Property F. X agrees to accept the return of Property F, a decision in which B does not participate. Property F has declined in value since the date of the excess benefit transaction. On July 5, 2005, the property has a fair market value of $*9v*. For purposes of correction, B's return of Property F to X is treated as a payment of $*9v*, the fair market value of the property determined on the date the property is returned to the organization. If $*9v* is greater than the correction amount ($*4v* plus interest on $*4v* at a rate that equals or exceeds 6.21%, compounded annually, for the period from January 1, 2000, to July 5, 2005), then X may make a cash payment to B equal to the difference.

Example 4. The facts are the same as in *Example 3*, except that Property F has increased in value since January 1, 2000, the date the excess benefit transaction occurred, and on July 5, 2005, has a fair market value of $*13v*. For purposes of correction, B's return of Property F to X is treated as a payment of $*10v*, the fair market value of the property on the date the excess benefit transaction occurred. If $*10v* is greater than the correction amount ($*4v* plus interest on $*4v* at a rate that equals or exceeds 6.21%, compounded annually, for the period from January 1, 2000, to July 5, 2005), then X may make a cash payment to B equal to the difference.

Example 5. The facts are the same as in *Example 2*. Assume that the correction amount B paid X in cash on July 5, 2005, was $*5.58v*. On July 4, 2005, X loaned $*5.58v* to B, in exchange for a promissory note signed by B in the amount of $*5.58v*, payable with interest at a future date. These facts indicate that B engaged in the loan transaction to circumvent the requirement of this section that (except as provided in paragraph (b)(3) or (4) of this section), the correction amount must be paid only in cash or cash equivalents. As a result, the Commissioner may determine that B effectively transferred property other than cash or cash equivalents, and therefore did not satisfy the correction requirements of this section.

§ 53.4958–8 Special rules.

(a) *Substantive requirements for exemption still apply.* Section 4958 does not affect the substantive standards for tax exemption under section 501(c)(3) or (4), including the requirements that the organization be organized and operated exclusively for exempt purposes, and that no part of its net earnings inure to the benefit of any private shareholder or individual. Thus, regardless of whether a particular transaction is subject to excise taxes under section 4958, existing principles and rules may be implicated, such as the limitation on private benefit. For example, transactions that are not subject to section 4958 because of the initial contract exception described in § 53.4958–4(a)(3) may, under certain circumstances, jeopardize the organization's tax-exempt status.

(b) *Interaction between section 4958 and section 7611 rules for church tax inquiries and examinations.* The procedures of section 7611 will be used in initiating and conducting any inquiry or examination into whether an excess benefit transaction has occurred between a church and a disqualified person. For purposes of this rule, the reasonable belief required to initiate a church tax inquiry is satisfied if there is a reasonable belief that a section 4958 tax is due from a disqualified person with respect to a transaction involving a church. See § 301.7611–1 Q&A 19 of this chapter.

(c) *Other substantiation requirements.* These regulations, in § 53.4958–4(c)(3), set forth specific substantiation rules. Compliance with the specific substantiation rules of that section does not relieve applicable tax-exempt organizations of other rules and requirements of the Internal Revenue Code, regulations, Revenue Rulings, and other guidance issued by the Internal Revenue Service (including the substantiation rules of sections 162 and 274, or § 1.6001–1(a) and (c) of this chapter).

PART 301—PROCEDURE AND ADMINISTRATION

3. The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

§ 301.7611–1 [Amended]

4. In § 301.7611–1, Q–19 and A–19 at the end of the section are revised to read as follows:

§ 301.7611–1 Questions and answers relating to church tax inquiries and examinations.

* * * * *

Application to Section 4958

Q–19: When do the church tax inquiry and examination procedures described in section 7611 apply to a determination of whether there was an excess benefit transaction described in section 4958?

A–19: See § 53.4958–7(b) of this chapter for rules governing the interaction between section 4958 excise taxes on excess benefit transactions and section 7611 church tax inquiry and examination procedures.

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

5. The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

6. In § 602.101, paragraph (b) is amended by removing the entry for ''53.4958–6T'' and adding an entry for ''53.4958–6'' to the table in numerical order to read as follows:

§ 602.101 OMB control numbers.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB control No.
* * * * *	
53.4958–6	1545–1623
* * * * *	

Approved: December 21, 2001.

Robert E. Wenzel,

Deputy Commissioner of Internal Revenue.

Mark Weinberger,

Assistant Secretary of the Treasury.

[FR Doc. 02–985 Filed 1–22–02; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Parts 19 and 20

RIN 2900–AK91

Board of Veterans' Appeals: Obtaining Evidence and Curing Procedural Defects Without Remanding

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the Appeals Regulations and Rules of Practice of the Board of Veterans' Appeals (Board) to permit the Board to obtain evidence, clarify the evidence, cure a procedural defect, or perform any other action essential for a proper appellate decision in any appeal properly before it without having to remand the appeal to the agency of original jurisdiction. It also allows the Board to consider additional evidence without having to refer the evidence to the agency of original jurisdiction for initial consideration and without having to obtain the appellant's waiver. By reducing the number of appeals remanded, VA intends to shorten appeal processing time and to reduce the backlog of claims awaiting decision.

DATES: *Effective Date:* These amendments are effective February 22, 2002.

