4. A new subpart D is added to read as follows:

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

General

Sec.
3.2100 Scope of Applicability.
3.2130 Will VA accept a signature by mark or thumbprint?

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

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

General

5. Section 3.2100 is added to read as follows:

§ 3.2100 Scope of Applicability.

Unless otherwise specified, the provisions of this subpart apply only to claims governed by part 3 of this title.

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

6. Section 3.2130 is added to read as follows:

§ 3.2130 Will VA accept a signature by mark or thumbprint?

VA will accept signatures by mark or thumbprint if:

(a) They are witnessed by two people who sign their names and give their addresses, or

(b) They are witnessed by an accredited agent, attorney, or service organization representative, or

(c) They are certified by a notary public or any other person having the authority to administer oaths for general purposes, or

(d) They are certified by a VA employee who has been delegated authority by the Secretary under 38 CFR 2.3.

(Authority: 38 U.S.C. 5101).

[FR Doc. 01–8491 Filed 4–5–01; 8:45 am]

BILLING CODE 8320–01–U

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900–AJ59

Claims Based on the Effects of Tobacco Products

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the Department of Veterans Affairs (VA) adjudication regulations governing determinations of whether disability or death is service-connected. These changes are necessary to implement a statutory amendment providing that a disability or death will not be service-connected on the basis that it resulted from injury or disease attributable to a veteran's use of tobacco products during service.

DATES: *Effective Dates:* June 10, 1998.

FOR FURTHER INFORMATION CONTACT: Bill Russo, Regulations Staff, Compensation and Pension Service, Veterans Benefits Administration, 810 Vermont Avenue, NW., Washington, DC 20420, telephone (202) 273–7210.

SUPPLEMENTARY INFORMATION: In a document published in the **Federal Register** on February 16, 2000 (65 FR 7807–7809), we proposed to amend the adjudication regulations to provide that a disability or death will not be service-connected on the basis that it resulted from injury or disease attributable to a veteran's use of tobacco products during service. The comment period ended April 17, 2000. We received written comments from the Disabled American Veterans, the Paralyzed Veterans of America, the Veterans of Foreign Wars (Department of Maine), and four individuals. Based on the rationale set forth in the proposed rule and this document, we are adopting the provisions of the proposed rule as a final rule with changes discussed below.

Statutory Requirements

Four commenters asserted that it would be wrong to preclude service members from service connection for disability or death based upon tobacco use during service because the military encouraged them to use tobacco products. One commenter asserted that the proposed regulations are unfair because the federal government has filed a lawsuit against the tobacco companies to recover the cost of smoking-related illnesses and VA should therefore provide compensation for smoking-related illnesses. We have made no changes based on these comments. The final rule merely reflects the statutory provision stating that a disability or death will not be service-connected on the basis that it resulted from injury or disease attributable to a veteran's use of tobacco products during service. (Section 9014(a) of the ''Internal Revenue Service Restructuring and Reform Act of 1998,'' Public Law 105–206, amended section 8202 of the ''Transportation Equity Act for the 21st Century,'' Public Law 105–178, by adding section 1103 to title 38, United States Code). We have no authority to change statutory provisions by regulation.

Another commenter requested that the effective date of the proposed regulations be the date of publication of the final rule rather than June 9, 1998, as set forth in the proposed rule. We have retained the effective date of June 9, 1998, because this is the effective date imposed by statute (section 8202(c) of Pub. L. No. 105–178, as amended by section 9014(b) of Pub. L. No. 105–206). Again, we have no authority to change statutory provisions by regulation.

Definition of Tobacco Products

We proposed to define ''tobacco products'' to mean ''cigars, cigarettes, smokeless tobacco, pipe tobacco, and roll-your-own tobacco.'' The term ''tobacco products'' is not defined in 38 U.S.C. 1103. We based our proposed definition on provisions in the Internal Revenue Code (26 U.S.C. 5702(c)) that define tobacco products for purposes of levying excise taxes. The proposal stated that it was appropriate to rely on the definition in 26 U.S.C. 5702(c) because a rule of statutory construction provides that statutes that are *in pari materia* (relating to the same matter) should be construed together. Under this rule, the meaning of words in one statute may be determined by referring to another statute on the same subject matter in which the same words are used. Black's Law Dictionary 794 (7th ed. 1999).

One commenter stated that the definition of ''tobacco products'' in section 3.300(a) is too broad because from the inception of the legislative proposal for 38 U.S.C. 1103, the concern was about the effects of smoking tobacco. In this regard, the commenter disagreed with VA's reliance on the definition of ''tobacco products'' in 26 U.S.C. 5702(c), stating that the rule of statutory construction regarding statutes *in pari materia* does not apply because 26 U.S.C. 5702(c) is unrelated to 38 U.S.C. 1103. In further support of his argument, the commenter noted that a heading on two VA budget proposals including this proposed legislation referred to ''Smoking-Related Disabilities,'' that the cost savings estimate in the FY 1999 budget was derived from a study regarding smoking-related diseases, and that a letter from the Office of Management and Budget (OMB) referred to the legislation as relating to ''smoking-related disabilities.''

