Members of the Board during prescheduled visits to Department of Veterans Affairs facilities having adequate physical resources and personnel for the support of such hearings. Subject to paragraph (f) of this section, the hearings will be scheduled for each area served by a regional office in accordance with the place of each case on the Board's docket, established under § 20.902, relative to other cases for which hearings are scheduled to be held within that area.

(b) *Notification of hearing.* When a hearing at a Department of Veterans Affairs field facility is scheduled, the person requesting it will be notified of its time and place, and of the fact that the Government may not assume any expense incurred by the appellant, the representative, or witnesses attending the hearing.

(c) *Requests for changes in hearing dates.* Requests for a change in a hearing date may be made at any time up to two weeks prior to the scheduled date of the hearing if good cause is shown. Such requests must be in writing, must explain why a new hearing date is necessary, and must be filed with the

Board. Examples of good cause include, but are not limited to, illness of the appellant and/or representative, difficulty in obtaining necessary records, and unavailability of a necessary witness. If good cause is shown, the hearing will be rescheduled for the next available hearing date after the appellant or his or her representative gives notice that the contingency which gave rise to the request for postponement has been removed. If good cause is not shown, the appellant and his or her representative will be promptly notified and given an opportunity to appear at the hearing as previously scheduled. If the appellant elects not to appear at the prescheduled date, the request for a hearing will be considered to have been withdrawn. In such cases, however, the record will be submitted for review by the Member who would have presided over the hearing. If the presiding Member determines that good cause has been shown, the hearing will be rescheduled for the next available hearing date after the contingency which gave rise to the request for postponement has been removed.

(d) *Failure to appear for a scheduled hearing.* If an appellant (or when a hearing only for oral argument by a representative has been authorized, the representative) fails to appear for a scheduled hearing and a request for postponement has not been received and granted, the case will be processed as though the request for a hearing had been withdrawn. No further request for a hearing will be granted in the same appeal unless such failure to appear was with good cause and the cause for the failure to appear arose under such circumstances that a timely request for postponement could not have been submitted prior to the scheduled hearing date. A motion for a new hearing date following a failure to appear for a scheduled hearing must be in writing, must be filed within 15 days of the originally scheduled hearing date, and must explain why the appellant failed to appear for the hearing and why a timely request for a new hearing date could not have been submitted. Such motions must be filed with: Board of Veterans' Appeals, P.O. Box 27063, Washington, DC 20038. Whether good cause for such failure to appear and the impossibility of timely requesting postponement have been established will be determined by the Member who would have presided over the hearing. If good cause and the impossibility of timely requesting postponement are shown, the hearing will be rescheduled for the next available hearing date at the same facility after the appellant or his or her representative gives notice that the contingency which gave rise to the failure to appear has been removed.

(e) *Withdrawal of hearing requests.* A request for a hearing may be withdrawn by an appellant at any time before the date of the hearing. A request for a hearing may not be withdrawn by an appellant's representative without the consent of the appellant. Notices of withdrawal must be submitted to the Board.

(f) *Advancement of the case on the hearing docket.* A hearing may be scheduled at a time earlier than would be provided for under paragraph (a) of this section upon written motion of the appellant or the representative. The same grounds for granting relief, motion filing procedures, and designation of authority to rule on the motion specified in Rule 902(c) (§ 20.902(c)) for advancing a case on the Board's docket shall apply.

(Authority: 38 U.S.C. 7107; Sec. 102, Pub. 114–315; 130 Stat. 1536)

[Approved by the Office of Management and Budget under control number 2900–0085]

§ 20.702 [Redesignated as § 20.704]

■ 123. Redesignate § 20.702 as § 20.704.

■ 124. Amend newly redesignated § 20.704 by revising the section heading and paragraphs (a) and (c) through (e) and by adding paragraph (f) to read as follows:

§ 20.704 Rule 704. Scheduling and notice of hearings conducted by the Board of Veterans' Appeals.

(a)(1) *General.* To the extent that officials scheduling hearings for the Board determine that necessary physical resources and qualified personnel are available, hearings will be scheduled at the convenience of appellants and their representatives, with consideration of the travel distance involved. Subject to paragraph (f) of this section, electronic hearings will be scheduled for each area served by a regional office in accordance with the place of each case on the Board's docket, established under Rule 801 (§ 20.801) for appeals and under Rule 902 (§ 20.902) for legacy appeals, relative to other cases for which hearings are scheduled to be held within that area.

(2) *Special provisions for legacy appeals.* The procedures for scheduling and providing notice of Board hearings in legacy appeals conducted at a Department of Veterans Affairs facility having adequate physical resources and personnel for the support of such hearings under paragraph (a)(3) of Rule 601 (§ 20.601(a)(3)) are contained in Rule 603 (§ 20.603).

* * * * *

(c) *Requests for changes in hearing dates.* Requests for a change in a hearing date may be made at any time up to two weeks prior to the scheduled date of the hearing if good cause is shown. Such requests must be in writing, must explain why a new hearing date is necessary, and must be filed with the Board. Examples of good cause include, but are not limited to, illness of the appellant and/or representative, difficulty in obtaining necessary records, and unavailability of a necessary witness. If good cause is shown, the hearing will be rescheduled for the next available hearing date after the appellant or his or her representative gives notice that the contingency which gave rise to the request for postponement has been removed. If good cause is not shown, the appellant and his or her representative will be promptly notified and given an opportunity to appear at the hearing as previously scheduled. If the appellant elects not to appear at the prescheduled date, the request for a hearing will be considered to have been withdrawn. In such cases, however, the record will be submitted for review by the Member who would have presided over the hearing. If the presiding Member determines that good cause has been shown, the hearing will be rescheduled for the next available hearing date after the contingency which gave rise to the request for postponement has been removed.

(d) *Failure to appear for a scheduled hearing.* If an appellant (or when a hearing only for oral argument by a representative has been authorized, the representative) fails to appear for a scheduled hearing and a request for postponement has not been received and granted, the case will be processed as though the request for a hearing had been withdrawn. No further request for a hearing will be granted in the same appeal unless such failure to appear was with good cause and the cause for the failure to appear arose under such circumstances that a timely request for postponement could not have been submitted prior to the scheduled hearing date. A motion for a new hearing date following a failure to appear for a scheduled hearing must be in writing, must be filed within 15 days of the originally scheduled hearing date, and must explain why the appellant failed to appear for the hearing and why a timely request for a new hearing date could not have been submitted. Such motions must be filed with: Board of

Veterans' Appeals, P.O. Box 27063, Washington, DC 20038. Whether good cause for such failure to appear and the impossibility of timely requesting postponement have been established will be determined by the Member who would have presided over the hearing. If good cause and the impossibility of timely requesting postponement are shown, the hearing will be rescheduled for the next available hearing date at the same facility after the appellant or his or her representative gives notice that the contingency which gave rise to the failure to appear has been removed.

(e) *Withdrawal of hearing requests.* A request for a hearing may be withdrawn by an appellant at any time before the date of the hearing. A request for a hearing may not be withdrawn by an appellant's representative without the consent of the appellant. Notices of withdrawal must be submitted to the Board.

(f) *Advancement of the case on the hearing docket.* A hearing may be scheduled at a time earlier than would be provided for under paragraph (a) of this section upon written motion of the appellant or the representative. The same grounds for granting relief, motion filing procedures, and designation of authority to rule on the motion specified in Rule 902(c) (§ 20.902(c)) for advancing a case on the Board's docket shall apply.