Applicability Date: These amendments apply to appeals for which the notice of disagreement was filed on or after February 22, 2002, and to appeals pending, whether at the Board of Veterans' Appeals, the United States Court of Appeals for Veterans Claims, or

the United States Court of Appeals for the Federal Circuit, on February 22, 2002.

FOR FURTHER INFORMATION CONTACT: Steven L. Keller, Senior Deputy Vice Chairman, Board of Veterans' Appeals ((202) 565–5978), or Michael J. Timinski, Attorney, Office of General Counsel ((202) 273–6327), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420.

SUPPLEMENTARY INFORMATION: The Board of Veterans' Appeals (Board) is the component of the Department of Veterans Affairs (VA) in Washington, DC, that decides appeals from denials of claims for veterans' benefits.

On August 6, 2001, VA published a notice of proposed rulemaking (NPRM) which would permit the Board to obtain evidence and correct procedural defects without remanding the case to the agency of original jurisdiction. 66 FR 40942 (2001). We received seven comments: Two from individuals; three from veterans service organizations; one from a state department of veterans affairs; and one from an association of attorneys.

For the reasons described below, we are adopting the regulations largely as proposed, but with some amendments based on the comments and other concerns.

Changes to Proposed Regulations

One commenter suggested extensive changes to Rule 903 (38 CFR 20.903), relating to notification of evidence secured and law to be considered by the Board and opportunity for response. While we decline to follow all of the suggestions, we have amended Rule 903 to clarify that the appellant may, within the 60-day period, submit evidence and argument relating to the evidence or law. Proposed Rule 1304(b)(2) (38 CFR 20.1304(b)) implicitly provided the right to submit evidence and argument in connection with the Board's consideration of evidence or law not previously considered by the agency of original jurisdiction.

We decline to adopt the commenter's suggestion that the Board's notice include a statement of the weight the Board intends to assign to new evidence or law, an assessment of whether the evidence or law is ''determinative, significant or of minimal impact,'' a statement of whether the new evidence or law will likely result in the denial of the appeal, and a list of the claimant's options. These matters are generally not determined until the Board weighs the evidence and decides the appeal. The purpose of our amendments to § 20.903 is to ensure that an appellant receives adequate notice of new evidence obtained by the Board and of law that the Board intends to consider, as well as an opportunity to respond with additional evidence or argument; the purpose is not to give an appellant advance notice of the decision the Board intends to make in an appeal. Our purpose is adequately served by providing the appellant with a copy of the evidence obtained by the Board, a copy or summary of the law to be considered, and an opportunity to submit relevant evidence or argument in response.

Another commenter suggested that, in connection with the Board's consideration of law not already considered by the agency of original jurisdiction, we should provide a copy or summary of the law, rather than a copy or ''reference'' to the law. We think this is a good suggestion and have incorporated it into Rule 903(c).

The same commenter suggested that, when the Board secures evidence not provided by the appellant, the Board should provide a copy of that evidence to the appellant. Because that was our intent, we have clarified Rule 903(b) to make it explicit.

Further, that commenter asserted that the record development procedures in 38 CFR 19.9 lack provisions to make this record development comply with the notice and other requirements of the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. 106–475, 114 Stat. 2096. We agree and have amended proposed § 19.9(a)(2) to clarify that any development undertaken by the Board will comply with 38 CFR 3.159(a) and (c)–(f), which implements the VCAA. Those provisions delineate the obligations of VA and the claimant with respect to obtaining evidence. Section 3.159(b) relates to notices VA must give when it receives a substantially complete or incomplete application. Because that notice is normally given in the earliest stages of claim processing, even before evidence gathering begins, § 3.159(b) was designed for implementation by regional offices. Application of those provisions to the Board would be inapt. Nevertheless, because under § 19.9(a)(2) the Board could provide the notice, we have made other amendments to § 19.9(a)(2) to provide the same protections afforded by the VCAA.

We have added a provision (38 CFR 19.9(a)(2)(ii)) to ensure two things: First, if the Board undertakes to provide the notice required by 38 U.S.C. 5103(a) and/or 38 CFR 3.159(b)(1), the appellant shall have not less than 30 days in which to respond to that notice. Second, because 38 U.S.C. 5103(b) appears to give the claimant one year to provide the evidence requested of the claimant in the notice, we have clarified that, if the appellant submits relevant evidence within one year of the notice but after the Board's decision, the evidence will be referred to the agency of original jurisdiction. If that agency makes a favorable determination based on that evidence, the effective date of the determination will be the same as if the Board had granted the appeal. This latter rule is based on Rule 1304(b)(1), which relates to evidence submitted to the Board before its decision, but not accepted in connection with the appeal.

We have modified Rule 903(c) to make explicit that, in two situations, the Board need not notify the appellant that it intends to consider a law not considered by the regional office: (1) If the Board intends to grant the benefit; or (2) if the appellant or the appellant's representative has advanced or otherwise argued consideration of the law in question. If the Board intends to grant the benefit, there is no need to delay the claim with notice. Similarly, if the appellant has raised the applicability of a law, then he or she has already been heard with respect to the law, and Rule 903(c)'s purpose has been satisfied. Accordingly, there would be no need to go through these notice procedures in either of these situations.

We have also corrected an erroneous reference in proposed § 20.903(b).

