tall ships beginning at 43°14′36″ N, 086°15′44″ W, proceeding to waypoint 43°13′37″ N, 086°17′41″ W, then to waypoint 43°14′07″ N, 086°19′21″ W, then outbound through Muskegon Lake Entrance Channel to the final parade waypoint in Lake Michigan at 43°13′11″ N, 086°21′36″ W. The Moving Safety Zone will terminate at 5 p.m. EDT on Monday, August 13, 2001 at position 43°13′11″ N, 086°21′36″ W.

(2) All vessel operators shall comply with the instructions of the U.S. Coast Guard Captain of the Port Chicago or the designated on-scene U.S. Coast Guard patrol personnel including commissioned, warrant, and petty officers. Permission to deviate from the above rules must be obtained from the Captain of the Port Chicago or his representative by VHF/FM radio, Channel 9 or by telephone at (616) 204–2877.

Dated: March 27, 2001.

James D. Hull,

Rear Admiral, U.S. Coast Guard, Commander, Ninth Coast Guard District, Cleveland, Ohio.

[FR Doc. 01–8186 Filed 4–3–01; 8:45 am]

BILLING CODE 4910–15–U

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900–AK69

Duty to Assist

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) is proposing to amend its adjudication regulations to implement the provisions of the Veterans Claims Assistance Act of 2000 (the VCAA), which was signed by the President on November 9, 2000. The intended effect of this regulation is to establish clear guidelines consistent with the intent of Congress regarding the timing and the scope of assistance VA will provide to a claimant who files a substantially complete application for VA benefits.

DATES: Comments must be received on or before May 4, 2001.

ADDRESSES: Mail or hand-deliver written comments to: Director, Office of Regulations Management (02D), Department of Veterans Affairs, 810 Vermont Ave., NW, Room 1154, Washington, DC 20420; or fax comments to (202) 273–9289; or e-mail comments to *OGCRegulations@mail.va.gov.* Comments should indicate that they are submitted in response to ''RIN 2900–AK69.'' All comments received will be available for public inspection in the Office of Regulations Management, Room 1158, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays).

FOR FURTHER INFORMATION CONTACT: Janice Jacobs, Lead Consultant, Strategy Development Staff, Compensation and Pension Service, Veterans Benefits Administration, 810 Vermont Avenue, NW, Washington, DC 20420, telephone (202) 273–7223.

SUPPLEMENTARY INFORMATION: In the Veterans Claims Assistance Act of 2000, Pub. L. 106–475 (the VCAA), Congress amended sections 5102 and 5103 of title 38, United States Code, and added new sections 5100 and 5103A pertaining to VA's duty to assist a claimant in obtaining evidence in support of a claim for benefits. Congress also amended section 5107 by deleting the concept of a ''well-grounded claim'' previously contained in that section. It retained the concept that the claimant is responsible for presenting and supporting a claim for benefits, and affirmed that the VCAA shall not be construed to require VA to reopen a claim that has been disallowed except when new and material evidence is presented or secured as described in 38 U.S.C. 5108. VA is proposing regulations to implement the provisions of these sections.

The VA General Counsel held in VAOPGCPREC 11–2000 that all of the provisions of the VCAA apply to claims filed on or after November 9, 2000, as well as to claims filed before then but not finally decided as of that date.

Need to Write Regulations

Section 5103A(e) of title 38, United States Code, directs VA to prescribe regulations to carry out the provisions of section 5103A, which now govern VA's duty to assist claimants in obtaining evidence to support their claims. Accordingly, VA is proposing to revise 38 CFR 3.159, the regulation that governs VA's duty to assist.

Definitions

We propose to define the terms ''competent medical evidence'' and ''competent lay evidence'' in paragraphs (a)(1) and (a)(2) of § 3.159 consistently with the intent of Congress as shown in the legislative history of the VCAA. *See* Explanatory Statement on H.R. 4864, As Amended, 146 Cong. Rec. H9913, 9915 (daily ed. Oct. 17, 2000). Our proposed definitions are also consistent with the holdings of the Court of Appeals for Veterans Claims. *See, e.g., Espiritu* v. *Derwinski,* 2 Vet. App. 492 (1992). We propose to define ''competent medical evidence'' to mean evidence provided by a person who, through education, training, or experience, is qualified to offer medical diagnoses, statements or opinions. Competent medical evidence would also include statements conveying sound medical principles found in medical treatises. In addition it would include statements contained in authoritative writings such as medical and scientific articles and research reports or analyses.