(Authority: 38 U.S.C. 7107)

[Approved by the Office of Management and Budget under control number 2900–0085]

■ 125. Add new § 20.702 to read as follows:

§ 20.702 Rule 702. Methods by which hearings are conducted.

A hearing on appeal before the Board may be held by one of the following methods:

(a) In person at the Board's principal location in Washington, DC, or

(b) By electronic hearing, through picture and voice transmission, with the appellant appearing at a Department of Veterans Affairs facility.

(Authority: 38 U.S.C. 7102, 7105(a), 7107)

§ 20.703 [Redesignated as § 20.602]

■ 126. Redesignate § 20.703 as § 20.602 and revise it to read as follows:

§ 20.602 Rule 602. When a hearing before the Board of Veterans' Appeals may be requested in a legacy appeal; procedure for requesting a change in method of hearing.

(a) *How to request a hearing.* An appellant, or an appellant's representative, may request a hearing before the Board when submitting the substantive appeal (VA Form 9) or anytime thereafter, subject to the restrictions in Rule 1305 (§ 20.1305). Requests for such hearings before a substantive appeal has been filed will be rejected.

(b) *Board's determination of method of hearing.* Following the receipt of a request for a hearing, the Board shall determine, for purposes of scheduling the hearing for the earliest practical date, whether a hearing before the Board will be held at its principal location or at a facility of the Department or other appropriate Federal facility located within the area served by a regional office of the Department. The Board shall also determine whether the hearing will occur by means of an electronic hearing or by the appellant personally appearing before a Board member or panel. An electronic hearing will be in lieu of a hearing held by personally appearing before a Member or panel of Members of the Board and shall be conducted in the same manner as, and considered the equivalent of, such a hearing.

(c) *Notification of method of hearing.* The Board will notify the appellant and his or her representative of the method of a hearing before the Board.

(d) *How to request a change in method of hearing.* Upon notification of the method of the hearing requested pursuant to paragraph (c) of this section, an appellant may make one request for a different method of the requested hearing. If the appellant makes such a request, the Board shall grant the request and notify the appellant of the change in method of the hearing.

(e) *Notification of scheduling of hearing.* The Board will notify the appellant and his or her representative of the scheduled time and location for the requested hearing not less than 30 days prior to the hearing date. This time limitation does not apply to hearings which have been rescheduled due to a postponement requested by an appellant, or on his or her behalf, or due to the prior failure of an appellant to appear at a scheduled hearing before the Board with good cause. The right to notice at least 30 days in advance will be deemed to have been waived if an appellant accepts an earlier hearing date due to the cancellation of another previously scheduled hearing.

(Authority: Sec. 102, Pub. L. 114–315; 130 Stat. 1536)

■ 127. Add new § 20.703 to read as follows:

§ 20.703 Rule 703. When a hearing before the Board of Veterans' Appeals may be requested; procedure for requesting a change in method of hearing.

(a) *How to request a hearing.* An appellant, or an appellant's representative, may request a hearing before the Board when submitting the Notice of Disagreement, or when requesting to modify the Notice of Disagreement, as provided in Rule 202 (§ 20.202). Requests for such hearings at any other time will be rejected.

(b) *Board's determination of method of hearing.* Following the receipt of a request for a hearing, the Board shall determine, for purposes of scheduling the hearing for the earliest practical date, whether a hearing before the Board will be held at its principal location or by picture and voice transmission at a facility of the Department located within the area served by a regional office of the Department.

(c) *Notification of method of hearing.* The Board will notify the appellant and his or her representative of the method of a hearing before the Board.

(d) *How to request a change in method of hearing.* If an appellant declines to participate in the method of hearing selected by the Board, the appellant's opportunity to participate in a hearing before the Board shall not be affected. Upon notification of the method of the hearing requested pursuant to paragraph (c) of this section, an appellant may make one request for a different method of the requested hearing. If the appellant makes such a request, the Board shall grant the request and notify the appellant of the change in method of the hearing.

(e) *Notification of scheduling of hearing.* The Board will notify the appellant and his or her representative of the scheduled time and location for the requested hearing not less than 30 days prior to the hearing date. This time limitation does not apply to hearings which have been rescheduled due to a postponement requested by an appellant, or on his or her behalf, or due to the prior failure of an appellant to appear at a scheduled hearing before the Board of Veterans' Appeals with good cause. The right to notice at least 30 days in advance will be deemed to have been waived if an appellant accepts an earlier hearing date due to the cancellation of another previously scheduled hearing.

(Authority: 38 U.S.C. 7105(a), 7107)

§ 20.705 [Redesignated as § 20.601]

■ 128. Redesignate § 20.705 as § 20.601 and revise it to read as follows:

§ 20.601 Rule 601. Methods by which hearings in legacy appeals are conducted; scheduling and notice provisions for such hearings.

(a) *Methods by which hearings in legacy appeals are conducted.* A hearing

on appeal before the Board may be held by one of the following methods:

(1) In person at the Board's principal location in Washington, DC;

(2) By electronic hearing, through voice transmission or through picture and voice transmission, with the appellant appearing at a Department of Veterans Affairs facility or appropriate Federal facility; or

(3) At a Department of Veterans Affairs facility having adequate physical resources and personnel for the support of such hearings.

(b) *Electronic hearings.* An appropriate Federal facility consists of a Federal facility having adequate physical resources and personnel for the support of such hearings.

(c) *Provisions for scheduling and providing notice of hearings in legacy appeals.*

(1) The procedures for scheduling and providing notice of Board hearings in legacy appeals conducted by the methods described in paragraphs (a)(1) and (a)(2) of this section are contained in Rule 704 (§ 20.704).

(2) The procedures for scheduling and providing notice of Board hearings in legacy appeals conducted at a Department of Veterans Affairs facility having adequate physical resources and personnel for the support of such hearings under (a)(3) are contained in Rule 603 (§ 20.603).

(Authority: 38 U.S.C. 7107; Sec. 102, Pub. L. 114–315; 130 Stat. 1536)

§ 20.706 [Redesignated as § 20.705]

■ 129. Redesignate § 20.706 as § 20.705 and revise it to read as follows:

§ 20.705 Rule 705. Functions of the presiding Member.

(a) *General.* The presiding Member is responsible for the conduct of a Board hearing in accordance with the provisions of subparts G and H of this part.

(b) *Duties.* The duties of the presiding Member include, but are not limited to, any of the following:

(1) Conducting a prehearing conference, pursuant to § 20.707;

(2) Ruling on questions of procedure;

(3) Administering the oath or affirmation;

(4) Ensuring that the course of the Board hearing remains relevant to the issue or issues on appeal;

(5) Setting reasonable time limits for the presentation of argument;

(6) Prohibiting cross-examination of the appellant and any witnesses;

(7) Determining whether documentary evidence, testimony, and/or argument is relevant or material to the issue or issues being considered and not unduly repetitious;

(8) Terminating a Board hearing or directing that an offending party, representative, witness, or observer leave the hearing if that party persists or engages in disruptive or threatening behavior;

(9) Disallowing or halting the use of personal recording equipment being used by an appellant or representative if it becomes disruptive to the hearing; and

(10) Taking any other steps necessary to maintain good order and decorum.

(c) *Ruling on motions.* The presiding Member has the authority to rule on any Board hearing-related motion.

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

■ 130. Add new § 20.706 to read as follows:

§ 20.706 Rule 706. Designation of Member or Members to conduct the hearing.

Hearings will be conducted by a Member or panel of Members of the Board. Where a proceeding has been assigned to a panel, the Chairman, or the Chairman's designee, shall designate one of the Members as the presiding Member.