Alternative Approach

One commenter suggested an alternative approach. Under this approach, if a case requires additional evidence, a Board member would prepare a memorandum listing such evidence. Personnel from the Veterans Benefits Administration (VBA), the part of VA that operates the regional offices, would be temporarily assigned to the Board and would complete the required development. When the development was completed, the appellant would be given the choice, as under prior regulatory procedures, of having the Board decide the case or first having the regional office make another decision, based on the additional evidence.

The chief efficiency in this approach would probably be that experienced VBA personnel would be developing the evidence, rather than the Board, which has essentially no experience in such matters. On the other hand, the approach would not eliminate remands to the regional offices to decide a claim based on new evidence, since the appellant could decline to waive initial regional office consideration.

While we appreciate this thoughtful suggestion, we do not believe that it

would do as much to relieve pressure on the regional offices.

Hearings

One commenter suggested that the Board's rules should provide a right to a hearing when the Board is considering new evidence. While we understand the concern motivating this suggestion, we think that Rule 1304(b), which permits a hearing upon a showing of good cause, is sufficient to protect the appellant's right to due process.

First, there should be no question that these regulations provide substantial due process protections when the Board develops new evidence: We have amended 38 CFR 20.903(b) to provide that, if the Board obtains pertinent evidence not submitted by the appellant, the Board will provide the appellant a copy of the evidence and 60 days to submit additional evidence or argument in response.

Second, evidence submitted after an appeal is transferred to the Board is not a new situation. The Board has dealt with it for many years. *Compare* 38 CFR 20.709 (2001) (procurement of additional evidence following a hearing) *with* 38 CFR 19.164 (1983) (same), *published in* 48 FR 6961 (1983); *also compare* 38 CFR 20.1304(b) (evidence submitted after certification and transfer) *with* 38 CFR 19.174 (1983) (same), *published in* 48 FR 6961 (1983). While in the past, Board consideration in the first instance required the appellant to waive initial consideration by the regional office, 38 CFR 20.1304(c) (2001), a hearing would have been available—and is still available—upon a showing of good cause, *id.* 20.1304(b).

We think this time-tested approach will adequately serve the interests of veterans both in being heard and in receiving a prompt decision on appeal. In sum, we believe we are protecting the important due process rights of all appellants.

Objections

The veterans service organizations and the association of attorneys opposed the proposed rule. In general, their reasons for opposition fell into four categories: (1) Procedural issues relating to the rulemaking; (2) alleged legal barriers to implementation of the proposed rules; (3) alleged conflicts with the VCAA; and (4) policy issues which allegedly make adoption of the rule unwise. In addition, one commenter raised questions concerning the effective date of these rules.

We do not agree with these objections. We will address them in turn.

1. Procedural Issues

One commenter felt the 30-day comment period was too short and suggested that, in connection with publication of the final rule, we announce another 30-day comment period. We decline to do so.

As we explained in our NPRM, 66 FR at 40944, we chose a 30-day comment period because of the exigent nature of the backlog of claims at our regional offices. We received thoughtful comments from a number of commenters. While we are always interested in comments from the public relating to our rules, we do not see any particular interest that would be served by reopening the comment period.

2. Legal Barriers to Regulations

Several commenters suggested that provisions of the proposed rule conflict with general legal principles or particular statutes that would prevent the rule's adoption.

a. The Board's Status as an Appellate Body Prevents it From Developing Evidence

Three commenters asserted that the Board does not have the authority to develop evidence because it is an appellate tribunal and hence limited to review of the record below. We have examined the applicable statutes and court decisions interpreting them. We do not agree that the nature of the Board's administrative appellate review excludes the possibility of securing and ruling on evidence or ruling on issues of law that were not decided by the agency of original jurisdiction.

As a general matter, an agency's administrative appellate body has all the power the agency has in the initial decision process—in VA's case, the process at the regional offices—and the power to receive additional or supplemental evidence. 2 Am. Jur. 2d *Administrative Law* §§ 372, 375 (2000). Other agencies have issued regulations authorizing their administrative appellate bodies to secure and review new evidence. *See* 42 CFR 404.976(b)(2) (in appeals from decisions of Social Security Administration administrative law judges, Appeals Council has authority to obtain additional evidence if needed); 29 CFR 1614.404(a) (in appeals from decisions of administrative judges, the Equal Employment Opportunity Commission may supplement the record by investigation or other procedures); *see also Chrysler Corp.* v. *Federal Trade Comm'n,* 561 F.2d 357, 362–63 (1977) (on appeal from initial decision, FTC could supplement record with evidence it obtained). Because the statutes governing the Board do not withhold the power to receive additional evidence, which is generally held by administrative appellate bodies, we believe the Board also holds that power.

Moreover, in our view, VA's statutory scheme supports the Board's development of evidence. For example, the United States Court of Appeals for Veterans Claims (CAVC) has held that 38 U.S.C. 7109, which authorizes the Board to obtain expert medical opinions from outside VA, is an enabling provision which supplements the Board's inherent authority to secure medical opinions from within VA. *Winsett* v. *West,* 11 Vet. App. 420, 426 (1998) (Board has the authority, and in many cases the duty, to obtain an expert medical opinion irrespective of section 7109), *aff'd,* 217 F.3d 854 (Fed. Cir. 1999) (unpublished opinion). Furthermore, the CAVC has indicated that evidentiary development by the Board is consistent with statutory authority also suggestive of a Board fact-finding role. *Austin* v. *Brown,* 6 Vet. App. 547, 551 (1994); *see also Gilbert* v. *Derwinski,* 1 Vet. App. 49, 52 (1990) (Board is an administrative tribunal which functions as a fact finder in a manner similar to that of a trial court, although, for the most part, in a non-adversarial setting).

