certificate holder or to a designated representative. In the case of a corporation, partnership, or association, personal delivery may be made to an officer, manager, or general agent thereof, or to the attorney of record.

§ 13.81 Representation before ATF.

An applicant or certificate holder may be represented by an attorney, certified public accountant, or other person recognized to practice before ATF as provided in 31 CFR part 8 (Practice Before the Bureau of Alcohol, Tobacco and Firearms). The applicable requirements of 26 CFR 601.521 through 601.527 (conference and practice requirements for alcohol, tobacco, and firearms activities) shall apply.

§ 13.91 Computation of time.

In computing any period of time prescribed or allowed by this part, the day of the act, event or default after which the designated period of time is to run, is not counted. The last day of the period to be computed is counted, unless it is a Saturday, Sunday, or legal holiday, in which case the period runs until the next day that is not a Saturday, Sunday, or legal holiday. Papers or documents that are required or permitted to be filed under this part must be received at the appropriate office within the filing time limits, if any.

§ 13.92 Extensions.

An applicant or certificate holder may apply to the Chief, Product Compliance Branch, the Chief, Alcohol and Tobacco Programs Division, or the Assistant Director, Alcohol and Tobacco for an extension of any time limit prescribed in this part. The time limit may be extended if ATF agrees the request is reasonable.

PART 19—DISTILLED SPIRITS PLANTS

Par. 12. The authority citation for part 19 continues to read as follows:

Authority: 19 U.S.C. 81c, 1311; 26 U.S.C. 5001, 5002, 5004–5006, 5008, 5010, 5041, 5061, 5062, 5066, 5081, 5101, 5111–5113, 5142, 5143, 5146, 5171–5173, 5175, 5176, 5178–5181, 5201–5204, 5206, 5207, 5211–5215, 5221–5223, 5231, 5232, 5235, 5236, 5241–5243, 5271, 5273, 5301, 5311–5313, 5362, 5370, 5373, 5501–5505, 5551–5555, 5559, 5561, 5562, 5601, 5612, 5682, 6001, 6065, 6109, 6302, 6311, 6676, 6806, 7011, 7510, 7805; 31 U.S.C. 9301, 9303, 9306.

Par. 13. Section 19.633 is amended to add paragraph (c) to read as follows:

§ 19.633 Distinctive liquor bottles.

* * * * *

(c) *Cross reference.* For procedures regarding issuance, denial and revocation of distinctive liquor bottle approvals, as well as appeal procedures, see part 13 of this chapter.

Par. 14. Section 19.641 is revised to read as follows:

§ 19.641 Certificate of label approval or exemption.

(a) *Requirement.* Proprietors are required by 27 CFR part 5 to obtain approval of labels, or exemption from label approval, for any label to be used on bottles of spirits for domestic use and shall exhibit evidence of label approval, or of exemption from label approval, on request of an ATF officer.

(b) *Cross reference.* For procedures regarding the issuance, denial and revocation of certificates of label approval and certificates of exemption from label approval, as well as appeal procedures, see Part 13 of this chapter.

''(Sec. 201, Pub. L. 85–859, 72 Stat. 1356, as amended (26 U.S.C. 5201))

Signed: August 6, 1998.

John W. Magaw,

Director.

Approved: December 11, 1998.

John P. Simpson,

Deputy Assistant Secretary (Regulatory, Tariff and Trade Enforcement).

[FR Doc. 99–624 Filed 1–12–99; 8:45 am]

BILLING CODE 4810–31–U

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 20

RIN 2900–AJ15

Board of Veterans' Appeals: Rules of Practice—Revision of Decisions on Grounds of Clear and Unmistakable Error

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the Rules of Practice of the Board of Veterans' Appeals (Board) to implement the provisions of section 1(b) of Pub. L. No. 105–111 (Nov. 21, 1997), which permit challenges to Board decisions on the grounds of ''clear and unmistakable error'' (CUE). The amendments provide specific application procedures and establish decision standards based on case law. These changes implement the new statutory provisions, which permit a claimant to demand review by the Board to determine whether CUE exists in an appellate decision previously issued by the Board, with a right of review of such determinations by the U.S. Court of Veterans Appeals.

DATES: Effective Date: February 12, 1999.

FOR FURTHER INFORMATION CONTACT: Steven L. Keller, Chief Counsel, Board of Veterans' Appeals, Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, (202) 565–5978.

SUPPLEMENTARY INFORMATION: The Board of Veterans' Appeals (Board) is an administrative body that decides appeals from denials of claims for veterans' benefits. There are currently 60 Board members, who decide 35,000 to 40,000 such appeals per year.

On May 19, 1998, the Department of Veterans Affairs (VA) published a notice of proposed rulemaking (NPRM) in the **Federal Register**. 63 FR 27534. We proposed to implement the provisions of section 1(b) of Pub. L. 105–111 (Nov. 21, 1997), which permits challenges to decisions of the Board of Veterans' Appeals (Board) on the grounds of ''clear and unmistakable error'' (CUE).

The public comment period ended on July 20, 1998. VA received 5 comments: 3 from veterans service organizations; one from a consortium of organizations, including veterans service organizations; and one from an individual. These comments are discussed below.

Based on the rationale set forth in the proposed rule and in this document, we adopt the provisions of the proposed rule as a final rule with changes explained below.

Subpart G, Rule 609(c)—Attorney Fees

Two commenters questioned Rule 609(c)(4)'s approach to attorney fees. That rule provides that the term ''issue,'' for purposes of charging a fee, would have the same meaning as ''issue'' in the context of a motion under subpart O. In other words, provided that the Board decision being challenged is associated with a notice of disagreement dated on or after November 18, 1988, and that the attorney was retained within one year of that decision, the attorney can be paid for services rendered in connection with a motion under subpart O.