(Authority: 38 U.S.C. 7102, 7107)

§ 20.707 [Redesignated as § 20.604]

■ 131. Redesignate § 20.707 as § 20.604.

■ 132. Amend newly redesignated § 20.604 and amend by:

■ a. Revising the section heading;

■ c. Removing the words ''§ 19.3 of this part'' and add in their place the words ''Rule 106 (§ 20.106)'';

■ d. Removing the words ''§ 19.11(c) of this part'' and add in their place the words ''Rule 1004 (§ 20.1004)''; and

■ e. Adding an authority citation to the end of the setion.

The revision and addition read as follows:

§ 20.604 Rule 604. Designation of Member or Members to conduct the hearing in a legacy appeal.

* * * * *

(Authority: 38 U.S.C. 7102; 38 U.S.C. 7101 (2016))

§ 20.708 [Redesignated as § 20.707]

■ 133. Redesignate § 20.708 as § 20.707.

■ 134. Amend newly redesignated § 20.707 and amend by:

■ a. Revisng the section heading;

■ b. Removing the second sentence; and

■ c. Adding an authority citation to the end of the section.

The revision and addtions read as follows:

§ 20.707 Rule 707. Prehearing conference.

* * * * *

(Authority: 38 U.S.C. 7102, 7107)

§ 20.709 [Redesignated as § 20.605]

■ 135. Redesignate § 20.709 as § 20.605.

■ 136. Amend newly redesignated § 20.605 by revising the section heading and adding an authority citation to the end of the section to read as follows:

§ 20.605 Rule 605. Procurement of additional evidence following a hearing in a legacy appeal.

* * * * *

(Authority: 38 U.S.C. 7102; 38 U.S.C. 7105, 7101 (2016))

§ 20.710 [Redesignated as § 20.708]

■ 137. Redesignate § 20.710 as § 20.708.

■ 138. Amend newly redesignated 20.708 by revising the section heading to read as follows:

§ 20.708 Rule 708. Witness at hearings.

* * * * *

§ 20.711 [Redesignated as § 20.709]

■ 139. Redesignate § 20.711 as § 20.709.

■ 140. Amend newly redesignated § 20.709:

■ a. By revising the section heading; and

■ b. In paragraph (c), by removing the words ''Director, Office of Management, Planning and Analysis (014),''.

The revision reads as follows:

§ 20.709 Rule 709, Subpoenas.

* * * * *

§ 20.712 [Redesignated as § 20.710]

■ 141. Redesignate § 20.712 as § 20.710.

■ 142. Amend newly redesignated 20.710 by revising the section heading to read as follows:

§ 20.710 Rule 710. Expenses of appellants, representatives, and witnesses incident to hearings not reimbursable by the Government.

* * * * *

§ 20.713 [Redesignated as § 20.711]

■ 143. Redesignate § 20.713 as § 20.711.

■ 144. Amend newly redesignated § 20.711 by revising paragraph (b) to read as follows:

§ 20.711 Rule 711. Hearings in simultaneously contested claims.

* * * * *

(b) *Requests for changes in hearing dates.* (1) General. Except as described in paragraphs (b)(2) and (3) of this section, any party to a simultaneously contested claim may request a change in a hearing date in accordance with the provisions of Rule 704, paragraph (c) (§ 20.704(c)).

(2)(i) A request under Rule 704, paragraph (c) must be made within 60 days from the date of the letter of notification of the time and place of the

hearing, or not later than two weeks prior to the scheduled hearing date, whichever is earlier.

(ii) In order to obtain a new hearing date under the provisions of Rule 704, paragraph (c) (§ 20.704(c)), the consent of all other interested parties must be obtained and submitted with the request for a new hearing date. If such consent is not obtained, the date of the hearing will become fixed. After a hearing date has become fixed, an extension of time for appearance at a hearing will be granted only for good cause, with due consideration of the interests of other parties. Examples of good cause include, but are not limited to, illness of the appellant and/or representative, difficulty in obtaining necessary records, and unavailability of a necessary witness. The motion for a new hearing date must be in writing and must explain why a new hearing date is necessary. If good cause is shown, the hearing will be rescheduled for the next available hearing date after the appellant or his or her representative gives notice that the contingency which gave rise to the request for postponement has been removed. Ordinarily, however, hearings will not be postponed more than 30 days. Whether good cause for establishing a new hearing date has been shown will be determined by the presiding Member assigned to conduct the hearing.

(3) A copy of any motion for a new hearing date required by these rules must be mailed to all other interested parties by certified mail, return receipt requested. The receipts, which must bear the signatures of the other interested parties, and a letter explaining that they relate to the motion for a new hearing date and containing the applicable Department of Veterans Affairs file number must be filed at the same address where the motion was filed as proof of service of the motion. Each interested party will be allowed a period of 10 days from the date that the copy of the motion was received by that party to file written argument in response to the motion.

(Authority: 38 U.S.C. 7105A)

§ 20.714 [Redesignated as § 20.712]

■ 145. Redesignate § 20.714 as § 20.712 and revise it to read as follows:

§ 20.712 Rule 712. Record of hearing.

(a) *General.* All Board hearings will be recorded. The Board will prepare a written transcript for each Board hearing conducted. The transcript will be the official record of the hearing and will be incorporated as a part of the record on appeal. The Board will not accept alternate transcript versions prepared by the appellant or representative.

(b) *Hearing recording.* The recording of the Board hearing will be retained for a period of 12 months following the date of the Board hearing as a duplicate record of the proceeding.

(c) *Copy of written transcript.* If the appellant or representative requests a copy of the written transcript in accordance with § 1.577 of this chapter, the Board will furnish one copy to the appellant or representative.

§ 20.715 [Redesignated as § 20.713]

■ 146. Redesignate § 20.715 as § 20.713.

■ 147. Amend newly redesignated § 20.713 by:

■ a. Revising the section heading;

■ b. Revising the fourth sentence

■ c. Removing the fifth sentence; and

■ d. Revising the authority citation at the end of the section.

The revisions read as follows:

§ 20.713 Rule 713. Recording of hearing by appellant or representative.

* * * In all such situations, advance arrangements must be made with the Board of Veterans' Appeals, P.O. Box 27063, Washington, DC 20038.

(Authority: 38 U.S.C. 7102, 7107)

§ 20.716 [Redesignated as § 20.714]

■ 148. Redesignate § 20.716 as § 20.714 and revise it to read as follows:

§ 20.714 Rule 714. Correction of hearing transcripts.

If an appellant wishes to seek correction of perceived errors in a hearing transcript, the appellant or his or her representative should move for correction of the hearing transcript within 30 days after the date that the transcript is mailed to the appellant. The motion must be in writing and must specify the error, or errors, in the transcript and the correct wording to be substituted. The motion must be filed with the Board of Veterans' Appeals, P.O. Box 27063, Washington, DC 20038. The ruling on the motion will be made by the presiding Member of the hearing.

(Authority: 38 U.S.C. 7102, 7107)

§ 20.717 [Redesignated as § 20.715]

■ 149. Redesignate § 20.717 as § 20.715 and revise it to read as follows:

§ 20.715 Rule 715. Loss of hearing recordings or transcripts—request for new hearing.