We propose to define ''competent lay evidence'' in § 3.159(a)(2) to mean any evidence not requiring that the proponent have specialized education, training, or experience. Lay evidence is competent if it is provided by a person who has knowledge of facts or circumstances and conveys matters that can be observed and described by a lay person. Although a lay person, under this proposed definition, would not be qualified to offer medical opinions or to diagnose a medical condition, he or she would be qualified to describe symptoms of disability that he or she has experienced or has observed in others. For example, as noted in the legislative history of the VCAA, a lay person can provide competent evidence that he or she has a pain in the knee but ''VA would not be bound to accept a veteran's assertion that he has a torn ligament, for that would require more sophisticated information.'' *See* Explanatory Statement on H.R. 4864, As Amended, 146 Cong. Rec. H9913, 9915 (daily ed. Oct. 17, 2000).

We propose to define a ''substantially complete application'' for benefits in 38 CFR 3.159(a)(3) as one that contains the claimant's name; his or her relationship to the veteran, if applicable; identifying service information, if applicable; the benefit claimed and any underlying medical conditions on which it is based; and the claimant's signature. If applicable, as in claims for nonservice-connected disability or death pension, and parents' dependency and indemnity compensation, an application would also have to include a statement of income to be substantially complete. Although VA application forms request more information from the respondent than these facts, the information required to make an application substantially complete is generally sufficient for VA to identify the benefit claimed, determine whether the claimant is potentially eligible for it, and identify, at least generally, the types of evidence that would be required to substantiate the claim. A complete application would necessarily be a substantially complete application for purposes of VA's assistance in developing the claim.

In addition, we propose to define the term ''event'' in § 3.159(a)(4) for purposes of § 3.159(c)(4)(i) to mean a potentially harmful occurrence, such as would be associated with a particular duty assignment or place of duty.

We also propose in § 3.159(f) that, for the purpose of the notice requirements in paragraphs (b) and (e) of this section, notice to the claimant means notice to the claimant or his or her fiduciary, if any, as well as to his or her representative, if any.

VA's Duty To Notify Claimants of Necessary Information or Evidence

Consistent with the provisions in 38 U.S.C. 5103A, we propose in 38 CFR 3.159(b)(1) that, if VA receives an application for benefits that is substantially complete, VA would notify the claimant of the information and medical or lay evidence required to substantiate the claim. The legislative history of the VCAA indicates that Congress intended the notice to inform the claimant of what medical evidence, such as diagnoses or opinions on causes or onset of the claimed condition, and what lay evidence, such as statements by the veteran, witnesses, or family members, would be necessary to substantiate the claim. *See* Explanatory Statement on H.R. 4864, As Amended, 146 Cong. Rec. H9913, 9914 (daily ed. Oct. 17, 2000). The notice would also inform the claimant which information and evidence the claimant is to provide and which information and evidence VA will attempt to obtain on the claimant's behalf. Information and evidence the claimant is to provide would reasonably include identification of medical treatment providers, income evidence, and other information or evidence in the claimant's control.

Consistent with the statutory language, we propose in 38 CFR 3.159(b)(1) that, if VA does not receive the necessary information and evidence within one year of the date of the notice to the claimant, VA cannot pay or provide any benefits based on that application. However, in order to allow for the timely processing of claims, we propose that, if a claimant does not respond to VA's request for information and evidence necessary to substantiate the claim within a reasonable period of time, VA may adjudicate the claim based on the information and evidence it has obtained on behalf of the claimant and all other evidence then of record prior to the expiration of the one-year period. Consistent with current procedures, if VA subsequently receives the requested information and evidence from the claimant within one year from the date it requested it from the claimant, it will readjudicate the claim.

In addition, in order to allow for the timely processing of claims, we propose that, whether or not a claimant responded to VA's request for further evidence necessary to substantiate the claim, VA may adjudicate the claim prior to the expiration of the one-year period. If upon adjudication the claim is denied and VA subsequently receives the requested information and evidence within one year from the date of the request for information and evidence, the prior decision would be abrogated and the claim readjudicated.

In our view, it is also reasonable to request that the claimant submit any evidence in his or her possession that pertains to the claim, and we have included such a provision in the proposed regulation. A claimant has an obligation to cooperate with VA in obtaining evidence. Because the duty to assist is not ''always a one-way street,'' the claimant cannot passively wait for VA's assistance in circumstances where he or she may or should have information that is essential to obtaining evidence. *Zarycki* v. *Brown,* 6 Vet. App. 91 (1993); *Wamhoff* v. *Brown,* 8 Vet. App. 517 (1996).

We also propose in 38 CFR 3.159(b)(2) that, if VA receives an incomplete application, that is, one in which the claimant has failed to provide his or her name, relationship to the veteran, if applicable, identifying service information, the benefit claimed and any medical condition(s) on which it is based, a statement of income, if applicable, or a signature, VA would notify the claimant of the information necessary to complete the application. Consistent with 38 U.S.C. 5103A(a)(3), we propose that VA will defer assistance to the claimant until the claimant provides the information necessary to substantially complete the application. In our view, it is reasonable to require a claimant to submit a substantially complete application before VA will undertake to assist the claimant, so that VA can determine from the application whether the claimant is potentially eligible for the benefit claimed and whether or not VA assistance would help substantiate the claim.