The rule as proposed makes paid legal representation available to the maximum extent possible under existing law. For example, if we defined ''issue'' as meaning a challenge based on CUE, an attorney would never be able to charge for services in connection with a CUE motion because the Board would not have issued a final decision on the ''issue'' until after the CUE process was complete.

Two commenters suggested that we ignore the requirement that, in order for an attorney or agent to charge a fee, a

case must have associated with it a notice of disagreement received on or after November 18, 1988. That requirement is imposed by Pub. L. 100–687, Div. A, section 403, 102 Stat. 4108, *reprinted* at 38 U.S.C.A. 5904 note (applicability to attorneys fees), and VA may not by rule eliminate a requirement imposed by statute. One commenter suggested that we define ''case'' as a CUE case brought by a party unrepresented by an attorney, and that the one-year period should begin when the Board denies that party's motion. We do not believe that whether an action is a ''case'' depends on the nature of the movant's representation, and decline to adopt that suggestion.

Accordingly, we are adopting the change to Rule 609 as proposed.

Subpart K, Rule 1000—Reconsideration

General

We proposed to eliminate reconsideration on the grounds of obvious error based on the conclusion that this procedure was duplicative of the process under 38 U.S.C. 7111. Based on the comments received, we have concluded that the remedies are not totally equivalent, primarily because the remedy of reconsideration, when ordered by the Chairman, requires that the Board review the appeal de novo, while review on a CUE motion requires the review only of specific allegations of error. Accordingly, the final rule does not contain any change to Rule 1000.

Motions for Reconsideration as Motions for Review Under the Cue Standard

Because we had proposed to eliminate motions for reconsideration based on obvious error, we decided to treat motions for reconsideration alleging obvious error received after the enactment of Pub. L. 105–111 as motions for correction of CUE and so informed individuals who had filed such reconsideration motions. However, because we have now decided not to eliminate reconsideration based on obvious error, and because of the special pleading rules and the finality associated with motions under 38 U.S.C. 7111, we have decided that motions for reconsideration should not be considered CUE motions. In our view, there is a potential risk for the veteran to lose his or her chance at reversal on CUE grounds by inadvertently filing such a motion. We believe that CUE motions should be carefully thought out.

Accordingly, we have added a new paragraph (e) to Rule 1404 (relating to filing and pleading requirements) which provides that motions for reconsideration, whenever filed, will not be considered motions under subpart O. We do not believe this approach will prejudice anyone because (1) a CUE motion may be filed at any time; (2) the effect of a successful motion is the same no matter when filed—i.e., the prior Board decision is revised effective the date it was originally issued; and (3) the vast majority of individuals who applied for reconsideration probably had no idea that their motions would be construed as requests for revision under the new statute.

Nevertheless, since we have told individuals that we would decide their reconsideration motions under the new CUE regulations, and since the ''motions'' of those individuals have been assigned a place on the Board's ''docket,'' we will give each person so notified an opportunity to have his or her motion adjudicated under the new regulations. Accordingly, we will (1) notify the individuals concerned that their reconsideration motions will not be construed as CUE motions unless we receive notification from them that they want the motion construed as a CUE motion; (2) provide those individuals with a copy of the new regulations; and (3) encourage them to seek representation if they decide to pursue a motion under subpart O.

Subpart O—Revision of Decisions on Grounds of Clear and Unmistakable Error (Rules 1400–1411)

General

Several commenters suggested, in the context of various rules, that we interpret Pub. L. 105–111 more liberally than the courts have interpreted 38 CFR 3.105(a), VA's long-standing regulatory basis for CUE challenges to regional office decisions. We decline to follow these suggestions.

As we said in our NPRM, the legislative history of H.R. 1090, 105th Congress, which became Pub. L. 105–111, indicates that the Congress expected the Department would implement section 1(b) of the bill in accordance with current definitions of CUE. H.R. Rep. No. 52, 105th Cong., 1st Sess. 3 (1997) (report of House Committee on Veterans' Affairs on H.R. 1090) (''Given the Court's clear guidance on this issue [of CUE], it would seem that the Board could adopt procedural rules consistent with this guidance to make consideration of appeals raising clear and unmistakable error less burdensome''); 143 Cong. Rec. 1567, 1568 (daily ed. Apr. 16, 1997) (remarks of Rep. Evans, sponsor of H.R. 1090, in connection with House passage) (''The bill does not alter the standard for evaluation of claims of clear and unmistakable error'').

Rule 1400

Proposed Rule 1400 recited the statutory rule that Board decisions may be challenged on the grounds of CUE, and provided, in Rule 1400(b), that a Board decision on an issue (as defined in Rule 1401(a)) decided by a court of competent jurisdiction is not subject to challenge on the grounds of CUE.

One commenter objected to Rule 1400(b) on a variety of grounds, ranging from veterans' representatives who innocently miss grounds for appeal to the inapplicability of the rule, set forth in *Donovan* v. *Gober*, 10 Vet. App. 404 (1997), *aff'd sub. nom. Donovan* v. *West*, 158 F.3d 1377 (Fed. Cir. 1998), that a decision by an agency of original jurisdiction (AOJ) is ''subsumed'' in a Board decision on the merits, so that such an AOJ decision would no longer be subject to a CUE challenge. The reason for Rule 1400(b), as stated in our NPRM, is that it would be inappropriate for an inferior tribunal to review the actions of a superior, *Smith (William)* v. *Brown*, 35 F.3d 1516, 1526 (Fed. Cir. 1994); *Duran* v. *Brown*, 7 Vet. App. 216, 224 (1994). 63 FR 27536.