(a) *Notification.* (1) The Board must notify the appellant and his or her representative in writing in the event the Board discovers that a Board hearing has not been recorded in whole or in part due to equipment failure or other cause, or the official transcript of the hearing is lost or destroyed and the recording upon which it was based is no longer available. The notice must provide the appellant with a choice of either of the following options:

(i) Appear at a new Board hearing, pursuant to Rules 703 and 704 (§§ 20.703 and 20.704) for appeals or Rules 602 and 603 (§§ 20.602 and 20.603) for legacy appeals, as defined in § 19.2 of this chapter; or

(ii) Have the Board proceed to appellate review of the appeal based on the evidence of record.

(2) The notice will inform the appellant that he or she has a period of 30 days to respond to the notice. If the appellant does not respond by requesting a new hearing within 30 days from the date of the mailing of the notice, then the Board will decide the appeal on the basis of the evidence of record. A request for a new Board hearing will not be accepted once the Board has issued a decision on the appeal.

(b) *Board decision issued prior to a loss of the recording or transcript.* The Board will not accept a request for a new Board hearing under this section if a Board decision was issued on an appeal prior to the loss of the recording or transcript of a Board hearing, and the Board decision considered testimony provided at that Board hearing.

(Authority: 38 U.S.C. 7102, 7105(a), 7107)

§§ 20.716 and 20.717 [Reserved]

■ 150. Add reserved §§ 20.716 and 20.717.

§ 20.901 [Redesignated as § 20.906]

■ 151. Redesignate § 20.901 as § 20.906.

§ 20.902 [Redesignated as § 20.907]

■ 152. Redesignate § 20.902 as § 20.907.

§ 20.800 [Redesignated as § 20.901]

■ 153. Redesignate § 20.800 as § 20.901.153.

■ 154. Revise the subpart I heading and add new § 20.800 and §§ 20.801 through 20.804 to read as follows:

Subpart I—Appeals Processing

20.800 Rule 800. Order of consideration of appeals.
20.801 Rule 801. The decision.
20.802 Rule 802. Remand for correction of error.
20.803 Rule 803. Content of Board decision, remand, or order in simultaneously contested claims.
20.804 Rule 804. Opinions of the General Counsel.

* * * * *

§ 20.800 Rule 800. Order of consideration of appeals.

(a) *Docketing of appeals.* (1) Applications for review on appeal are docketed in the order in which they are received on the following dockets:

(i) A docket for appeals in which an appellant does not request a hearing or an opportunity to submit additional evidence on the Notice of Disagreement;

(ii) A docket for appeals in which the appellant does not request a hearing but does request an opportunity to submit additional evidence on the Notice of Disagreement; and

(iii) A docket for appeals in which the appellant requests a hearing on the Notice of Disagreement.

(2) An appeal may be moved from one docket to another only when the Notice of Disagreement has been modified pursuant to Rule 202, paragraph (c)(3) (§ 20.202(c)(3)). The request to modify the Notice of Disagreement must reflect that the appellant requests the option listed in § 20.202(b) that corresponds to the docket to which the appeal will be moved. An appeal that is moved from one docket to another will retain its original docket date.

(b) Except as otherwise provided, each appeal will be decided in the order in which it is entered on the docket to which it is assigned.

(c) *Advancement on the docket*—(1) *Grounds for advancement.* A case may be advanced on the docket to which it is assigned on the motion of the Chairman, the Vice Chairman, a party to the case before the Board, or such party's representative. Such a motion may be granted only if the case involves interpretation of law of general application affecting other claims, if the appellant is seriously ill or is under severe financial hardship, or if other sufficient cause is shown. ''Other sufficient cause'' shall include, but is not limited to, administrative error resulting in a significant delay in docketing the case, administrative necessity, or the advanced age of the appellant. For purposes of this Rule, ''advanced age'' is defined as 75 or more years of age. This paragraph does not require the Board to advance a case on the docket in the absence of a motion of a party to the case or the party's representative.

(2) *Requirements for motions.* Motions for advancement on the docket must be in writing and must identify the specific reason(s) why advancement on the docket is sought, the name of the veteran, the name of the appellant if other than the veteran (*e.g.,* a veteran's survivor, a guardian, a substitute appellant, or a fiduciary appointed to receive VA benefits on an individual's behalf), and the applicable Department of Veterans Affairs file number. The motion must be filed with the Board of Veterans' Appeals, P.O. Box 27063, Washington, DC 20038.

(3) *Disposition of motions.* If a motion is received prior to the assignment of the case to an individual member or panel of members, the ruling on the motion will be by the Vice Chairman, who may delegate such authority to a Deputy Vice Chairman. If a motion to advance a case on the docket is denied, the appellant and his or her representative will be immediately notified. If the motion to advance a case on the docket is granted, that fact will be noted in the Board's decision when rendered.

(d) *Consideration of appeals remanded by the United States Court of Appeals for Veterans Claims.* A case remanded by the United States Court of Appeals for Veterans Claims for appropriate action will be treated expeditiously by the Board without regard to its place on the Board's docket.

(Authority: 38 U.S.C. 7112; Sec. 302,103–446; 108 Stat. 4645)

(e) *Case remanded to correct duty to assist error and new Notice of Disagreement filed after readjudication.* A case will not be returned to the Board following the agency of original jurisdiction's readjudication of an appeal previously remanded by the Board pursuant to Rule 803, paragraph (c) (§ 20.802(c)), unless the claimant files a new Notice of Disagreement. Such cases will be docketed in the order in which the most recent Notice of Disagreement was received.

(f) *Cases involving substitution.* A case returned to the Board following the grant of a substitution request or pursuant to an appeal of a denial of a substitution request assumes the same place on the docket held by the deceased appellant at the time of his or her death. If the deceased appellant's case was advanced on the docket prior to his or her death pursuant to paragraph (c) of this section, the substitute will receive the benefit of the advanced placement.

(Authority: 38 U.S.C. 5121A)

(g) *Postponement to provide hearing.* Any other provision of this Rule notwithstanding, a case may be postponed for later consideration and determination if such postponement is necessary to afford the appellant a hearing.

(Authority: 38 U.S.C. 7105, 7107)

§ 20.801 Rule 801. The decision.

(a) *General.* Decisions of the Board will be based on a de novo review of the evidence of record at the time of the agency of original jurisdiction decision on the issue or issues on appeal, and any additional evidence submitted pursuant to Rules 302 and 303 (§§ 20.302 and 20.303). Any findings favorable to the claimant as identified by the agency of original jurisdiction in notification of a decision or in a prior Board decision on an issue on appeal are binding on all agency of original jurisdiction and Board of Veterans' Appeals adjudicators, unless rebutted by evidence that identifies a clear and unmistakable error in the favorable finding. For purposes of this section, findings means conclusions on questions of fact and application of law to facts made by an adjudicator concerning the issue under review.

(b) *Content.* The decision of the Board will be in writing and will set forth specifically the issue or issues under appellate consideration. Except with respect to appeals which are dismissed because an appellant seeking nonmonetary benefits has died while the appeal was pending, the decision will also include:

(1) Findings of fact and conclusions of law on all material issues of fact and law presented on the record;

(2) The reasons or bases for those findings and conclusions;

(3) A general statement reflecting whether any evidence was received at a time when not permitted under subpart D, and informing the appellant that any such evidence was not considered by the Board and of the options available to have that evidence reviewed by the Department of Veterans Affairs; and

(4) An order granting or denying the benefit or benefits sought on appeal, dismissing the appeal, or remanding the issue or issues as described in Rule 802 (§ 20.802).

(c) *Panel decision.* A decision by a panel of Members will be by a majority vote of the panel Members.

(Authority: 38 U.S.C. 7104(d))

§ 20.802 Rule 802. Remand for correction of error.