General Rule, VA's Duty To Assist Claimants in Obtaining Evidence

We propose a general rule in 38 CFR 3.159(c), paralleling the statutory language in 38 U.S.C. 5103A(a)(1), that VA, upon receipt of a substantially complete application, will make reasonable efforts to help a claimant obtain evidence necessary to substantiate a claim. Consistent with the provisions of the VCAA, we also propose regulations related to VA's duty to obtain relevant existing records and VA's duty to provide a medical examination or obtain a medical opinion. In addition, we propose to retain the provision in current § 3.159 that prohibits VA from paying any fees charged by a custodian of the records for providing the records. VA has no statutory authority to pay any costs charged for providing records. Furthermore, 38 U.S.C. 5106 as amended by the VCAA requires the department or agency providing information to VA for purposes of determining eligibility for, the amount of, or verifying entitlement to veterans' benefits to bear the cost of providing the information.

We propose in 38 CFR 3.159(c)(1) that, upon receipt of a substantially complete application, VA will make reasonable efforts to help a claimant obtain records relevant to the claim that are not in the custody of a Federal department or agency. This provision would encompass medical records from private care providers, records from current or former employers, and records from other non-governmental entities.

38 U.S.C. 5103A(b)(1) states that VA ''shall make reasonable efforts'' to obtain relevant records adequately identified by the claimant. We propose in 38 CFR 3.159(c)(1) that, for record requests to non-Federal government sources, VA's reasonable efforts would generally consist of an initial request for the records identified by the claimant and, if the records are not received, at least one follow-up request. A follow-up request would not be required if the response to the initial request indicates that the records sought do not exist or that further requests would be futile. For example, if in response to VA's request for records from a private physician VA receives a response that the physician is no longer in practice and his or her records no longer exist, a follow-up request would be unnecessary. We also propose in § 3.159(c)(1) that, if VA receives information showing that subsequent requests to this or another source could result in obtaining the records sought, then reasonable efforts would also include an initial request and, if the records are not received, at least one follow-up request to the new source or an additional request to the original source. We believe that two requests for records are generally sufficient because, in our experience in claims development, if VA requests documents from a custodian of private records but receives no response after

two requests, the custodian seldom, if ever, responds to additional requests. Therefore, it would serve no purpose to continue requesting records. If two requests do not produce the records but point VA to a new source for them, however, VA would follow up on this additional information by an initial request for the records to the newly-identified source and a follow-up request if necessary.

VA will also assist claimants by requesting records in the custody of a Federal agency or department. We propose that the following types of records would be considered in the custody of a Federal agency or department: military records, including service medical records; medical and other records from VA medical facilities; records from non-VA facilities providing examination or treatment at VA expense; and records from other Federal agencies, such as the Social Security Administration. 38 U.S.C. 5103A(b)(3) provides that VA's efforts to obtain such records ''shall continue until the records are obtained unless it is reasonably certain that such records do not exist or that further efforts to obtain those records would be futile.'' Therefore, we propose in 38 CFR 3.159(c)(2) that, in requesting records from a Federal department or agency, VA will make as many requests as are necessary to obtain the identified records. We also propose that VA's efforts would end only if VA concludes that the records do not exist or that further efforts would be futile. We propose that VA may make that conclusion, for example, if the source advises VA that the requested records do not exist or that it does not have them or if VA's substantial efforts to obtain the records are unsuccessful. In our view, this proposed provision reflects the Congressional intent that VA have a higher burden in attempting to obtain records maintained by VA and other Federal agencies than it does in attempting to obtain records from non-Federal governmental sources.

38 U.S.C. 5103A(b)(1) requires VA to make reasonable efforts to obtain relevant records that a claimant ''adequately identifies'' and authorizes VA to obtain. We propose to state that a claimant must cooperate fully with VA's reasonable efforts to obtain relevant records. Consistent with section 5103A(b)(1) we propose in paragraphs (c)(1)(i) and (c)(2)(i) of § 3.159 that such cooperation would require a claimant to provide enough information to identify and locate the relevant records. This information would ordinarily include the name of the person, company, agency, or other custodian of the records; the approximate time frame covered by the records; and in the case of medical treatment records, the condition for which treatment was provided. Depending on the nature of the records sought, adequate identification by the claimant may also require that the claimant provide additional information to enable the custodian of the record to locate the record. This would include VA requests for records from custodians such as the National Archives and Records Administration or the U.S. Armed Forces Center for Unit Records Research to corroborate a claimed stressor for post-traumatic stress disorder.