The same commenter suggested that Rule 1400(b) was unclear as to which final Board decisions would be exempt from review based on appeal to a court of competent jurisdiction. It was our intent that two classes of Board decisions not be subject to challenge: Those appealed to and decided by such courts, and those on issues which are subsequently decided by such courts. Consider this example:

> A 1985 Board decision finally denied service connection for a disability. In 1990, the veteran reopened the claim with new and material evidence at the regional office; the claim was denied and appealed to the Board; the Board again denied service connection; and the decision was appealed to the Court of Veterans' Appeals which, in 1995, affirmed the Board's decision. In 1997, the veteran reopened his claim at the regional office, where it was denied on the merits, and, in 1998, denied on appeal to the Board.

Under our rules, the veteran could challenge the 1998 Board decision, but could not challenge either the decision which was affirmed by the Court, or the 1985 decision. We believe that the rationale stated in jurisprudence which prevents regional offices from overturning Board decisions, and which therefore precludes regional offices from reviewing for CUE their own decisions that have been subsumed by subsequent Board decisions, is sound and is equally

applicable to the Board. *See generally Donovan* v. *West*, supra. Therefore, our rule precludes a CUE challenge to a Board decision on an issue that has been subsequently decided by a court of competent jurisdiction, whether on direct appeal of that Board decision or on appeal of a subsequent Board decision on the same issue.

We have amended Rule 1400(b) to make this clearer.

Rule 1401

Rule 1401 defines the terms ''issue'' and ''party.''

Rule 1401(a), which defines ''issue,'' requires that the applicable Board decision either have been appealable under Chapter 72 of title 38, United States Code, or would have been appealable if the notice of disagreement had been received by the AOJ on or after November 18, 1988.

One commenter thought that our definition of ''issue'' could be misinterpreted to mean that only Board decisions which in fact could have been appealed under Chapter 72 could be challenged on the grounds of CUE. That is certainly not what we intended. The purpose of this qualification is simply to clarify that only final, outcome-determinative decisions of the Board are subject to revision on the grounds of CUE. Our purpose in referencing appeals to the court is simply to provide a meaningful standard for what we mean by ''final'' Board decisions. Since all Board decisions on appeals require that the appellant have filed a notice of disagreement, 38 U.S.C. 7105(a), and final Board decisions are appealable under chapter 72 of title 38, *Zevalkink* v. *Brown*, 6 Vet. App. 483, 488 (1994), *aff'd*, 102 F.3d 1236 (Fed. Cir. 1996), *cert. denied*, 117 S. Ct. 2478 (1997), parties, the Board and reviewing courts, by using this standard, will be able to determine whether a Board decision was in fact final, whether or not it was actually appealed to the court. Nevertheless, we have revised Rule 1401(a) to clarify that a ''final decision'' is one which was appealable to the Court of Veterans Appeals (CVA), or which would have been appealable if the relevant statutory provisions providing review had been in effect at the time of the Board decision.

One commenter stated that the definition of ''issue'' was too vague because it refers to ''a matter upon which the Board made a final decision,'' and the term ''matter'' is not defined. We do not agree. The term ''matter'' is taken from 38 U.S.C. 7103(a), which refers to the finality of a ''decision of the Board determining a matter under section 7102'' of title 38. Section 7102 in turn relates to assignment of proceedings to Board members. ''Matter'' is not an unknown term in the context of Board decisions, *cf.* 38 U.S.C. 7104(a) (''matter'' for decision under 38 U.S.C. 511(a)), and we think it is serviceable enough in the context of subpart O.

The same commenter suggests that various ''subsidiary'' questions also be subject to CUE challenges. Again, we do not agree. As we stated in our NPRM, one of the purposes of this definition is to clarify that ''only final, outcome-determinative decisions of the Board are subject to revision on the grounds of CUE, so as to avoid, in the interests of judicial economy, atomization of Board decisions into myriad component parts * * *.'' 63 FR 27537.

Two commenters suggest amending the definition of ''party'' in Rule 1401(b), to include, variously, the representative of a party and the family of a party. We do not agree. The right to challenge a Board decision is limited by statute to the claimant and the Board. 38 U.S.C. 7111(c). Cf. *Haines* v. *West*, 154 F.3d 1298, 1301 (Fed. Cir. 1998) (substantively identical 38 U.S.C. 5109A, applicable to regional office decisions, contains nothing that provides for another person, even a survivor, to seek correction of a decision on a veteran's claim). We note that, under Rule 1404(a), a party's representative may sign the motion for a challenge on the grounds of CUE.

Accordingly, we are adopting Rule 1401(b) as proposed.

Rule 1402

There were no comments on Rule 1402, which provides that motions filed under subpart O are not appeals and, except as otherwise provided, are not subject to the provisions of the Board's regulations which relate to the processing and disposition of appeals. We are adopting Rule 1402 as proposed.

Rule 1403

Rule 1403 relates to what constitutes CUE and what does not. We received a number of comments on this rule.

In our proposed rulemaking, we based our definition of CUE on rulings by the CVA. A number of commenters suggested that this definition was too restrictive, and should be modified.

We do not agree. Congress intended that VA adopt the CVA interpretation of the term ''clear and unmistakable error.'' Indeed, as discussed in the NPRM, 63 FR 27536, the sponsor of the bill which became the law specifically noted that the bill would ''not alter the standard for evaluation of claims of clear and unmistakable error.'' 143 Cong. Rec. 1567, 1568 (daily ed. Apr. 16, 1997) (remarks of Rep. Evans, sponsor of H.R. 1090, in connection with House passage).

Several commenters objected to our incorporation, in Rule 1403(b)(2), of the holding in *Bell* v. *Derwinski*, 2 Vet. App. 611 (1992), that, with respect to Board decisions issued on or after July 21, 1992, documents which were actually in VA's possession—even though not physically before the adjudicator—are constructively a part of the record. While we agree that this rule appears to conflict with a basic tenet of CUE—i.e., that we look at the same set of facts and law as did the original adjudicator—we do not believe we are free to ignore the court's decision.