To support its assertion that the Board's status as an appellate body prevents the Board from developing evidence, one commenter cited a number of cases, including *Nolen* v. *Gober,* 222 F.3d 1356 (Fed. Cir. 2000); *Winters* v. *Gober,* 219 F.3d 1375 (Fed. Cir. 2000); *Hensley* v. *West,* 212 F.3d 1255 (Fed. Cir. 2000); *Smith* v. *Brown,* 35 F.3d 1516 (Fed. Cir. 1994); and *McCormick* v. *Gober,* 14 Vet. App. 39 (2000). We have reviewed those cases. While some of them deal with the nature of review by the CAVC, none of them stands for the proposition—or even implies the proposition—that the Board cannot develop evidence.

With respect to the Board applying law not considered by the regional office, the CAVC has never held that the Board is barred from such consideration, only that the appellant must be given notice and the opportunity to submit evidence and argument on that point. *e.g., Sutton* v. *Brown,* 9 Vet. App. 553, 564–67 (1994). Our amendment to Rule 903 meets this standard.

Accordingly, we conclude that the Board's status as an appellate body does not bar it from developing evidence or considering law not considered by the regional office.

b. Statutes Prohibit the Board From Developing Evidence or Curing Procedural Defects

Several commenters asserted that various statutes, 38 U.S.C. 511, 7101, 7104, 7105, and 7105A, prohibit the Board from developing evidence. We have carefully reviewed those statutes. We find nothing in any of them prohibiting or precluding the Board from developing evidence.

One commenter referred extensively to what various statutes ''contemplated.'' For example, this commenter stated that 38 U.S.C. 7104(a) ''does not contemplate that the Board is to cure procedural defects.'' This is the text of that statute:

> All questions in a matter which under section 511(a) of this title is subject to decision by the Secretary shall be subject to one review on appeal to the Secretary. Final decisions on such appeals shall be made by the Board. Decisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation.

Nothing in the statute refers to procedural defects, much less to curing them. The commenter provided no authority for its conclusion. Because we disagree with the commenters that any statute prohibits or precludes the Board from engaging in the activities mentioned in the proposed rule, we decline to make any change based on these comments.

That same commenter asserted that VA had never before interpreted 38 U.S.C. 7104(a) to authorize the Board to obtain evidence or cure procedural defects. While that may be true, the Board has long been authorized by statute to collect evidence in connection with a hearing, 38 U.S.C. 7107(b), and in connection with a request for independent medical opinions, *id.* 7109. Further, the commenter ignores the fact that the substance of Rule 901(a) (38 CFR 20.901(a)), relating to Board requests for medical opinions from VA's Under Secretary for Health (formerly the Chief Medical Director), has been in the Board's published rules of practice for more than 35 years. *See* 38 CFR 19.144 (1965) (expert medical opinions), *published in* 29 FR 1464, 1468 (1964). The commenter also fails to consider the Board's ability to cure some procedural defects, e.g., clarification of the issues on appeal or whether the appellant wants a hearing before the Board, without remand, which has been in the Board's appeals regulations since 1996. *See* 38 CFR 19.9(a). Regardless of whether VA has previously interpreted section 7104(a) to permit the Board to obtain evidence and cure procedural defects, that interpretation is consistent with all governing statutes.

Accordingly, we do not accept the proposition that statutes in title 38, United States Code, bar the Board from obtaining evidence or curing procedural defects.

c. Statutes Require Waiver of Consideration by the Regional Office When Evidence is Developed by the Board

One commenter asserted that the proposed amendment to 38 CFR 20.1304, which would allow the Board to consider evidence that it obtains or that is submitted to it, without having to refer the evidence to the agency of original jurisdiction for initial consideration in the absence of the appellant's waiver, is inconsistent with the statutory language of 38 U.S.C. 7104(a), 7105(a), 7109(a), and 7109(c). This commenter offered no authority for this proposition, other than to assert that, (1) as an appellate body, the Board is limited to the record before the Secretary, and (2) the amendment represents a change.

As discussed above, we think administrative appellate bodies generally are not limited to the evidence developed below, and that the Board in particular is not so limited. With respect to the comment that these amendments represent a change in policy, we agree. However, VA has the right to amend its regulations as long as the amendments do not conflict with statutes. We have carefully reviewed the cited statutes, and find nothing in them that would prohibit or preclude the change. Accordingly, we reject this objection.

Another commenter argued that 38 U.S.C. 7101 and 7104 prevent the Board from generating determinations which have not been subject to prior agency adjudication and review. The commenter offers no other authority for this proposition. We have reviewed those provisions carefully and find in their text no support for the commenter's argument. We reject this argument.

The same commenter argued that, by considering laws not considered by the regional office, the Board would unlawfully relieve the regional office of its obligation to follow all applicable statutes and regulations. The argument appears to be this: If the Board considers a law not considered by the regional office and decides the case without remand, it will have sanctioned the regional office's failure to consider the law.