(a) *Remand.* Unless the issue or issues can be granted in full, the Board shall remand the appeal to the agency of original jurisdiction for correction of an error on the part of the agency of original jurisdiction to satisfy its duties under 38 U.S.C. 5103A, if the error occurred prior to the date of the agency of original jurisdiction decision on appeal. The Board may remand for correction of any other error by the agency of original jurisdiction in

satisfying a regulatory or statutory duty, if correction of the error would have a reasonable possibility of aiding in substantiating the appellant's claim. The remand must specify the action to be taken by the agency of original jurisdiction.

(b) *Advisory Medical Opinion.* If the Board determines that an error as described in paragraph (a) of this section may only be corrected by obtaining an advisory medical opinion from a medical expert who is not an employee of the Department of Veterans Affairs, the Board shall remand the case to the agency of original jurisdiction to obtain such an opinion, specifying the questions to be posed to the independent medical expert providing the advisory medical opinion.

(c) *Action by agency of original jurisdiction after receipt of remand.* After correction of any error identified in the Board's remand, the agency of original jurisdiction must readjudicate the claim and provide notice of the decision under 38 U.S.C. 5104, to include notice under 38 U.S.C. 5104C of a claimant's options for further review of the agency of original jurisdiction's decision. The agency of original jurisdiction must provide for the expeditious treatment of any claim that is remanded by the Board.

(Authority: 38 U.S.C. 5103A, 5109, 5109B, 7102, 7104(a), 7105)

§ 20.803 Rule 803. Content of Board decision, remand, or order in simultaneously contested claims.

The content of the Board's decision, remand, or order in appeals involving a simultaneously contested claim will be limited to information that directly affects the issues involved in the contested claim. Appellate issues that do not involve all of the contesting parties will be addressed in one or more separate written decisions, remands, or orders that will be furnished only to the appellants concerned and their representatives, if any.

(Authority: 5 U.S.C. 552a(b), 38 U.S.C. 5701(a))

§ 20.804 Rule 804. Opinions of the General Counsel.

(a) The Board may obtain an opinion from the General Counsel of the Department of Veterans Affairs on legal questions involved in the consideration of an appeal.

(b) *Filing of requests for the procurement of opinions.* The appellant or representative may request that the Board obtain an opinion under this section. Such request must be in writing and will be granted upon a showing of good cause, such as the identification of a complex or controversial legal issue involved in the appeal which warrants such an opinion.

(c) *Notification of evidence to be considered by the Board and opportunity for response.* If the Board requests an opinion pursuant to this section, it will notify the appellant and his or her representative, if any. When the Board receives the opinion, it will furnish a copy of the opinion to the appellant, subject to the limitations provided in 38 U.S.C. 5701(b)(1), and to the appellant's representative, if any. A period of 60 days from the date the Board furnishes a copy of the opinion will be allowed for response, which may include the submission of relevant evidence or argument. The date the Board furnishes a copy will be presumed to be the same as the date of the letter or memorandum that accompanies the copy of the opinion for purposes of determining whether a response was timely filed.

(d) For purposes of this section, the term ''the Board'' includes the Chairman, the Vice Chairman, any Deputy Vice Chairman, and any Member of the Board before whom a case is pending.

(Authority: 38 U.S.C. 5107(a), 7102(c), 7104(a), 7104(c))

Subpart J—Action by the Board in Legacy Appeals

■ 155. Revise the subpart J heading to read as set forth above.

§ 20.900 [Redesignated as § 20.902]

■ 156. Redesignate § 20.900 as § 20.902.

■ 157. Add new § 20.900 to read as follows:

§ 20.900 Rule 900. Applicability.

The provisions in this subpart apply to Board decisions and remands rendered in legacy appeals, as defined in § 19.2 of this chapter.

(Authority: Sec. 2,115–55; 131 Stat. 1105)

■ 158. Amend newly redesignated § 20.901 by revising the section heading and the authority citation at the end of the section to read as follows:

§ 20.901 Rule 901. Submission of additional evidence after initiation of appeal.

* * * * *

(Authority: 38 U.S.C. 5902, 5903, 5904; 38 U.S.C. 5904, 7105(d)(1) (2016))

■ 159. Amend newly redesignated § 20.902:

■ a. By revising the section heading;

■ b. By revising the third sentence in paragraph (c)(1);

■ c. In paragraph (c)(2), by removing the words ''Director, Office of Management, Planning and Analysis (014),''; and

■ d. Revising the authority citations at the end of paragraph (d) and at the end of the section.

The revisions read as follows:

§ 20.902 Rule 902. Order of consideration of appeals.

* * * * *

(c) * * *

(1) * * * ''Other sufficient cause'' shall include, but is not limited to, administrative error resulting in a significant delay in docketing the case, administrative necessity, or the advanced age of the appellant. * * *

* * * * *

(d) * * *

(Authority: Sec. 302, Pub. L. 103–446; 108 Stat. 4645)

* * * * *

(Authority: 38 U.S.C. 5121A, 7107; 38 U.S.C. 7107 (2016))

§ 20.1002 [Removed]

■ 160. Remove § 20.1002.

§§ 20.1000 and 20.1001 [Redesignated as §§ 20.1001 and 20.1002]

■ 161. Redesignate §§ 20.1000 and 20.1001 as §§ 20.1001 and 20.1002, respectively.

■ 162. Amend newly redesignated § 20.906:

■ a. By revising the section heading; and

■ b. In paragraph (b), by removing the words ''Armed Forces Institute of Pathology'' and adding in its place the words ''Joint Pathology Center'' both places it appears.

The revision reads as follows:

§ 20.906 Rule 906. Medical opinions and opinions of the General Counsel.

* * * * *

■ 163. Amend newly redesignate § 20.907 by:

■ a. Revising the section heading; and

■ b. Removing the words ''Rule 901 (§ 20.901 of this part)'' and adding in its place the words ''Rule 906 (§ 20.906)''.

The revision reads as follows:

§ 20.907 Rule 907. Filing of requests for the procurement of opinions.

* * * * *

■ 164. Amend newly redesignated § 20.908:

■ a. By revising the section heading;

■ b. In paragraph (a), by removing the words ''Rule 901 (§ 20.901 of this part)'' and adding in its place the words ''Rule 906 (§ 20.906)''; and

■ c. In paragraph (b)(1), by removing the words ''§ 19.9(d)(5) of this chapter'' and adding in its place the words ''Rule 904(d)(5) (§ 20.904(d)(5))''.

The revision reads as follows:

§ 20.908 Rule 908. Notification of evidence to be considered by the Board and opportunity for response.

* * * * *

Subpart K—Vacatur and Reconsideration

■ 165. Revise the subpart K heading to read as set forth above.

■ 166. Amend newly redesignated § 20.1000 by revising the section heading and paragraphs (a)(2) and (3) to read as follows:

§ 20.1000 Rule 1000. Vacating a decision.

* * * * *

(a) * * *

(1) * * *

(2) When there was a prejudicial failure to afford the appellant a personal hearing. (Where there was a failure to honor a request for a hearing and a hearing is subsequently scheduled, but the appellant fails to appear, the decision will not be vacated.), and

(3) For a legacy app7al, as defined in § 19.2 of this chapter, when a Statement of the Case or required Supplemental Statement of the Case was not provided.

* * * * *

■ 167. Amend newly redesignated § 20.1001 and amend by:

■ a. Revising the section; and

■ b. Removing the words ''and material'' from paragraph (b).