One commenter objected to Rules 1403(d)(2) and 1403(d)(3), which provide that neither (1) the Secretary's failure to fulfill the duty to assist nor (2) a disagreement as to how the facts were weighed or evaluated can constitute CUE. As described in our NPRM, the law is clear on these points. 63 FR 27536–37.

Rule 1403(e) provides that CUE does not include the otherwise correct application of a statute or regulation where, subsequent to the Board decision challenged, there has been a change in the interpretation of the statute or regulation. Two commenters objected to this rule. Without getting into the various arguments advanced, it is, we believe, enough to say that the CVA has now ruled that this is the proper interpretation of the law. *Smith (Rose)* v. *West*, 11 Vet. App. 134, 137–38 (1998).

Accordingly, we are adopting Rule 1403 as proposed.

Rule 1404

Rule 1404 relates to filing and pleading requirements in connection with a motion challenging a Board decision on the grounds of CUE. We received a number of comments on this rule.

Several commenters expressed the view that the pleading requirements set forth in the proposed rule are too strict. We do not agree.

While it is true that the requirements set forth in these proposed regulations are more strenuous than the ''paternalistic'' rules commonly associated with veterans' claims, challenges on the grounds of CUE are different from claims for benefits. Claims for benefits that meet certain minimum requirements—i.e., that are ''well grounded''—require VA to assist the veteran in a variety of ways and demand only that the veteran show that it is at least as likely as not that he or she meets the standards for a grant of

benefits. This process indeed occurs in a non-adversarial setting.

On the other hand, a CUE challenge to a final Board decision—itself the product of this non-adversarial process—is based on the allegation that the Board has denied the claim in such a fundamentally erroneous way that any reasonable person would have granted the claim. It is a collateral challenge to an otherwise final decision as to which the presumption of validity is very strong. *Fugo* v. *Brown*, 6 Vet. App. 40, 44 (1993).

We understand that a person whose claim for benefits is denied would prefer that the claim have been granted. And, indeed, in our NPRM we outlined several ways in which veterans' claims can be revived. 63 FR 27535. Nevertheless, where the veteran makes this kind of collateral challenge to a presumptively valid final decision, he or she is required to come forward with specific allegations as to the CUE. *Phillips* v. *Brown*, 10 Vet. App. 25, 31 (1997); *Fugo* v. *Brown*, 6 Vet. App. 40, 44 (1993); *cf. Berger* v. *Brown*, 10 Vet. App. 166, 169 (1997) (''(A)ppellant, who always bears the burden of persuasion on appeals to this Court, bears an extra-heavy burden when the appeal is a collateral attack, in the form of a CUE claim, concerning a final decision''). That is, in essence, all that our rules call for.

As described earlier in this document, we have added a new paragraph (e) to Rule 1404 to provide that motions for reconsideration, whenever filed, will not be considered motions under subpart O.

We have also added a new paragraph (f) to Rule 1404 to clarify that a motion under subpart O may be withdrawn at any time before the Board promulgates a decision on the motion. If such a request is timely received, the motion shall be dismissed without prejudice to refiling under subpart O.

Rule 1405

Rule 1405 relates to the disposition of motions filed under subpart O. The rule includes directions with respect to hearings, evidence, and opinions of VA's General Counsel. We received a number of comments on this rule.

Evidence (Rule 1405(b))

One commenter proposed another definition of CUE, which would include the Board's failure to obtain evidence that a reasonable Board member would have tried to obtain and that, more likely than not, would have resulted in a grant of benefits. This commenter further proposed that, under that definition, if a party submitted with the CUE motion evidence that a reasonable Board member would have tried to obtain, that evidence be considered to have been of record at the time of the original decision. While we appreciate the thoughtful recommendation, we do not concur. Congress intended VA to follow the established case law defining CUE in implementing 38 U.S.C. 7111. This recommendation—which would include in the definition of CUE evidence which would obviously not have been before the Board at the time of the original decision—does not meet that standard.

One commenter argued that a moving party should be permitted to submit additional evidence in connection with a CUE challenge because the word ''evidence'' is used in 38 U.S.C. 7111. Our NPRM set forth controlling court precedents which make it clear that a ruling on CUE is based on the record that was before the adjudicator. We have not adopted this commenter's suggestion.

That same commenter argued that it is arbitrary to prohibit a claimant from submitting evidence in connection with a CUE motion (Rule 20.1405(b)) but to permit the Board to use AOJs to ensure completeness of the record (Rule 20.1405(e)). However, Rule 20.1405(e) would not permit the Board to supplement the record with evidence that was not of record at the time of the original decision, but rather would permit the Board to ensure that all evidence that was before the Board at the time of the original decision is before the Board on the CUE motion. Accordingly, we have not adopted this argument.

Hearings (Rule 1405(c))

Rule 1405(c) provides that the Board, for good cause shown, may grant a request for a hearing for the purpose of argument. One commenter suggests that such hearings be made a matter of right. While it is true, as this commenter points out, that hearings are freely available in connection with most veterans' claims, those hearings are typically for the purpose of submitting evidence. There is, however, no evidence to be submitted in connection with a challenge based on CUE. Indeed, a ''hearing'' with respect to a motion under subpart O is more akin to oral argument in an appellate case. Accordingly, we are adopting Rule 1405(c) as proposed.

General Counsel opinions (Rule 1405(f))

Rule 1405(f) permits the Board to secure opinions of VA's General Counsel in connection with a motion under subpart O.

Two commenters expressed the opinion that this authority would be used only to establish post-hoc rationalizations for Board decisions. Those commenters articulate no factual basis for this conclusion. We believe that, in the proper case, an opinion from the Department's chief legal officer could be helpful in properly deciding the case. We are adopting Rule 1405(f) as proposed.