We propose in paragraphs (c)(1)(i) and (c)(2)(i) of § 3.159 that a claimant must adequately identify all records to be requested by VA on the claimant's behalf. This would apply to all records, Federal and non-Federal, except for service medical records, which are records that VA can easily obtain without further identification from the claimant. We believe that it is reasonable to require a claimant to provide enough information to allow the custodian of the records to locate them. In the case of VA medical records, this information is necessary to determine which of the many VA medical facilities provided treatment and to locate any relevant records of such treatment. We believe it is reasonable to require a claimant to identify the condition for which treatment was provided because this information may assist VA and non-VA medical facilities in locating the requested records, particularly if treatment has been provided for several medical conditions. The claimant's failure to adequately identify records may, depending on the evidence of record, result in denial of the benefit sought.

Consistent with 38 U.S.C. 5103A(b)(1), VA proposes in paragraphs (c)(1)(ii) and (c)(2)(ii) of § 3.159 to require a claimant to authorize, if necessary, the release of existing records in a form acceptable to the records' custodian. If a claimant does not do so, the claimant prevents VA from obtaining the records, and in such cases, depending on the evidence of record, the claimant's failure to authorize the release of records may result in denial of the benefit sought.

VA's Duty To Assist a Claimant in Obtaining Records in Compensation Claims

In addition to any other requirements under VA's general duty to assist a claimant in obtaining evidence, there are specific provisions in 38 U.S.C. 5103A(c) requiring VA to obtain certain records identified by the claimant to help substantiate a claim for compensation. These records are service records, VA treatment or examination records, and other Federal department or agency records. Therefore, we are proposing that, in claims for disability compensation, VA's efforts to assist a claimant in obtaining records must include attempts to obtain service medical records, and the following records if sufficiently identified by the claimant and relevant: other records related to military service, such as military personnel records; VA medical records or records of examination or treatment at non-VA facilities authorized by VA; and any other records held by any Federal department or agency, which would include records from the Social Security Administration.

Medical Examinations and Medical Opinions at VA Expense

Under section 5103A(d) of 38 U.S.C., VA must provide a medical examination or obtain a medical opinion in compensation claims ''when such an examination or opinion is necessary to make a decision on the claim.'' The VCAA further provides that an examination or opinion is ''necessary'' if the evidence of record, considering all the information and lay or medical evidence, including statements of the claimant: (1) Contains competent evidence that the claimant has a current disability or persistent or recurrent symptoms of disability; and (2) indicates that the disability or symptoms may be associated with the claimant's military service; but (3) does not contain sufficient medical evidence to decide the claim.

We propose to implement 38 U.S.C. 5103A(d)(2) by providing in 38 CFR 3.159(c)(4)(i) that, in claims for disability compensation, VA would provide an examination or obtain a medical opinion if, after completing its duty to assist a claimant in obtaining evidence as outlined in proposed § 3.159(c)(1) through (c)(3), the record: (1) Contains competent evidence of a current disability or of persistent or recurrent symptoms of a disability; (2) establishes an in-service event, disease or injury that may be associated with the claimed condition; and (3) indicates that the claimed condition may be associated with the event, injury, or disease in service. If there is evidence of these three elements, VA would, when necessary to adjudicate the claim, provide a medical examination or obtain a medical opinion as to the relationship, if any, of the current disability to an

established event, injury, or disease in service, or an existing service-connected disability.

We would require that the evidence establish an in-service event, disease, or injury. In our view, if, after VA completes its duty to obtain records as required by 38 U.S.C. 5103A(b), the evidence of record does not establish such an event, disease, or injury, ''no reasonable possibility exists that further assistance [*i.e.*, a medical examination or opinion], would aid in substantiating the claim.'' 38 U.S.C. 5103A(a)(2). The gap left by a lack of evidence of an *in-service* event, disease, or injury could not generally be filled by a VA examination report or medical opinion. For example, a doctor who examines a veteran after service could not, in his or her capacity as an examiner, attest to whether the veteran was exposed to a particular stressor at a particular time.

We further propose in 38 CFR 3.159(c)(4)(ii) that the 38 U.S.C. 5103A(d)(2)(B) condition that there be evidence ''indicat[ing] that the disability or symptoms may be associated with the claimant's'' service could be satisfied by evidence showing continuity of symptoms of a disability since the veteran's release from active duty, post-service treatment for a condition, or other possible association with military service.

Circumstances Where VA Will Refrain From or Discontinue Providing Assistance

38 U.S.C. 5103A(a)(2) states that VA has no duty to assist a claimant if there is no reasonable possibility that VA assistance would help substantiate the claim. We propose in 38 CFR 3.159(d) that VA will refrain from providing assistance if the substantially complete application for benefits indicates that there is no reasonable possibility that VA assistance would help substantiate the claim. We propose in addition that VA will discontinue providing assistance, such as providing a VA examination, when the evidence obtained shows that there is no reasonable possibility that the further assistance would help substantiate the claim.