The revision reads as follows:

§ 20.1001 Rule 1001. When reconsideration is accorded.

* * * * *

■ 168. Amend newly redesignated § 20.1002 and amend by:

■ a. Revising the section heading;

■ b. Removing the words ''Director, Office of Management, Planning and Analysis (014),'' in paragraph (b); and

■ c. Removing the words ''§ 19.11 of this chapter'' and adding in its place the words ''Rule 1004 (§ 20.1004)'' in paragraph (c)(2).

The revision reads as follows:

§ 20.1002 Rule 1002. Filing and disposition of motion for reconsideration.

* * * * *

■ 169. Amend § 20.1003 by revising the first sentence and removing the fifth sentence.

The revision reads as follows:

§ 20.1003 Rule 1003. Hearing on reconsideration.

After a motion for reconsideration has been allowed, a hearing will be granted if the issue under reconsideration was considered on a docket for cases that may include a hearing, and an appellant requests a hearing before the Board. * * *

Subpart L—Finality

■ 170. Revise § 20.1103 to read as follows:

§ 20.1103 Rule 1103. Finality of determinations of the agency of original jurisdiction where issue is not appealed.

A determination on a claim by the agency of original jurisdiction of which the claimant is properly notified is final if an appeal is not perfected as prescribed in § 19.52 of this chapter. If no Notice of Disagreement is filed as prescribed in subpart C of this part, the claim shall not thereafter be readjudicated or allowed, except as provided by 38 U.S.C. 5104B or 5108, or by regulation.

■ 171. Revise § 20.1105 to read as follows:

§ 20.1105 Rule 1105. Supplemental claim after promulgation of appellate decision.

(a) After an appellate decision has been promulgated on a claim, a claimant may file a supplemental claim with the agency of original jurisdiction by submitting the prescribed form with new and relevant evidence related to the previously adjudicated claim as set forth in § 3.2601 of this chapter, except in cases involving simultaneously contested claims under Subpart E of this part.

(Authority: 38 U.S.C. 5108, 7104)

(b) *Legacy appeals pending on the effective date.* For legacy appeals as defined in § 19.2 of this chapter, where prior to the effective date described in Rule 4 (§ 20.4), an appellant requested that a claim be reopened after an appellate decision has been promulgated and submitted evidence in support thereof, a determination as to whether such evidence is new and material must be made and, if it is, as to whether it provides a basis for allowing the claim. An adverse determination as to either question is appealable.

(Authority: 38 U.S.C. 5108, 7104 (2016))

Subpart M—Privacy Act

§ 20.1201 [Amended]

■ 172. Amend § 20.1201 by removing the words ''Rules 1000 through 1003 (§§ 20.1000–20.1003 of this part)'' and adding in its place the words ''Rules 1001 through 1004 (§§ 20.1001–20.1004)'' both places it appears.

Subpart N—Miscellaneous

■ 173. Amend § 20.1301:

■ a. By revising paragraph (a);

■ b. By redesignating paragraph (b) as paragraph (c);

■ c. By adding new paragraph (b);

■ d. By removing the text ''the internet at *http://www.index.va.gov/search/va/bva.html*'' and adding in its place the text ''the Board's website'' in newly redesignated paragraph (c)(1); and

■ c. In newly redesignated paragraph (c)(2) by:

■ i. Removing the words ''at the Research Center'' from the second sentence;

■ ii. Removing the words ''Board's Research Center'' and adding in its place the words ''Board'' from the third sentence;

■ iii. Removing the word ''paper'' from the ninth sentence; and

■ iv. Removing the words ''Research Center (01C1),'' from the last sentence.

The revisions and additions read as follows:

§ 20.1301 Rule 1301. Disclosure of information.

(a) *Policy.* It is the policy of the Board for the full text of appellate decisions to be disclosed to appellants. In those situations where disclosing certain information directly to the appellant would not be in conformance with 38 U.S.C. 5701, that information will be removed from the decision and the remaining text will be furnished to the appellant. A full-text appellate decision will be disclosed to the designated representative, however, unless the relationship between the appellant and representative is such (for example, a parent or spouse) that disclosure to the representative would be as harmful as if made to the appellant.

(b) *Legacy appeals.* For legacy appeals as defined in § 19.2 of this chapter, the policy described in paragraph (a) of this section is also applicable to Statements of the Case and supplemental Statements of the Case.

(Authority: 38 U.S.C. 7105(d)(2))

* * * * *

§ 20.1302 [Amended]

■ 174. Amend § 20.1302 in paragraph (a) by removing the words ''Rule 900 (§ 20.900(a)(2)'' and adding in its place the words ''Rule 800, paragraph (f) (§ 20.800(f)) or, for legacy appeals, Rule 902, paragraph (a)(2) (§ 20.902(a)(2))'' both places it appears.

§ 20.1304 [Redesignated as § 20.1305]

■ 175. Redesignate § 20.1304 as § 20.1305.

■ 176. Add new § 20.1304 to read as follows:

§ 20.1304 Rule 1304. Request for a change in representation.

(a) *Request for a change in representation within 90 days following Notice of Disagreement.* An appellant

and his or her representative, if any, will be granted a period of 90 days following receipt of a Notice of Disagreement, or up to and including the date the appellate decision is promulgated by the Board, whichever comes first, during which they may submit a request for a change in representation.

(b) *Subsequent request for a change in representation.* Following the expiration of the period described in paragraph (a) of this section, the Board will not accept a request for a change in representation except when the appellant demonstrates on motion that there was good cause for the delay. Examples of good cause include, but are not limited to, illness of the appellant or the representative which precluded action during the period; death of an individual representative; illness or incapacity of an individual representative which renders it impractical for an appellant to continue with him or her as representative; and withdrawal of an individual representative. Such motions must be in writing and must include the name of the veteran; the name of the claimant or appellant if other than the veteran (*e.g.,* a veteran's survivor, a guardian, or a fiduciary appointed to receive VA benefits on an individual's behalf) or the name of any substitute claimant or appellant; the applicable Department of Veterans Affairs file number; and an explanation of why the request for a change in representation could not be accomplished in a timely manner. Such motions must be filed at the following address: Board of Veterans' Appeals, P.O. Box 27063, Washington, DC 20038. Depending upon the ruling on the motion, action will be taken as follows:

(1) *Good cause not shown.* If good cause is not shown, the request for a change in representation will be referred to the agency of original jurisdiction for association with the appellant's file for any pending or subsequently received claims upon completion of the Board's action on the pending appeal without action by the Board concerning the request.

(2) *Good cause shown.* If good cause is shown, the request for a change in representation will be honored.

(Authority: 38 U.S.C. 5902, 5903, 5904, 7105, 7105A)

■ 177. Amend newly redesignated § 20.1305:

■ a. By revising the section heading and paragraph (a);

■ b. In paragraph (b)(1) introductory text, by removing the words ''Director, Office of Management, Planning and Analysis (014),'';

■ c. In paragraph (b)(2), by removing the words ''§ 20.903 of this chapter'' and adding in their place ''§ 20.908''; and

■ d. In paragraph (c), by removing the words ''§ 20.903'' and adding in their place the words ''§ 20.908'';

■ e. Revising the authority citation at the end of the section.

The revisions read as follows:

§ 20.1305 Rule 1305. Procedures for legacy appellants to request a change in representation, personal hearing, or submission of additional evidence following certification of an appeal to the Board of Veterans' Appeals.