The only authority the commenter offers for this proposition is a case which reiterates the axiom that agencies must act in accordance with applicable statutes and regulations. *Paralyzed Veterans of America* v. *West,* 136 F.3d 1434, 1436 (Fed. Cir. 1998). That axiom provides no support for the proposition that an administrative tribunal has no authority to apply law not applied by an inferior tribunal. If a regional office has failed to consider an applicable law, it is important that the law be considered in connection with the claim, but whether the consideration is made by the Board in the first instance or by the regional office on remand from the Board is not important. The Board's functions include correction of errors by the regional offices. For the reasons stated in the NPRM, we have decided to have the Board make such consideration in the first instance. We therefore reject the commenter's argument.

3. Conflicts With the VCAA

a. The Board Has No Jurisdiction To Implement the VCAA

Two commenters asserted that any evidence development by VA requires application of the VCAA and that, because the Board has no authority to implement that Act, the Board cannot develop evidence. The only argument advanced in support of this proposition is that the VCAA specifies that the Secretary provide assistance but does not mention the Board.

The VCAA requires the Secretary of Veterans Affairs to provide certain types of assistance in connection with a claim for benefits. By statute, the Board stands in place of the Secretary in connection with appeals. 38 U.S.C. 7104(a). Even if we were to associate some significance with the fact that the VCAA does not mention the Board—which, since it also does not mention agencies of original jurisdiction, we do not—the Secretary can delegate his VCAA obligations, which he is doing by publishing this regulation. Therefore, we reject this argument.

b. The Regulation's 60-Day Time Periods for Response Conflict With the One-year Time Period Set Forth in the VCAA

One commenter, without specifying any statutory or regulatory provisions other than ''the VCAA,'' asserted that an appellant is always entitled to a one-year response period because of the VCAA. We do not agree.

New Rule 903, relating to notification of evidence secured and law to be considered by the Board and opportunity for response, provides a 60-day response period. The VCAA does not prohibit or preclude such a period.

The only one-year period provided by the VCAA is mentioned in 38 U.S.C. 5103(b). Under 38 U.S.C. 5103(a), when VA receives a substantially complete application for benefits, it must notify the claimant of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim. In the case of information or evidence that VA tells the claimant he or she must provide, section 5103(b)(1) provides that, if such information or evidence is not received by VA within one year from the date of the notification, no benefit may be paid or furnished by reason of the claimant's application.

This one-year period in the VCAA is expressly applicable to information and evidence requested from a claimant in VA's notification in response to receiving a substantially complete application. The limitation in section 5103(b)(1) simply does not apply to an appellant's opportunity to respond to an opinion, evidence, or law, as set forth in new Rule 903.

We therefore reject this argument.

4. Policy Issues

Several commenters raised questions as to whether this increased authority for the Board made sense from a policy perspective.

a. Quality Problems at the Regional Offices

Three commenters were concerned that, to the extent these regulations curtailed the Board's remand function, the quality of regional office determinations would suffer. As one commenter stated:

> Appellate review is a quality control function. The goal (and perhaps intensity) of quality review is lost if the quality reviewer must itself correct the mistakes it finds. If the Board must correct the mistakes of the agency of original jurisdiction, the agency of original jurisdiction has no incentive to improve performance, and without having to ever acknowledge and correct its own mistakes, the agency of original jurisdiction is deprived of the means to learn from them.

We are sensitive to these concerns. However, a remand does not always connote error on the part of the regional office. For example, during the period October 2000 through March 2001, more than 27% of the Board's remands were based primarily on the need for the regional office to apply law which was not in effect at the time of the original decision. Similarly, during the period October 1998 through March 2001, between 5% and 10% of the Board's remands were based primarily on the appellant's request for a Board hearing at the regional office, which may have been submitted subsequent to the filing of the appeal. In any event, we believe that VBA's quality-review programs will solve any perceived problem with quality.

b. Inefficient Use of Resources

One commenter opposed the regulations in part because they would foster inefficient use of resources. Specifically, this commenter argued that Board employees possess a higher level of expertise than regional office employees, and that that higher expertise should be used where most appropriate, i.e., in reviewing regional office decisions, not in duplicating the regional offices' work.

As described in our NPRM, VA is now concerned with the very large backlog at the regional offices. At the end of August 2001, there were 367,000 original and reopened claims for service-connected disability compensation pending in VA's regional offices, double the number pending at the end of August 2000. Of the August 2001 cases, 40% (146,000 of 367,000) had been pending for more than 180 days, and 11% had been pending for more than a year (40,000 of 367,000). (The corresponding percentages in August 2000 were 28% and 8%, respectively.) We think employing the Board to help develop appealed claims will take pressure off the regional offices so that they can deal with these pending claims.

c. If Board Applies New Law, Claims Will Be Denied

One commenter argued that, if the Board decides a case based on law not applied by the regional office, the Board will deny the appeal because of inadequately developed records. The argument is essentially that the Board will consider the new law without providing the appellant an opportunity to submit evidence or argument.

The commenter does not take into account new Rule 903(c), which provides for notice to the claimant that the Board intends to consider such law and provides 60 days for a response. This approach is consistent with the CAVC's holding in *Sutton, supra,* and provides the appellant with an opportunity to present evidence and argument.

In addition, we have modified all three paragraphs in Rule 903 to clarify that the appellant may submit evidence and/or argument in response to the Board's notice.

d. Issues Relating to the Supplemental Statement of the Case

Two commenters raised questions relating to supplemental statements of the case (SSOC).