We propose, in addition, to specify three situations in which VA will refrain from providing assistance when the claimant has submitted a substantially complete application. The first situation would involve a claimant applying for a benefit for which he or she is not legally eligible. Examples of such claims are veterans who lack wartime service applying for pension or veterans who have dishonorable discharges applying for any VA benefit. A second situation would involve a claim that, on its face, is inherently incredible or clearly lacks merit. Such a claim would be incapable of substantiation. Examples of that type of claim would be a compensation claim for prostate cancer from a female veteran, a claim for ovarian cancer from a male veteran. There may be other claims, as well, in which the claimant asserts an etiology for a claimed condition that would be inherently incredible. The third situation would involve a claim for a benefit to which the claimant is not entitled as a matter of law. Examples of such claims are ones for compensation for a disability that is the result of willful misconduct or a claim for service connection for alcoholism or drug addiction.

Duty To Notify Claimant of Inability To Obtain Records

38 U.S.C. 5103A also requires VA to (1) notify the claimant that it is unable to obtain relevant records, (2) identify the records it cannot obtain, (3) briefly explain the efforts it made to obtain them, and (4) describe any further action VA will take with respect to the claim. We propose in § 3.159(e)(1) that VA would provide the claimant written or oral notice that it is unable to obtain specific records when it makes its final request for relevant records or after it has exhausted efforts and is preparing to decide the claim.

We believe that, in order to make an accurate factual determination regarding a claimant's entitlement to veterans benefits, VA must have before it all relevant records of which it is aware and which are obtainable. Therefore, we propose in § 3.159(e)(2) that, if VA becomes aware of relevant records but is unable to obtain the records because the claimant has not authorized their release, VA would notify the claimant of the existence of the records and its inability to obtain them and request that the claimant provide VA with a release for the records. If the claimant does not provide a release, VA would request that the claimant obtain the relevant documents and submit them to VA. If VA does not receive the requested documents, the claim may be denied.

Reopened Claims and New and Material Evidence

VA proposes to assist claimants in the submission of new and material evidence to reopen a finally adjudicated claim, by requesting existing records reasonably identified by the claimant, on the claimant's behalf.

VA decisions on claims for benefits are final, to a certain extent. If the Board of Veterans' Appeals (Board) disallows a claim, the claim may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered, except as provided in 38 U.S.C. 5108. 38 U.S.C. 7104(b). Section 5108 provides that, if new and material evidence is presented or secured with respect to a claim which has been disallowed, VA shall reopen the claim and review the former disposition of the claim.'' Not only Board decisions are final; decisions of the agency of original jurisdiction can become final too. If an action or determination of an agency of original jurisdiction is not timely appealed, the action or determination becomes final and the claim may not thereafter be reopened or allowed, except as provided. 38 U.S.C. 7105(c); 38 CFR 3.104(a). Final decisions by an agency of original jurisdiction are also subject to reopening if new and material evidence is presented or secured. *Suttman* v. *Brown,* 5 Vet. App. 127, 135 (1993) (section 7105(c) finality also subject to exception in section 5108).

Nothing in 38 U.S.C. 5103A requires VA to reopen a disallowed claim unless new and material evidence is presented or secured, as provided by section 5108. 38 U.S.C. 5103A(f). However, nothing in section 5103A precludes VA from providing a claimant such assistance in substantiating a claim as VA considers appropriate. 38 U.S.C. 5103A(g). VA considers it appropriate to provide some assistance to claimants who are attempting to reopen a finally denied claim with new and material evidence. However, given section 5103A(f)'s express preservation of the finality of VA decisions, we propose to provide less assistance in attempts to reopen previously disallowed claims than we would in an original claim or a claim that is actually reopened. Accordingly, we propose to provide in such casesattempts to reopen claims the assistance described below.

Generally, in attempts to reopen a previously disallowed claim, VA would help a claimant to obtain existing records from Federal agencies or departments such as VA treatment or examination records or records from the Social Security Administration, provided that the claimant has submitted sufficient information to identify and locate the records. VA also proposes to provide assistance in requesting existing records from non-Federal sources, such as private physicians. VA considers this appropriate assistance because it would require minimal VA effort and expense to obtain these records.

VA will not, however, provide a medical examination or obtain a

medical opinion in an attempt to reopen a previously disallowed claim. VA considers this inappropriate assistance because it would require substantial effort and expense without any assurance that the created evidence would in fact be new and material. Although VA is willing to help a claimant to obtain existing records based on a claimant's allegation that such records are new and material evidence, we do not want to expend our limited resources on ''fishing expeditions'' to create evidence based on a claimant's hopes that such evidence would prove to be new and material. If new evidence is presented or secured, VA would reopen the previously disallowed claim and provide a medical examination or obtain a medical opinion as provided in proposed section 3.159(c)(4).