Decision format (Rule 1405(g))

One commenter questioned the decision format to be used by the Board, i.e., findings of fact, conclusions of law, and reasons and bases for such findings and conclusions. As we said in our NPRM, we believe that the format in our rule—based on the requirements in 38 U.S.C. 7104(d)—best facilitates judicial review. 63 FR at 27537. Accordingly, we are adopting Rule 1405(g) as proposed.

Rule 1406

Rule 1406 relates to the effect of a revision of a Board decision based on CUE. One commenter suggested that VA consider adopting a regulation permitting the claimant to file a motion requesting a stay of a Board order under subpart O which terminates or reduces benefits pending a decision on appeal to the court. We decline to add such a provision. In such a case, the Board would have, by definition, decided that an award of benefits was clearly and unmistakably erroneous. To continue the payment of benefits based on a clearly and unmistakably erroneous award would create an overpayment attributable to the party.

One commenter argued that Rule 1406 is contrary to law to the extent that it contemplates discontinuance or reduction of benefits in the context of a CUE motion because, according to this commenter, the Board has no authority to order such discontinuance or reduction. We do not agree. Section 7111(a) of title 38, United States Code, requires that, if evidence establishes a clear and unmistakable error in a Board decision, that decision be reversed or revised. The Board's duty to reverse or revise a clearly and unmistakably erroneous Board decision is not limited by the statutory language to situations in which a grant or increase in benefits would result. The commenter argued that 38 U.S.C. 7111(b)—which relates to procedures to be followed in those cases where the CUE motion results in an award of benefits—implicitly limits the Board's authority to granting benefits and denying motions. However, that subsection simply provides the effective date of a reversal or revision of a prior Board decision resulting in a grant of or

increase in benefits. The fact that section 7111(b) does not mention the effective date for discontinuances or reductions does not prohibit such orders any more than the fact that it does not mention denial of a motion means the Board must grant every CUE motion.

We have divided Rule 1406 into two separate paragraphs for purposes of clarity. This is purely stylistic, and we intend no substantive change.

Rule 1407

Rule 1407 relates to motions under subpart O made by the Board.

One commenter suggested that we amend that portion of the rule which provides that decisions on motions initiated by the Board are subject to the same finality as those initiated by a party. We do not agree. Should the Board undertake a motion, all parties will have an opportunity to address the motion fully. While we do not anticipate that the Board would use this authority often, we believe that the process outlined is fair.

Another commenter suggested that the regulations be amended to provide that the Board is subject to the same pleading rules as parties. No changes are made based on this comment. The purpose of the pleading requirements is for a claimant to sufficiently identify to the Board the particular case, issue, and alleged error to be adjudicated. In the case of the Board's own motion, the Board will already be aware of this information. Furthermore, Rule 1407 will provide means for the Board to inform the claimant of the same information and permit the claimant to respond to the Board's motion.

That same commenter also suggests that, when the Board proposes to reduce or terminate benefits as a result of a decision on the Board's motion under subpart O, the Board provide the party a predetermination hearing. We believe that the notice provisions of Rule 1407, and the availability of a hearing under Rule 1405(c) satisfy any due process concerns.

Accordingly, we are adopting Rule 1407 as proposed.

Rule 1408

No comments were received relating to Rule 1408, which applies to simultaneously contested claims.

Accordingly, we are adopting Rule 1408 as proposed.

Rule 1409

Rule 1409 relates to finality and appeal of a decision on a motion under subpart O.

One commenter objected to Rule 1409(c), which provides that, once there is a final decision on a motion under subpart O, that prior Board decision on that issue is no longer subject to revision on the grounds of CUE. We believe our explanation in the NPRM is sufficient to rebut any argument on this point, and will not burden the record with a point-by-point discussion. 63 FR 27538. *See also Allin* v. *Brown*, 10 Vet. App. 55, 57 (1997) (where court previously determined that there was no CUE in 1971 regional office decision, the question is no longer open for review).

As discussed earlier in this document, we have amended proposed Rule 1404(f) to clarify that a CUE motion may be withdrawn at any time before the Board promulgates a decision on the motion. We have amended Rule 1409(b) to provide that a dismissal without prejudice under Rule 1404(f) is not a final decision of the Board.

Rule 1410

Rule 1410 relates to stays pending court action. There were no comments relating to Rule 1410.

Accordingly, we are adopting Rule 1410 as proposed.

Rule 1411

Rule 1411 concerns the relationship of subpart O to other statutes.

One commenter objected to virtually all aspects of Rule 1411.

''Benefit of the doubt'' (Rule 1411(a)). This commenter argued that, because 38 U.S.C. 7111 uses the word ''case,'' the benefit of the doubt rule must apply to decisions made under subpart O. This commenter does not attempt to distinguish controlling precedent from the CVA, *Russell* v. *Principi*, 3 Vet. App. 310, 314 (1992), (discussed in our NPRM, 63 FR 27536), that the ''benefit of the doubt'' rule does not apply to the question of whether a prior decision was the result of CUE, nor the legislative history described earlier in this document. We reject this argument.

New and material evidence (Rule 1411(b)). The same commenter objects to the rule providing that CUE claims are not subject to reopening on the grounds of new and material evidence. However, as discussed extensively in our NPRM, a motion under subpart O is a challenge based on the evidence of record when the original decision was made. Accordingly, there is no evidence to submit in connection with such a motion, much less ''new and material evidence'' at some later date. Further, a motion under subpart O is not a claim within the meaning of 38 U.S.C. 5108 (relating to reopening claims with new and material evidence). We reject this argument.