(a) *Request for a change in representation, request for a personal hearing, or submission of additional evidence within 90 days following notification of certification and transfer of records.* An appellant in a legacy appeal, as defined in § 19.2 of this chapter, and his or her representative, if any, will be granted a period of 90 days following the mailing of notice to them that an appeal has been certified to the Board for appellate review and that the appellate record has been transferred to the Board, or up to and including the date the appellate decision is promulgated by the Board, whichever comes first, during which they may submit a request for a personal hearing, additional evidence, or a request for a change in representation. Any such request or additional evidence should be submitted directly to the Board and not to the agency of original jurisdiction. If any such request or additional evidence is submitted to the agency of original jurisdiction instead of to the Board, the agency of original jurisdiction must forward it to the Board in accordance with § 19.37(b) of this chapter. The date of mailing of the letter of notification will be presumed to be the same as the date of that letter for purposes of determining whether the request was timely made or the evidence was timely submitted. Any evidence which is submitted at a hearing on appeal which was requested during such period will be considered to have been received during such period, even though the hearing may be held following the expiration of the period. Any pertinent evidence submitted by the appellant or representative is subject to the requirements of paragraph (d) of this section if a simultaneously contested claim is involved.

* * * * *

(Authority: 38 U.S.C. 5121A, 5902, 5903; 38 U.S.C. 5904, 7104, 7105, 7105A (2016))

§§ 20.1306–20.1399 [Reserved]

■ 178. Add reserved §§ 20.1306 through 20.1399.

Subpart O—Revision of Decisions on Grounds of Clear and Unmistakable Error

§ 20.1401 [Amended]

■ 179. Amend § 20.1401 by removing the words '', but does not include officials authorized to file administrative appeals pursuant to § 19.51 of this title'' in the last sentence of paragraph (b).

■ 180. Amend § 20.1403 by revising paragraph (b)(2) to read as follows:

§ 20.1403 Rule 1403. What constitutes clear and unmistakable error; what does not.

* * * * *

(b) * * *

(2) *Special rule for Board decisions on legacy appeals issued on or after July 21, 1992.* For a Board decision on a legacy appeal as defined in § 19.2 of this chapter issued on or after July 21, 1992, the record that existed when that decision was made includes relevant documents possessed by the Department of Veterans Affairs not later than 90 days before such record was transferred to the Board for review in reaching that decision, provided that the documents could reasonably be expected to be part of the record.

* * * * *

§ 20.1404 [Amended]

■ 181. Amend § 20.1404 in paragraph (c) by removing ''Director, Office of Management, Planning and Analysis (014),''.

■ 182. Amend § 20.1405:

■ a. In paragraph (a)(1), by removing the words ''§ 19.3 of this title'' and adding in their place ''§ 20.106'';

■ b. In paragraph (a)(2), by removing the words ''Rule 900(c) (§ 20.900(c) of this part)'' and adding in their place the words ''Rule 800, paragraph (c) (§ 20.800(c)) or, for legacy appeals, Rule 902, paragraph (c) (§ 20.902(c))'';

■ c. In paragraph (c)(2), by removing the words ''Director, Office of Management, Planning and Analysis (014),'';

■ d. By removing paragraph (d);

■ e. By redesignating paragraph (e) as paragraph (d);

■ f. By redesignating paragraph (f) as paragraph (e);

■ g. By redesignating paragraph (g) as paragraph (f); and

■ h. By revising the first sentence of the newly redesignated paragraph (f).

The revision reads as follows:

§ 20.1405 Rule 1405. Disposition.

* * * * *

(f) * * * The decision of the Board on a motion under this subpart will be in writing. * * *

* * * * *

§ 20.1408 [Amended]

■ 183. Amend § 20.1408 by removing the words ''Rule 3(o) (§ 20.3(o) of this part)'' and adding in its place the words ''Rule 3(l) (§ 20.3(l) of this part)'' from the first sentence.

§ 20.1409 [Amended]

■ 184. Amend § 20.1409 in paragraph (b) by removing the words ''Rule 1405(e)'' and adding in its place the words ''Rule 1405, paragraph (d) (§ 20.1405(d) of this part)''.

■ 185. Amend § 20.1411 by revising paragraphs (b) and (d) to read as follows:

§ 20.1411 Rule 1411. Relationship to other statutes.

* * * * *

(b) For legacy appeals as defined in § 19.2 of this chapter, a motion under this subpart is not a claim subject to reopening under 38 U.S.C. 5108 (prior to the effective date described in Rule 4, paragraph (a) (§ 20.4(a) of this part) (relating to reopening claims on the grounds of new and material evidence).

* * * * *

(d) A motion under this subpart is not a claim for benefits subject to the requirements and duties associated with 38 U.S.C. 5103A (imposing a duty to assist).

* * * * *

§§ 20.1412—20.1499 [Reserved]

■ 186. Add reserved §§ 20.1412 through 20.1499.

Subpart P—[Removed and Reserved]

■ 187. Remove and reserve subpart P, consisting of §§ 20.1500–20.1510.

Appendix A to Part 20 [Removed]

■ 188. Remove appendix A to part 20.

PART 21—VOCATIONAL REHABILITATION AND EMPLOYMENT

Subpart A—Vocational Rehabilitation and Employment Under 38 U.S.C. Chapter 31

■ 189. The authority citation for part 21, subpart A, continues to read as follows:

Authority: 38 U.S.C. 501(a), chs. 18, 31, and as noted in specific sections.

§ 21.59 [Removed]

■ 190. Remove § 21.59.

§ 21.98 [Removed]

■ 191. Remove § 21.98.

§ 21.184 [Amended]

■ 192. Amend § 21.184 by removing the CROSS REFERENCE paragraph from the end of the section.

§ 21.188 [Amended]

■ 193. Amend § 21.188 in paragraph (b) by removing the words ''§ 21.96, or § 21.98'' and adding in their place the words ''or § 21.96''.

§ 21.190 [Amended]

■ 194. Amend § 21.190 in paragraph (b) by removing the words ''§ 21.96, or § 21.98'' and adding in their place the words ''or § 21.96''.

§ 21.192 [Amended]

■ 195. Amend § 21.192 in paragraph (b) by removing the words ''§ 21.96, or § 21.98'' and adding in their place the words ''or § 21.96''.

§ 21.194 [Amended]

■ 196. Amend § 21.194 in paragraph (b) by removing the words ''§ 21.94 and 21.98'' and adding in their place the words ''and § 21.94''.

§ 21.282 [Amended]

■ 197. Amend § 21.282 in paragraph (c)(4) by removing ''21.98'' and adding in its place ''21.96''.

§ 21.412 [Amended]

■ 198. Amend § 21.412 in paragraph (a)(2) by removing the words ''(See §§ 19.153, 19.154, and 19.155''.

■ 199. Amend § 21.414:

■ a. In paragraph (e), by removing the period following ''§ 3.105(e)'' and adding in its place a semicolon;

■ b. By adding paragraph (f); and

■ c. Revising the authority citation at the end of the section.

The addition and revision read as follows:

§ 21.414 Revision of decision.

* * * * *

(f) Review of decisions, § 21.416.

(Authority: 38 U.S.C. 5104B, 5108, and 5112)

■ 200. Add § 21.416 before the undesignated center heading ''Informing the Veteran'' to read as follows:

§ 21.416 Review of decisions.

(a) *Applicability.* This section applies where notice of a decision under this subpart or subpart M of this part was provided to a claimant or his/her representative on or after the effective date of the modernized review system as provided in § 19.2(a) of this chapter, or where a claimant has elected review of a legacy claim under the modernized review system as provided in § 3.2400(c) of this chapter.