We propose to clarify the definition of ''new and material evidence'' in 38 CFR 3.156(a) to state that ''new evidence'' means existing evidence not previously submitted to agency decisionmakers, that is neither cumulative nor redundant of the evidence of record at the time of the last final denial of the claim. We also propose to state that ''material evidence'' means existing evidence that relates specifically to the reason why the prior claim was last denied. By ''existing evidence'' we mean evidence that is not newly generated by or with the help of VA as explained above. The proposed definition is a clarification of the current language that defines ''material evidence'' as evidence that ''bears directly and substantially upon the specific matter under consideration * * * and which by itself or in connection with evidence previously assembled is so significant that it must be considered in order to fairly decide the merits of the claim.'' Only evidence that relates to the reason why the claim was last denied can be evidence that is ''so significant that it must be considered in order to fairly decide the merits of the claim.'' Evidence relating to elements of proof that the claimant has already satisfied would be cumulative and redundant and would not be material evidence because it could not raise a reasonable possibility of substantiating the claim. This is consistent with the threshold established by Congress in the VCAA for VA's duty to assist.

We also propose to revise 38 CFR 3.102, the regulation regarding the application of reasonable doubt, and § 3.326, the regulation regarding VA examinations, to remove the references to well-grounded claims.

Comment Period

Section 6(a)(1) of Executive Order 12866 indicates that, in most cases a comment period should be ''not less than 60 days.'' We believe that this rule is essential to the efficient and consistent implementation of the VCAA. In order to avoid delays in the development and adjudication of claims and potential confusion regarding the requirements of the new law, we believe it is important that final regulations be published expeditiously. The United States Court of Appeals for Veterans Claims (CAVC), for example, has noted that the Secretary of Veterans Affairs must prescribe regulations to implement the VCAA and that, pursuant to 38 U.S.C. 5103A(g), the Secretary may issue regulations providing more assistance than is required by law. Holliday v. Principi, 2001 U.S. App. Vet. Claims LEXIS 125, at *28. As a result, the CAVC has concluded that, if it were to issue a decision as to the applicability of the VCAA, it would risk abridging or usurping the Secretary's authority to implement the law as he sees fit and would be acting as an executive agency responsible for promulgating regulations rather than as a reviewing judicial tribunal. Id., at *34–35. Thus, under this analysis, virtually every case pending on the CAVC's docket may have to be remanded to VA for a determination as to the applicability of the VCAA until these regulations become final. For this reason, we have shortened the comment period for this rulemaking action to 30 days.

Unfunded Mandates

The Unfunded Mandates Reform Act requires (in section 202) that agencies prepare an assessment of anticipated costs and benefits before developing any rule that may result in expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more in any given year. This amendment will have no consequential effect on State, local, or tribal governments.

Executive Order 12866

This proposed rule has been reviewed by the Office of Management and Budget under Executive Order 12866.

Paperwork Reduction Act

All collections of information under the Paperwork Reduction Act (44 U.S.C. 3501–3520) referenced in this proposed rule have existing OMB approval as forms. No changes are made in this proposed rule to those collections of information.

Regulatory Flexibility Act

The Secretary hereby certifies that the adoption of these amendments will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This action would not directly affect any small entities. Only individuals could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), these amendments are exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

The Catalog of Federal Domestic Assistance program numbers are 64.100, 64.101, 64.104, 64.105, 64.106, 64.109, and 64.110.

List of Subjects in 38 CFR Part 3

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

Approved: March 5, 2001.

Anthony J. Principi,

Secretary of Veterans Affairs.

For the reasons set forth in the preamble, 38 CFR part 3 is proposed to be amended as follows:

PART 3—ADJUDICATION

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

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

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

§ 3.102 [Amended]

2. In § 3.102, the fifth sentence is amended by removing ''evidence; the claimant is required to submit evidence sufficient to justify a belief in a fair and impartial mind that the claim is well grounded.'' and adding, in its place, ''evidence.''.

3. Section 3.156(a) and its authority citation are revised to read as follows:

§ 3.156 New and material evidence.

(a) A claimant may reopen a finally adjudicated claim by submitting new and material evidence. New evidence means existing evidence not previously submitted to agency decisionmakers. Material evidence means existing evidence that relates specifically to the reason why the claim was last denied. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim.

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

* * * * *

4. Section 3.159 and its authority citation are revised to read as follows:

§ 3.159 Department of Veterans Affairs assistance in developing claims.

(a) *Definitions.* For purposes of this section, the following definitions apply:

(1) *Competent medical evidence* means evidence provided by a person who is qualified through education, training or experience to offer medical diagnoses, statements, or opinions. Competent medical evidence may also mean statements conveying sound medical principles found in medical treatises. It would also include statements contained in authoritative writings such as medical and scientific articles and research reports or analyses.

(2) *Competent lay evidence* means any evidence not requiring that the person offering the evidence have specialized education, training, or experience. Lay evidence is competent if it is provided by a person who has knowledge of facts or circumstances and conveys matters that can be observed and described by a lay person.