Generally, after a claimant files a notice of disagreement with a regional office decision, the regional office must prepare what the law calls a ''statement of the case'' (SOC). 38 U.S.C. 7105(d). An SOC includes a summary of pertinent evidence in the case, a citation to pertinent laws and regulations, a discussion of how those laws and regulations affect the decision, and a summary of the reasons for the decision. *Id.* 7105(d)(1)(A)–(C).

VA's regulations require the regional office to prepare an SSOC if the regional office receives additional pertinent evidence or the SOC is otherwise inadequate, such as where the regional office must apply new law in a case and the subsequent decision does not grant the benefits sought. 38 CFR 19.31. An SSOC is a document prepared by the regional office to inform the appellant of any material changes in, or additions to, the information included in the SOC or any prior SSOC.

One commenter appeared to assume that the Board would issue an SSOC if it considers new evidence or new law. It will not. The purpose of the SSOC is to provide the claimant with the reasons for the regional office decision so that the claimant can make an informed decision on whether to continue the appeal to the Board. Once a regional office transfers an appeal to the Board, this stage of the appeal is passed and there no longer is a need for an SSOC.

One commenter asserted that the Board's failure to provide an SSOC would eliminate a ''substantive due process right'' of the claimant. As discussed above, once an appeal has reached the Board, there is no reason to provide an SSOC, so no right is being eliminated.

We reject these arguments.

5. Effective Date

One commenter asserted that the new rules cannot apply to appeals pending on the date the rules become effective. Accordingly, it objected to our proposal that the amendments apply to appeals for which the notice of disagreement was filed on or after the effective date of these amendments and to appeals that were pending on that date. 66 FR at 40944.

As this commenter argues, retroactivity is not favored in regulations. *Bowen* v. *Georgetown Univ. Hospital,* 488 U.S. 204, 208 (1988). However, the effective date provisions in this rule do not make it retroactive.

The fact that a regulation applies to pending matters does not make it retroactive. As the Supreme Court has said, a statute has retroactive effect if it ''impairs rights a party possessed when he acted, increases a party's liability for past conduct, or imposes new duties with respect to transactions already completed.'' *Landgraf* v. *USI Film Prods.,* 511 U.S. 244, 280 (1994). And as the Federal Circuit has said, ''an effective date, unless expressly conditioned on other events, governs the application of a new rule.'' *Schockley* v. *Arcan,* Inc., 248 F.3d 1349, 1358–59 (Fed. Cir. 2001) (where reissue patent was pending when new rule took effect, the new rule applies); *cf. Demars* v. *First Service Bank for Savings,* 907 F.2d 1237, 1239–40 (1st Cir. 1990) (where substantive rights are not affected and there is no manifest injustice, new regulatory provisions apply to pending cases).

Under the new regulations, according to the commenter, appellants will lose their ''rights'' to have regional offices secure evidence and to have the regional offices adjudicate claims under laws those offices did not previously consider. In our view, which office within VA that will attempt to obtain evidence on behalf of a claimant or which office will adjudicate the effect of a law not previously considered are procedural matters. The appellant's rights to submit evidence and argument, as well as the right to have his or her regional office denial reviewed by the Board, are unabridged by these amendments.

Accordingly, we believe that it is proper to apply these rules to all pending appeals.

We do note, however, that these rules in no way abridge the appellant's right, under *Stegall* v. *West,* 11 Vet. App. 268, 271 (1998), to have VA comply with all remand orders, whether from the CAVC or from the Board. Accordingly, with respect to cases remanded by the Board, whether before or after the effective date of these amendments, VA's regional offices will continue to execute the remand orders, as well as prepare a SSOC when appropriate.

Paperwork Reduction Act

All collections under the Paperwork Reduction Act (44 U.S.C. 3501–3520) referenced in this document have existing Office of Management and Budget approval. This document makes no changes to those collections of information other than to change which VA component collects the information. Under this rule, the Board would collect some information currently collected by VA regional offices.

Executive Order 12866

The Office of Management and Budget has reviewed this document under Executive Order 12866.

Regulatory Flexibility Act

The Secretary hereby certifies that this regulatory amendment will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This rule affects only individuals. Therefore, pursuant to 5 U.S.C. 605(b), this regulatory amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

List of Subjects in 38 CFR Parts 19 and 20

Administrative practice and procedure, Claims, Veterans.

Approved: November 14, 2001.

Anthony J. Principi,

Secretary of Veterans Affairs.

For the reasons stated in the preamble, 38 CFR parts 19 and 20 are amended as follows:

PART 19—BOARD OF VETERANS' APPEALS: APPEALS REGULATIONS

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

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

Subpart A—Operation of the Board of Veterans' Appeals

2. Section 19.9 is revised to read as follows:

§ 19.9 Further development.

(a) *General.* If further evidence, clarification of the evidence, correction of a procedural defect, or any other action is essential for a proper appellate decision, a Board Member or panel of Members may:

(1) Remand the case to the agency of original jurisdiction, specifying the action to be undertaken; or

(2) Direct Board personnel to undertake the action essential for a proper appellate decision.

(i) Any such action shall comply with the provisions of § 3.159(a) and (c)-(f) of this chapter (relating to VA's assistance to claimants in developing claims).