Duties associated with applications for benefits (Rule 1411(c)). This same commenter objects to the rule providing that the duties associated with applications for benefits do not apply to motions under subpart O. We do not agree. Challenges based on CUE are collateral attacks on final decisions, *Berger* v. *Brown*, 10 Vet. App. 166, 169 (1997); *Duran* v. *Brown*, 7 Vet. App. 216, 223–24 (1994), not claims for benefits. Therefore, duties associated with applications for benefits do not apply to CUE motions. In any event, the detailed rules we are publishing are, we believe, fair and extremely detailed notice as to what is required to successfully maintain a challenge of CUE.

Accordingly, we are adopting Rule 1411 as proposed.

The Secretary hereby certifies that this final rule does 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 would affect only the processing of claims by VA and would not affect small businesses. Therefore, pursuant to 5 U.S.C. 605(b), this proposed rule is exempt from the initial and final regulatory flexibility analyses requirements of sections 603 and 604.

List of Subjects in 38 CFR Part 19

Administrative practice and procedure, Claims, Veterans.

Approved: January 8, 1999.

Togo D. West, Jr.,

Secretary of Veterans Affairs.

For the reasons set out in the preamble, 38 CFR part 20 is amended as set forth below:

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

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

Authority: 38 U.S.C. 501(a).

2. In subpart G, § 20.609, paragraph (c)(4) is added to read as follows:

§ 20.609 Rule 609. Payment of representative's fees in proceedings before Department of Veterans Affairs field personnel and before the Board of Veterans' Appeals.

* * * * *

(c) * * *

(4) For the purposes of this section, in the case of a motion under subpart O of this part (relating to requests for revision of prior Board decisions on the grounds of clear and unmistakable error), the ''issue'' referred to in this paragraph (c) shall have the same

meaning as ''issue'' in Rule 1401(a) (§ 20.1401(a) of this part).

* * * * *

3. A new subpart O is added to read as follows:

Subpart O—Revision of Decisions on Grounds of Clear and Unmistakable Error

Sec.

Subpart O—Revision of Decisions on Grounds of Clear and Unmistakable Error

§ 20.1400 Rule 1400. Motions to revise Board decisions.

(a) Review to determine whether clear and unmistakable error exists in a final Board decision may be initiated by the Board, on its own motion, or by a party to that decision (as the term ''party'' is defined in Rule 1401(b) (§ 20.1401(b) of this part) in accordance with Rule 1404 (§ 20.1404 of this part).

(b) All final Board decisions are subject to revision under this subpart except:

(1) Those decisions which have been appealed to and decided by a court of competent jurisdiction; and

(2) Decisions on issues which have subsequently been decided by a court of competent jurisdiction.

(Authority: 38 U.S.C. 501(a), 7111)

Sec. 20.1401 Rule 1401. Definitions.

(a) *Issue.* Unless otherwise specified, the term ''issue'' in this subpart means a matter upon which the Board made a final decision (other than a decision under this subpart). As used in the preceding sentence, a ''final decision'' is one which was appealable under Chapter 72 of title 38, United States Code, or which would have been so appealable if such provision had been in effect at the time of the decision.

(b) *Party.* As used in this subpart, the term ''party'' means any party to the proceeding before the Board that resulted in the final Board decision which is the subject of a motion under this subpart, but does not include officials authorized to file administrative appeals pursuant to § 19.51 of this title.

(Authority: 38 U.S.C. 501(a), 7104(a))

20.1402 Rule 1402. Inapplicability of other rules.

Motions filed under this subpart are not appeals and, except as otherwise provided, are not subject to the provisions of part 19 of this title or this part 20 which relate to the processing and disposition of appeals.

(Authority: 38 U.S.C. 501(a))

§ 20.1403 Rule 1403. What constitutes clear and unmistakable error; what does not.

(a) *General.* 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. Generally, either the correct facts, as they were known at the time, were not before the Board, or the statutory and regulatory provisions extant at the time were incorrectly applied.

(b) *Record to be reviewed.*—(1) *General.* Review for clear and unmistakable error in a prior Board decision must be based on the record and the law that existed when that decision was made.

(2) *Special rule for Board decisions issued on or after July 21, 1992.* For a Board decision 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.

(c) *Errors that constitute clear and unmistakable error.* To warrant revision of a Board decision on the grounds of clear and unmistakable error, there must have been an error in the Board's adjudication of the appeal which, had it not been made, would have manifestly changed the outcome when it was made. If it is not absolutely clear that a different result would have ensued, the error complained of cannot be clear and unmistakable.

(d) *Examples of situations that are not clear and unmistakable error.*—(1) *Changed diagnosis.* A new medical diagnosis that ''corrects'' an earlier diagnosis considered in a Board decision.

(2) *Duty to assist.* The Secretary's failure to fulfill the duty to assist.

(3) *Evaluation of evidence.* A disagreement as to how the facts were weighed or evaluated.

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

(Authority: 38 U.S.C. 501(a), 7111)

§ 20.1404 Rule 1404. Filing and pleading requirements; withdrawal.

(a) *General.* A motion for revision of a decision based on clear and unmistakable error must be in writing, and must be signed by the moving party or that party's representative. The motion must include the name of the veteran; the name of the moving party if other than the veteran; the applicable Department of Veterans Affairs file number; and the date of the Board of Veterans' Appeals decision to which the motion relates. If the applicable decision involved more than one issue on appeal, the motion must identify the specific issue, or issues, to which the motion pertains. Motions which fail to comply with the requirements set forth in this paragraph shall be dismissed without prejudice to refiling under this subpart.

(b) *Specific allegations required.* The motion must set forth clearly and specifically the alleged clear and unmistakable error, or errors, of fact or law in the Board 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. Motions which fail to comply with the requirements set forth in this paragraph shall be denied.