(3) *Substantially complete application* means an application containing the claimant's name; his or her relationship to the veteran, if applicable; service information, if applicable; the benefit claimed and any medical condition(s) on which it is based; the claimant's signature; and in claims for nonservice-connected disability or death pension and parents' dependency and indemnity compensation, a statement of income. A substantially complete application includes a complete application.

(4) For purposes of paragraph (c)(4)(i), *event* means a potentially harmful occurrence such as would be associated with a particular duty assignment or place of duty.

(b) *VA's duty to notify claimants of necessary information or evidence.* (1) If VA receives a complete or substantially complete application for benefits, it will notify the claimant of any information and medical or lay evidence that is necessary to substantiate the claim. VA will request that the claimant provide any evidence in the claimant's possession that pertains to the claim. VA will also inform the claimant which information and evidence, if any, that the claimant is to provide to VA and which information and evidence, if any, that VA will attempt to obtain on behalf of the claimant. If VA does not receive the information and evidence requested from the claimant within one year of the date of the notice, VA cannot pay or provide any benefits based on that application. If the claimant has not responded to the request within a reasonable period of time, VA may decide the claim prior to the expiration of the one-year period based on all the information and evidence contained in the file, including information and evidence it has obtained on behalf of the claimant. If VA does so, however, and the claimant subsequently provides the information and evidence within one year of the date of the request, VA must readjudicate the claim.

(Authority: 38 U.S.C. 5103)

(2) If VA receives an incomplete application for benefits, it will notify the claimant of the information necessary to complete the application and will defer assistance until the claimant submits this information.

(Authority: 38 U.S.C. 5102(b), 5103A(3))

(c) *VA's duty to assist claimants in obtaining evidence.* Upon receipt of a substantially complete application for benefits, VA will make reasonable efforts to help a claimant obtain evidence necessary to substantiate the claim. In addition, VA will give the assistance described in paragraphs (c)(1), (c)(2), and (c)(3) to an individual attempting to reopen a finally decided claim. VA will not pay any fees charged by a custodian to obtain records requested.

(1) *Obtaining records not in the custody of a Federal department or agency.* VA will make reasonable efforts to obtain relevant records not in the custody of a Federal department or agency, to include records from state or local governments, private medical care providers, current or former employers, and other non-Federal governmental sources. Such reasonable efforts will generally consist of an initial request for the records and, if the records are not received, at least one follow-up request. A follow-up request is not required if a response to the initial request indicates that the records sought do not exist or that a follow-up request for the records would be futile. If VA receives information showing that subsequent requests to this or another custodian could result in obtaining the records sought, then reasonable efforts will include an initial request and, if the records are not received, at least one follow-up request to the new source or an additional request to the original source.

(i) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from non-Federal agency or department custodians. The claimant must provide enough information to identify and locate the existing records, including the person, company, agency, or other custodian holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided. The claimant's failure to do so may, depending on the evidence of record, result in a denial of the benefit sought.

(ii) If necessary, the claimant must authorize the release of existing records in a form acceptable to the person, company, agency, or other custodian holding the records. The claimant's failure to do so may, depending on the evidence of record, result in a denial of the benefit sought.

(Authority: 38 U.S.C. 5103A(b), (f), and (g))

(2) *Obtaining records in the custody of a Federal department or agency.* VA will make as many requests as are necessary to obtain relevant records from a Federal department or agency. These records include but are not limited to military records, including service medical records; medical and other records from VA medical facilities; records from non-VA facilities providing examination or treatment at VA expense; and records from other Federal agencies, such as the Social Security Administration. VA will end its efforts to obtain records from a Federal department or agency only if VA concludes that the records sought do not exist or that further efforts to obtain those records would be futile. Cases in which VA may conclude that no further efforts are required include those in which the Federal department or agency advises VA that the requested records do not exist or the custodian does not have them.

(i) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from Federal agency or department custodians. If requested by VA, the claimant must provide enough information to identify and locate the existing records, including the custodian or agency holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided. In the case of records requested to corroborate a claimed stressful event in service, the claimant must provide information sufficient for the records custodian to conduct a search of the corroborative records. The claimant's failure to do so may, depending on the evidence of record, result in a denial of the benefit sought.

(ii) If necessary, the claimant must authorize the release of existing records in a form acceptable to the custodian or agency holding the records. The

claimant's failure to do so may, depending on the evidence of record, result in a denial of the benefit sought.

(Authority: (38 U.S.C. 5103A(b), (f), and (g))

(3) *Obtaining records in compensation claims.* In a claim for disability compensation, VA will make efforts to obtain the claimant's service medical records, if relevant to the claim; other relevant records pertaining to the claimant's active military, naval or air service that are held or maintained by a governmental entity; VA medical records or records of examination or treatment at non-VA facilities authorized by VA; and any other relevant records held by any Federal department or agency. The claimant must provide enough information to identify and locate the existing records including the custodian or agency holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided. The claimant's failure to do so may, depending on the evidence of record, result in a denial of the benefit sought.