(ii) If the Board undertakes to provide the notice required by 38 U.S.C. 5103(a) and/or § 3.159(b)(1) of this chapter, the appellant shall have not less than 30 days to respond to the notice. If, following the notice, the Board denies a benefit sought in the pending appeal and the appellant submits relevant evidence after the Board's decision but before the expiration of one year following the notice, that evidence shall be referred to the agency of original jurisdiction. If any evidence so referred, together with the evidence already of record, is subsequently found to be the basis of an allowance of that benefit, the award's effective date will be the same as if the Board had granted the benefit in the appeal pending when the notice was provided.

(b) *Examples.* A remand to the agency of original jurisdiction is not necessary:

(1) To clarify a procedural matter before the Board, including the appellant's choice of representative before the Board, the issues on appeal, and requests for a hearing before the Board; or

(2) For the Board to consider an appeal in light of law, including but not limited to statute, regulation, or court decision, not already considered by the agency of original jurisdiction.

(c) *Scope.* This section does not apply to:

(1) The Board's request for an opinion under Rule 901 (§ 20.901 of this chapter);

(2) The Board's supplementation of the record with a recognized medical treatise; and

(3) Matters over which the Board has original jurisdiction described in Rules 609 and 610 (§§ 20.609 and 20.610 of this chapter).

(Authority: 38 U.S.C. 7102, 7103(c), 7104(a)).

3. Section 19.31 is revised to read as follows:

§ 19.31 Supplemental statement of the case.

(a) *Purpose and limitations.* A ''Supplemental Statement of the Case,'' so identified, is a document prepared by the agency of original jurisdiction to inform the appellant of any material changes in, or additions to, the information included in the Statement of the Case or any prior Supplemental Statement of the Case. In no case will a Supplemental Statement of the Case be used to announce decisions by the agency of original jurisdiction on issues not previously addressed in the Statement of the Case, or to respond to a notice of disagreement on newly appealed issues that were not addressed in the Statement of the Case. The agency of original jurisdiction will respond to notices of disagreement on newly appealed issues not addressed in the Statement of the Case using the procedures in §§ 19.29 and 19.30 of this part (relating to statements of the case).

(b) *When furnished.* The agency of original jurisdiction will furnish the

appellant and his or her representative, if any, a Supplemental Statement of the Case if:

(1) The agency of original jurisdiction receives additional pertinent evidence after a Statement of the Case or the most recent Supplemental Statement of the Case has been issued and before the appeal is certified to the Board of Veterans' Appeals and the appellate record is transferred to the Board;

(2) A material defect in the Statement of the Case or a prior Supplemental statement of the Case is discovered; or

(3) For any other reason the Statement of the Case or a prior Supplemental Statement of the Case is inadequate.

(c) *Pursuant to remand from the Board.* The agency of original jurisdiction will issue a Supplemental Statement of the Case if, pursuant to a remand by the Board, it develops the evidence or cures a procedural defect, unless:

(1) The only purpose of the remand is to assemble records previously considered by the agency of original jurisdiction and properly discussed in a prior Statement of the Case or Supplemental Statement of the Case; or

(2) The Board specifies in the remand that a Supplemental Statement of the Case is not required.

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

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

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

Authority: 38 U.S.C. 501(a) and as noted in specific sections.

Subpart J—Action by the Board

5. Section 20.903 is revised to read as follows:

§ 20.903 Rule 903. Notification of evidence secured and law to be considered by the Board and opportunity for response.

(a) *If the Board obtains a legal or medical opinion.* If the Board requests an opinion pursuant to Rule 901 (§ 20.901 of this part), the Board 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's representative or, subject to the limitations provided in 38 U.S.C. 5701(b)(1), to the appellant if there is no representative. 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.

(b) *If the Board obtains other evidence.* If, pursuant to § 19.9(a) or § 19.37(b) of this chapter, the Board obtains pertinent evidence that was not submitted by the appellant or the appellant's representative, the Board will notify the appellant and his or her representative, if any, of the evidence obtained by furnishing a copy of such evidence. A period of 60 days from the date the Board furnishes the notice will be allowed for response, which may include the submission of relevant evidence or argument. The date the Board furnishes the notice will be presumed to be the same as the date of the letter or memorandum that accompanies the notice for purposes of determining whether a response was timely filed.

(c) *If the Board considers law not already considered by the agency of original jurisdiction.* If the Board intends to consider law not already considered by the agency of original jurisdiction and such consideration could result in denial of the appeal, the Board will notify the appellant and his or her representative, if any, of its intent to do so and that such consideration in the first instance by the Board could result in denial of the appeal. The notice from the Board will contain a copy or summary of the law to be considered. A period of 60 days from the date the Board furnishes the notice will be allowed for response, which may include the submission of relevant evidence or argument. The date the Board furnishes the notice will be presumed to be the same as the date of the letter that accompanies the notice for purposes of determining whether a response was timely filed. No notice is required under this paragraph if the Board intends to grant the benefit being sought or if the appellant or the appellant's representative has advanced or otherwise argued the applicability of the law in question.

(Authority: 38 U.S.C. 7104(a), 7109(c)).

Subpart N—Miscellaneous

6. Section 20.1304 is amended by:

a. Revising the last sentence in paragraph (a);

b. Revising paragraph (b);

c. Removing paragraph (c); and

d. Redesignating paragraph (d) as paragraph (c).

The revisions read as follows:

§ 20.1304 Rule 1304. Request for change in representation, request for personal hearing, or submission of additional evidence following certification of an appeal to the Board of Veterans' Appeals.

(a) * * * Any pertinent evidence submitted by the appellant or representative is subject to the requirements of paragraph (c) of this section if a simultaneously contested claim is involved.