(c) *Filing.* A motion for revision of a decision based on clear and unmistakable error may be filed at any time. Such motions should be filed at the following address: Director, Administrative Service (014), Board of Veterans' Appeals, 810 Vermont Avenue, NW, Washington, DC 20420.

(d) *Requests not filed at the Board.* A request for revision transmitted to the Board by the Secretary pursuant to 38 U.S.C. 7111(f) (relating to requests for revision filed with the Secretary other than at the Board) shall be treated as if

a motion had been filed pursuant to paragraph (c) of this section.

(e) *Motions for reconsideration.* A motion for reconsideration, as described in subpart K of this part, whenever filed, will not be considered a motion under this subpart.

(f) *Withdrawal.* A motion under this subpart may be withdrawn at any time before the Board promulgates a decision on the motion. Such withdrawal shall be in writing, shall be filed at the address listed in paragraph (c) of this section, and shall be signed by the moving party or by such party's representative. If such a writing is timely received, the motion shall be dismissed without prejudice to refiling under this subpart.

(Authority: 38 U.S.C. 501(a), 7111)

§ 20.1405 Rule 1405. Disposition.

(a) *Docketing and assignment.* Motions under this subpart will be docketed in the order received and will be assigned in accordance with § 19.3 of this title (relating to assignment of proceedings). Where an appeal is pending on the same underlying issue at the time the motion is received, the motion and the appeal may be consolidated under the same docket number and disposed of as part of the same proceeding. A motion may not be assigned to any Member who participated in the decision that is the subject of the motion. If a motion is assigned to a panel, the decision will be by a majority vote of the panel Members.

(b) *Evidence.* No new evidence will be considered in connection with the disposition of the motion. Material included in the record on the basis of Rule 1403(b)(2) (§ 20.1403(b)(2) of this part) is not considered new evidence.

(c) *Hearing.*—(1) *Availability.* The Board may, for good cause shown, grant a request for a hearing for the purpose of argument. No testimony or other evidence will be admitted in connection with such a hearing. The determination as to whether good cause has been shown shall be made by the member or panel to whom the motion is assigned.

(2) *Submission of requests.* Requests for such a hearing shall be submitted to the following address: Director, Administrative Service (014), Board of Veterans' Appeals, 810 Vermont Avenue, NW, Washington, DC 20420.

(d) *Decision to be by the Board.* The decision on a motion under this subpart shall be made by the Board. There shall be no referral of the matter to any adjudicative or hearing official acting on behalf of the Secretary for the purpose of deciding the motion.

(e) *Referral to ensure completeness of the record.* Subject to the provisions of paragraph (b) of this section, the Board may use the various agencies of original jurisdiction to ensure completeness of the record in connection with a motion under this subpart.

(f) *General Counsel opinions.* The Board may secure opinions of the General Counsel in connection with a motion under this subpart. In such cases, the Board will notify the party and his or her representative, if any. When the opinion is received by the Board, a copy of the opinion will be furnished to the party's representative or, subject to the limitations provided in 38 U.S.C. 5701(b)(1), to the party if there is no representative. A period of 60 days from the date of mailing of a copy of the opinion will be allowed for response. The date of mailing will be presumed to be the same as the date of the letter or memorandum which accompanies the copy of the opinion for purposes of determining whether a response was timely filed.

(g) *Decision.* The decision of the Board on a motion will be in writing. The decision will include separately stated findings of fact and conclusions of law on all material questions of fact and law presented on the record, the reasons or bases for those findings and conclusions, and an order granting or denying the motion.

(Authority: 38 U.S.C. 501(a), 7104(d), 7111)

§ 20.1406 Rule 1406. Effect of revision; discontinuance or reduction of benefits.

(a) *General.* A decision of the Board that revises a prior Board decision on the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.

(b) *Discontinuance or reduction of benefits.* Revision of a prior Board decision under this subpart that results in the discontinuance or reduction of benefits is subject to laws and regulations governing the reduction or discontinuance of benefits by reason of erroneous award based solely on administrative error or errors in judgment.

(Authority: 38 U.S.C. 7111(b))

§ 20.1407 Rule 1407. Motions by the Board.

If the Board undertakes, on its own motion, a review pursuant to this subpart, the party to that decision and that party's representative (if any) will be notified of such motion and provided an adequate summary thereof and, if applicable, outlining any proposed discontinuance or reduction in benefits that would result from revision of the Board's prior decision. They will be allowed a period of 60 days to file a brief or argument in answer. The failure of a party to so respond does not affect the finality of the Board's decision on the motion.

(Authority: 38 U.S.C. 501(a), 7111)

§ 20.1408 Rule 1408. Special rules for simultaneously contested claims.

In the case of a motion under this subpart to revise a final Board decision in a simultaneously contested claim, as that term is used in Rule 3(o) (§ 20.3(o) of this part), a copy of such motion shall, to the extent practicable, be sent to all other contesting parties. Other parties have a period of 30 days from the date of mailing of the copy of the motion to file a brief or argument in answer. The date of mailing of the copy will be presumed to be the same as the date of the letter which accompanies the copy. 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.

(Authority: 38 U.S.C. 501(a))

§ 20.1409 Rule 1409. Finality and appeal.

(a) A decision on a motion filed by a party or initiated by the Board pursuant to this subpart will be stamped with the date of mailing on the face of the decision, and is final on such date. The party and his or her representative, if any, will be provided with copies of the decision.

(b) For purposes of this section, a dismissal without prejudice under Rule 1404(a) (§ 20.1404(a) of this part) or Rule 1404(f) (§ 20.1404(f)), or a referral under Rule 1405(e) is not a final decision of the Board.

(c) Once there is a final decision on a motion under this subpart relating to a prior Board decision on an issue, that prior Board decision on that issue is no longer subject to revision on the grounds of clear and unmistakable error. Subsequent motions relating to that prior Board decision on that issue shall be dismissed with prejudice.