(Authority: 38 U.S.C. 5103A(c), (f), and (g))

(4) *Providing medical examinations or obtaining medical opinions.* (i) In a claim for disability compensation, VA will provide a medical examination or obtain a medical opinion based upon a review of the evidence of record if VA determines it is necessary to decide the claim. A medical examination or medical opinion is necessary if the evidence of record does not contain sufficient competent medical evidence to decide the claim, but:

(A) Contains competent lay or medical evidence of a current diagnosed disability or persistent or recurrent symptoms of disability; and

(B) Establishes that the veteran suffered an event, injury or disease in service; and

(C) Indicates that the claimed disability or symptoms may be associated with the established event, injury, or disease in service or with another service-connected disability.

(ii) Paragraph (4)(i)(C) of this section could be satisfied by competent evidence showing continuity of symptoms of a disability since the veteran's release from active duty, post-service treatment for a condition, or other possible association with military service.

(iii) If new and material evidence is presented or secured, a finally adjudicated claim will be reopened and paragraph (c)(4) of this section will be applied to the reopened claim.

(Authority: 38 U.S.C. 5103A(d), (f), and (g))

(d) *Circumstances where VA will refrain from or discontinue providing assistance.* VA will refrain from providing assistance in obtaining evidence for a claim if the substantially complete application for benefits indicates that there is no reasonable possibility that any assistance VA would provide to the claimant would substantiate the claim. VA will discontinue providing assistance in obtaining evidence for a claim if the evidence obtained indicates that there is no reasonable possibility that the further assistance would substantiate the claim. Circumstances in which VA will refrain from providing assistance in obtaining evidence include, but are not limited to:

(1) An application showing the claimant is not eligible for the benefit sought because of lack of qualifying service, lack of veteran status, or other lack of legal eligibility;

(2) An application in which the claimant asserts an inherently incredible claim or one that clearly lacks merit; and

(3) An application requesting a benefit to which the claimant is not entitled as a matter of law.

(Authority: 38 U.S.C. 5103A(a)(2))

(e) *Duty to notify claimant of inability to obtain records.* (1) If VA makes reasonable efforts to obtain relevant non-Federal records but is unable to obtain them, or after continued efforts to obtain Federal records concludes that it is reasonably certain they do not exist or further efforts to obtain them would be futile, VA will provide the claimant with oral or written notice of that fact. For non-Federal records requests, VA may provide the notice at the same time it makes its final attempt to obtain the relevant records. The notice must contain the following information:

(i) The identity of the records VA was unable to obtain;

(ii) An explanation of the efforts VA made to obtain the records;

(iii) A description of any further action VA will take regarding the claim, including, but not limited to, notice that VA will decide the claim based on the evidence of record unless the claimant submits the records VA was unable to obtain; and

(iv) A notice that the claimant is ultimately responsible for providing the evidence.

(2) If VA becomes aware of the existence of relevant records before deciding the claim, VA will notify the claimant of the records and request that the claimant provide a release for the records. If the claimant does not provide any necessary release of the relevant records that VA is unable to obtain, VA will request that the claimant obtain the records and provide them to VA. If the claimant does not provide the relevant records which VA requested, the claim may be denied.

(Authority: 38 U.S.C. 5103A(b)(2))

(f) For the purpose of the notice requirements in paragraphs (b) and (e) of this section, notice to the claimant means notice to the claimant or his or her fiduciary, if any, as well as to his or her representative, if any.

§ 3.326 [Amended]

5. In § 3.326(a), the first sentence is amended by removing ''well-grounded''.

[FR Doc. 01–8303 Filed 4–3–01; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Parts 19 and 20

RIN 2900–AJ97

Board of Veterans' Appeals: Appeals Regulations and Rules of Practice—Jurisdiction

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes amending the Appeals Regulations and Rules of Practice of the Board of Veterans' Appeals (Board) to clarify that the Board may address questions related to its jurisdiction in the first instance. VA also proposes to amend the Rules of Practice to provide procedures for notifying parties to Board proceedings, and their representatives, when the Board raises jurisdictional questions on its own initiative and to give parties the opportunity to respond.

DATES: Comments must be received on or before June 4, 2001.

ADDRESSES: Mail or hand-deliver written comments to: Director, Office of Regulations Management (02D), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1154, Washington, DC 20420; or fax comments to (202) 273–9289; or e-mail comments to *OGCRegulations@mail.va.gov*. Comments should indicate that they are submitted in response to ''RIN 2900–AJ97.'' All comments received will be available for public inspection in the Office of Regulations Management, Room 1158, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays).

FOR FURTHER INFORMATION CONTACT: Steven L. Keller, Senior Deputy Vice