(b) *Subsequent request for a change in representation, request for a personal hearing, or submission of additional evidence*—(1) *General rule.* Subject to the exception in paragraph (b)(2) of this section, following the expiration of the period described in paragraph (a) of this section, the Board of Veterans' Appeals will not accept a request for a change in representation, a request for a personal hearing, or additional evidence 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; withdrawal of an individual representative; the discovery of evidence that was not available prior to the expiration of the period; and delay in transfer of the appellate record to the Board which precluded timely action with respect to these matters. 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 an explanation of why the request for a change in representation, the request for a personal hearing, or the submission of additional evidence could not be accomplished in a timely manner. Such motions must be filed at the following address: Director, Administrative Service (014), Board of Veterans' Appeals, 810 Vermont Avenue, NW., Washington, DC 20420. Depending upon the ruling on the motion, action will be taken as follows:

(i) *Good cause not shown.* If good cause is not shown, the request for a change in representation, the request for a personal hearing, or the additional evidence submitted will be referred to the agency of original jurisdiction upon completion of the Board's action on the pending appeal without action by the Board concerning the request or

additional evidence. Any personal hearing granted as a result of a request so referred or any additional evidence so referred may be treated by that agency as the basis for a reopened claim, if appropriate. If the Board denied a benefit sought in the pending appeal and any evidence so referred which was received prior to the date of the Board's decision, or testimony presented at a hearing resulting from a request for a hearing so referred, together with the evidence already of record, is subsequently found to be the basis of an allowance of that benefit, the effective date of the award will be the same as if the benefit had been granted by the Board as a result of the appeal which was pending at the time that the hearing request or additional evidence was received.

(ii) *Good cause shown.* If good cause is shown, the request for a change in representation or for a personal hearing will be honored. Any pertinent evidence submitted by the appellant or representative will be accepted, subject to the requirements of paragraph (c) of this section if a simultaneously contested claim is involved.

(2) *If the Board obtains evidence or considers law not considered by the agency of original jurisdiction.* The motion described in paragraph (b)(1) of this section is not required to submit evidence in response to the notice described in paragraph (b) or (c) of Rule 903 (paragraph (b) or (c) of § 20.903 of this part).

* * * * *

(Authority: 38 U.S.C. 7104, 7105, 7105A).

[FR Doc. 02–1536 Filed 1–22–02; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 61 and 63

[FRL –7126–3]

Approval of the Clean Air Act, Section 112(l), Delegation of Authority to the Idaho Department of Environmental Quality

AGENCY: Environmental Protection Agency.

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency, Region 10 (EPA) approves the Idaho Department of Environmental Quality's (IDEQ) request for program approval and delegation of authority to implement and enforce specific National Emission Standards for Hazardous Air Pollutants (NESHAPs) as they apply to major sources in Idaho required to obtain an operating permit under Title V of the federal Clean Air Act (CAA or Act). Pursuant to the authority of section 112(l) of the Act, this approval is based on EPA's finding that Idaho State law, regulations, and resources meet the requirements for program approval and delegation of authority specified in regulations pertaining to the criteria for straight delegation common to all approval options, and in applicable EPA guidance.

The purpose of this delegation is to acknowledge IDEQ's ability to implement a NESHAP program and to transfer primary implementation and enforcement responsibility from EPA to IDEQ for Title V sources, also referred to as ''major sources.'' Although EPA will look to IDEQ as the lead for implementing the NESHAPs delegated to IDEQ at major sources in Idaho, EPA retains authority under section 112(l)(7) of the Act to enforce any applicable emission standard or requirement for major sources, if needed. EPA also retains authority to implement and enforce these standards for non-Title V sources. With program approval, IDEQ may choose to request newly promulgated or updated standards and expand its program to include non-Title V sources by-way-of a streamlined request and approval process, described below.

Concurrent with this direct final rule, EPA is publishing a proposed rule in today's **Federal Register**. If no adverse comments are received in response to the direct final rule, no further activity is contemplated. If EPA receives adverse comments, this direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

DATES: This direct final rule is effective on March 25, 2002 without further notice, unless EPA receives adverse comment by February 22, 2002. If adverse comment is received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Written comments should be submitted to the address below:

Tracy Oliver, Office of Air Quality (OAQ–107), EPA, Region 10, 1200 Sixth Avenue, Seattle, Washington 98101, (206) 553–1172.

Copies of delegation requests and other supporting documentation are available for public inspection at US EPA, Region 10 office during normal business hours. Please contact Tracy Oliver to make an appointment.

FOR FURTHER INFORMATION CONTACT: Tracy Oliver, Office of Air Quality (OAQ–107), EPA, Region 10, 1200 Sixth Avenue, Seattle, Washington 98101, (206) 553–1172.

SUPPLEMENTARY INFORMATION:

Contents

I. Background and Purpose

Hazardous air pollutants are defined in the Act as pollutants that present or may present the threat of adverse human health effects through inhalation or other type of exposure. These pollutants are commonly referred to as ''air toxics'' and are listed in section 112(b)(1) of the Act. National Emission Standards for Hazardous Air Pollutants (NESHAPs) control emissions of hazardous air pollutants from specific source categories and implement the requirements of section 112 of the Act. These standards, found in 40 CFR Parts 61 and 63, constitute the Federal Air Toxics Program.