(d) Chapter 72 of title 38, United States Code (relating to judicial review), applies with respect to final decisions on motions filed by a party or initiated by the Board pursuant to this subpart.

(Authority: 38 U.S.C. 501(a); Pub. L. 105–111)

§ 20.1410 Rule 1410. Stays pending court action.

The Board will stay its consideration of a motion under this subpart upon receiving notice that the Board decision that is the subject of the motion has been appealed to a court of competent

jurisdiction until the appeal has been concluded or the court has issued an order permitting, or directing, the Board to proceed with the motion.

(Authority: 38 U.S.C. 501(a))

§ 20.1411 Rule 1411. Relationship to other statutes.

(a) The ''benefit of the doubt'' rule of 38 U.S.C. 5107(b) does not apply to the Board's decision, on a motion under this subpart, as to whether there was clear and unmistakable error in a prior Board decision.

(b) A motion under this subpart is not a claim subject to reopening under 38 U.S.C. 5108 (relating to reopening claims on the grounds of new and material evidence).

(c) A motion under this subpart is not an application for benefits subject to any duty associated with 38 U.S.C. 5103(a) (relating to applications for benefits).

(d) A motion under this subpart is not a claim for benefits subject to the requirements and duties associated with 38 U.S.C. 5107(a) (requiring ''well-grounded'' claims and imposing a duty to assist).

(Authority: 38 U.S.C. 501(a))

[FR Doc. 99–760 Filed 1–12–99; 8:45 am]

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POSTAL SERVICE

39 CFR Part 111

Addressing Requirements for Shared Mail Receptacles on Rural and Highway Contract Delivery Routes

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: This final rule amends the Domestic Mail Manual to clarify addressing requirements for customers of rural or highway contract delivery routes who share mail receptacles.

DATES: This final rule is effective February 11, 1999.

FOR FURTHER INFORMATION CONTACT: Jackie Estes, Operations Specialist, Delivery Policies and Programs, (202) 268–3543.

SUPPLEMENTARY INFORMATION: This rule change clarifies postal addressing requirements for certain customers of rural and highway contract delivery routes, when local governments implement street name and number systems. Normally this occurs in conjunction with Emergency 9–1–1 service activation.

Historically, customers of up to five (5) separate households on rural and highway contract delivery routes have been able to share a mail receptacle for purposes of receiving carrier delivery service, with the owner's written permission. In areas without street names and numbers, a postal route and box number addressing system (e.g., RR 1 BOX 250) is used. The box address reflects the receptacle location and sequence on the delivery route. Therefore, customers sharing the receptacle use its particular address. If a customer subsequently decides to erect an individual receptacle, that receptacle is assigned its own route-and-box-number address, reflecting its particular location and sequence.

When localities convert to street name and number systems, customers may continue to share a mail receptacle, but they still must use the address that reflects the particular box, e.g., the street name and number of the receptacle's owner, rather than the various street names and numbers now assigned to their individual properties. This addressing requirement is familiar to customers as the ''in care of'' address format, e.g.:

JOHN DOE
C/O R SMITH 123 MAIN ST
ANYTOWN USA 00000–0000

Customers who are entitled to individual carrier delivery but instead share a box, have always been able to erect individual receptacles. There is no change in this customer option. However, if a street name and number system is in place, the correct address for the individual receptacle will be the street name and number assigned to its owner's particular property.

These amendments are being published without a notice and comment provision in accordance with 5 U.S.C. 553(b)(B), since no customers are burdened by the rule change.

The Postal Service hereby adopts the following amendments to the Domestic Mail Manual which is incorporated by reference in the Code of Federal Regulations, 39 CFR 111.1.

List of Subjects in 39 CFR Part 111

Postal Service.

PART 111—[AMENDED]

1. The authority citation for 39 CFR part 111 continues to read as follows:

Authority: 5 U.S.C. 552(a); 39 U.S.C. 101, 401, 403, 404, 3001–3011, 3201–3219, 3403–3406, 3621, 3626, 5001.

2. Revise part D041 of the Domestic Mail Manual to read as follows:

D041 Customer Mail Receptacles

* * * * *

D041.2.0 CURBSIDE MAILBOXES

* * * * *

D041.2.8 More Than One Family

If more than one family wishes to share a mail receptacle, the following standards apply:

a. Route and Box Number Addressing. On rural and highway contract routes authorized to use a route and box numbering system (e.g., RR 1 BOX 155), up to five families may share a single mail receptacle and use a common route and box designation. A written notice of agreement, signed by the heads of the families or the individuals who want to join in the use of such box, must be filed with the postmaster at the delivery office.

b. Conversion to Street Name and Number Addressing. When street name and numbering systems are adopted, those addresses reflect distinct customer locations and sequences. Rural and highway contract route customers who are assigned different primary addresses (e.g., 123 APPLE WAY vs. 136 APPLE WAY) should erect individual mail receptacles in locations recommended by their postmasters and begin using their new addresses. Customers having different primary addresses, who wish to continue sharing a common receptacle, must use the address of the receptacle's owner and the ''care of'' address format:

JOHN DOE
C/O ROBERT SMITH 123 APPLE WAY

Customers having a common primary address (e.g., 800 MAIN ST, but different secondary addresses (e.g., APT 101, APT 102, etc.), may continue to share a common receptacle if single-point delivery is authorized for the primary address. Secondary addresses should still be included in all correspondence.

* * * * *

Stanley F. Mires,

Chief Counsel, Legislative.

[FR Doc. 99–685 Filed 1–12–99; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CA 211–0116a; FRL–6214–1]

Approval and Promulgation of Implementation Plans; California State Implementation Plan Revision, Antelope Valley Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).