(b) *Reviews available.* Within one year from the date on which VA issues notice of a decision on an issue contained within a claim, a claimant may elect one of the following administrative review options:

(1) *Supplemental Claim.* The nature of this review will accord with § 3.2501 of this chapter, except that a complete application in writing on a form prescribed by the Secretary will not be required and a hearing will not be provided.

(2) *Appeal to the Board of Veterans' Appeals.* See 38 CFR part 20.

(3) *Higher-level Review.* The nature of this review will accord with § 3.2601.

(c) *Notice requirements.* Notice of a decision made under paragraph (b)(1) or (3) of this section will include all of the elements described in § 21.420(b).

(Authority: 38 U.S.C. 5104B, 5108, 5109A, and 7105)

■ 201. Amend § 21.420 by revising paragraphs (b) and (d), adding paragraph (e), and revising the authority citation at the end of the section to read as follows:

§ 21.420 Informing the veteran.

* * * * *

(b) *Notification:* Each notification should include the following:

(1) Identification of the issues adjudicated.

(2) A summary of the evidence considered by the Secretary.

(3) A summary of the applicable laws and regulations relevant to the decision.

(4) Identification of findings favorable to the veteran.

(5) In the case of a denial of a claim, identification of elements not satisfied leading to the denial.

(6) An explanation of how to obtain or access evidence used in making the decision.

(7) A summary of the applicable review options available for the veteran to seek further review of the decision.

* * * * *

(d) *Prior notification of adverse action.* VA shall give the veteran a period of at least 30 days to review, prior to its promulgation, an adverse action other than one which arises as a consequence of a change in training time or other such alteration in circumstances. During that period, the veteran shall be given the opportunity to:

(1) Meet informally with a representative of VA;

(2) Review the basis for VA decision, including any relevant written documents or material; and

(3) Submit to VA any material which he or she may have relevant to the decision.

(e) *Favorable findings.* Any finding favorable to the veteran is binding on all

subsequent agency of original jurisdiction and Board of Veterans' Appeals adjudicators, unless rebutted by evidence that identifies a clear and unmistakable error in the favorable finding.

(Authority: 38 U.S.C. 3102, 5104, 5104A, and 7105)

§ 21.430 [Amended]

■ 202. Amend § 21.430 in paragraph (b) by removing ''21.98'' and adding in its place ''21.96''.

Subpart B—Claims and Applications for Educational Assistance

■ 203. The authority citation for part 21, subpart B is revised to read as follows:

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

§ 21.1033 [Amended]

■ 204. Amend § 21.1033 in paragraph (f)(2) by removing the text ''§§ 20.302 and 20.305'' and adding in its place the text ''§§ 20.203 and 20.110''.

■ 205. Revise § 21.1034 to read as follows:

§ 21.1034 Review of decisions.

(a) *Decisions.* A claimant may request a review of a decision on eligibility or entitlement to educational assistance under title 38, United States Code. A claimant may request review of a decision on entitlement to educational assistance under 10 U.S.C. 510, and 10 U.S.C. chapters 106a, 1606, and 1607. A claimant may not request review of a decision on eligibility under 10 U.S.C. 510, and 10 U.S.C. chapters 106a, 1606, and 1607 or for supplemental or increased educational assistance under 10 U.S.C. 16131(i) or 38 U.S.C. 3015(d), 3021, or 3316 to VA as the Department of Defense solely determines eligibility to supplemental and increased educational assistance under these sections.

(b) *Reviews available.* Except as provided in paragraph (d) of this section, within one year from the date on which the agency of original jurisdiction issues notice of a decision described in paragraph (a) of this section as subject to a request for review, a claimant may elect one of the following administrative review options:

(1) *Supplemental Claim Review.* See § 3.2501 of this chapter.

(2) *Higher-level Review.* See § 3.2601 of this chapter.

(3) *Board of Veterans' Appeals Review.* See 38 CFR part 20.

(c) *Part 3 provisions.* See § 3.2500(b)–(d) of this chapter for principles that generally apply to a veteran's election of review of a decision described in paragraph (a) of this section as subject to a request for review.

(d) *Contested claims.* See subpart E of part 20 of this title for the timeline pertaining to contested claims.

(e) *Applicability.* This section applies where notice of a decision described in paragraph (a) of this section was provided to a veteran on or after the effective date of the modernized review system as provided in § 19.2(a) of this chapter, or where a veteran has elected review of a legacy claim under the modernized review system as provided in § 3.2400(c) of this chapter.

(Authority: 38 U.S.C. 501, 5104B)

■ 206. Add § 21.1035 to read as follows:

§ 21.1035 Legacy review of benefit claims decisions.

(a) A claimant who has filed a Notice of Disagreement with a decision described in § 21.1034(a) that does not meet the criteria of § 21.1034(e) of this chapter has a right to a review under this section. The review will be conducted by the Educational Officer of the Regional Processing Officer, at VA's discretion. An individual who did not participate in the decision being reviewed will conduct this review. Only a decision that has not yet become final (by appellate decision or failure to timely appeal) may be reviewed. Review under this section will encompass only decisions with which the claimant has expressed disagreement in the Notice of Disagreement. The reviewer will consider all evidence of record and applicable law, and will give no deference to the decision being reviewed.

(b) Unless the claimant has requested review under this section with his or her Notice of Disagreement, VA will, upon receipt of the Notice of Disagreement, notify the claimant in writing of his or her right to a review under this section. To obtain such a review, the claimant must request it not later than 60 days after the date VA mails the notice. This 60-day time limit may not be extended. If the claimant fails to request review under this section not later than 60 days after the date VA mails the notice, VA will proceed with the legacy appeal process by issuing a Statement of the Case. A claimant may not have more than one review under this section of the same decision.

(c) The reviewer may conduct whatever development he or she considers necessary to resolve any disagreements in the Notice of Disagreement, consistent with applicable law. This may include an attempt to obtain additional evidence or the holding of an informal conference with the claimant. Upon the request of the claimant, the reviewer will conduct a hearing under the version of § 3.103(c) of this chapter predating Public Law 115–55.

(d) A review decision made under this section will include a summary of the evidence, a citation to pertinent laws, a discussion of how those laws affect the decision, and a summary of the reasons for the decision.

(e) The reviewer may grant a benefit sought in the claim, notwithstanding § 3.105(b) of this chapter. The reviewer may not revise the decision in a manner that is less advantageous to the claimant than the decision under review, except that the reviewer may reverse or revise (even if disadvantageous to the claimant) prior decisions of an agency of original jurisdiction (including the decision being reviewed or any prior decision that has become final due to failure to timely appeal) on the grounds of clear and unmistakable error (see § 3.105(a) of this chapter).

(f) Review under this section does not limit the appeal rights of a claimant. Unless a claimant withdraws his or her Notice of Disagreement as a result of this review process, VA will proceed with the legacy appeal process by issuing a Statement of the Case.

(Authority: 38 U.S.C. 5109A and 7105(d))

Subpart I—Temporary Program of Vocational Training for Certain New Pension Recipients

§ 21.6058 [Amended]

■ 207. Amend § 21.6058(b) by removing ''21.59'' and adding in its place ''21.416''.

§ 21.6080 [Amended]

■ 208. Amend § 21.6080:

■ a. In paragraph (a), by removing the text ''21.96 and 21.98'' and adding its place the text ''and 21.96''.

■ b. In paragraph (d)(3), by removing ''21.98'' and adding in its place ''21.416''.

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