We agree, upon further consideration, that although 26 U.S.C. 5702(c) and 38 U.S.C. 1103 deal with the same class of things, i.e., tobacco products, the statutes do not relate to the same subject

matter, i.e., excise taxes and veterans' benefits. Even so, for reasons stated below, we have retained our proposed definition in the final rule.

We believe that our definition reflects Congress' intent. The title of the statutory provision actually enacted by Congress, which proposed section 3.300 implements, is ''Special provisions relating to claims based upon effects of tobacco products,'' not ''smoking related disabilities.'' In addition, the plain language of section 1103 rules out compensation for disability or death resulting from injury or disease attributable to ''use of tobacco products,'' not smoking. While the legislative history refers to smoking, the language of section 1103 does not limit its applicability to claims for service connection based upon smoking tobacco but rather rules out service connection for injury or disease attributable to *use* of tobacco products. We do not believe that the title of the budgetary proposals which preceded enactment of section 1103 provides any guidance in this case with regard to Congress' intent. We note as well that the August 5, 1998, OMB letter to which the commenter referred states that awarding compensation for ''tobacco-related'' illnesses that begin after service based solely on a veteran's ''tobacco use'' during service goes beyond the important purposes of the veterans'' disability compensation program.

In addition, the effects of smoking tobacco about which the commenter contends the legislation was concerned are often the same as the effects of smokeless tobacco. There are two types of smokeless tobacco—snuff and chewing tobacco, and according to the National Cancer Institute, snuff and chewing tobacco contain 28 carcinogens and nicotine. NCI Fact Sheet: Questions and Answers About Smokeless Tobacco and Cancer—Updated 11/1997. Users of smokeless tobacco face an increased risk of many of the same cancers as those associated with smoking tobacco such as cancers of the oral cavity, larynx, and esophagus. NCI Fact Sheet; U.S. Dep't of Health and Human Servs., Reducing the Health Consequences of Smoking, A Report of the Surgeon General 38, 56 (1989). Further, a 1986 Surgeon General report concluded that, ''use of smokeless tobacco products can lead to nicotine dependence or addiction.'' U.S. Dep't of Health and Human Servs., The Health Consequences of Using Smokeless Tobacco, A Report of the Advisory Committee to the Surgeon General 182 (1986). If the purpose of 38 U.S.C. 1103 is, as this commenter also contends, to prohibit service connection for postservice disabilities which can be related to service only by nicotine dependence that began in service, the inclusion of smokeless tobacco is in keeping with this purpose because nicotine dependence results from use of smokeless tobacco.

Dependency and Indemnity Compensation (DIC) Claims

Proposed section 3.300(a) provides that, for claims received by VA after June 9, 1998, a disability or death will not be considered service-connected on the basis that it resulted from injury or disease attributable to the veteran's use of tobacco products during service.

One commenter stated that the proposed regulation does not make clear whether a claim for dependency and indemnity compensation (DIC) filed on or after June 9, 1998, based on a veteran's disability which was determined, prior to June 9, 1998, to be service-connected based upon the veteran's use of tobacco products during service is barred by 38 U.S.C. 1103(a). The commenter pointed out that 38 U.S.C. 1103(a) refers to injury or disease which is ''attributable,'' rather than ''attributed'' to use of tobacco products. The commenter contends that, if a veteran's service connection claim was granted prior to June 9, 1998, the veteran's disability was ''attributed'' to use of tobacco products. The commenter stated that, if the veteran dies from the disability which was service connected prior to June 9, 1998, a post-June 9, 1998, DIC claim would not be based on a disease or disability not yet ''attributed to'' tobacco use but ''attributable to'' tobacco use. Rather, according to the commenter, such a DIC claim would be based on a service-connected disability. This commenter recommended that if VA considers there to be any ambiguity in 38 U.S.C. 1103 on this point, VA should resolve this ambiguity in the veteran's favor.

DIC is payable to certain survivors of ''any veteran [who] dies after December 31, 1956, from a service-connected or compensable disability.'' 38 U.S.C. 1310(a). DIC is also payable, in the same manner as if the veteran's death were service connected, to certain survivors of a veteran ''who was in receipt of or entitled to receive * * * compensation at the time of death for a service-connected disability'' continuously rated totally disabling for an extended period immediately preceding the veteran's death. 38 U.S.C. 1318(a) and (b). Section 9014(a) of Pub. L. No. 105–206 provided that section 1103 ''shall apply with respect to *claims* received by [VA]'' after June 9, 1998. (Emphasis added). The unambiguous effect of this language is that, for a claim received after June 9, 1998, a disability or death which resulted from a disease or injury attributable to a veteran's use of tobacco products during service may not be considered service connected. *See* VAOPGCPREC 11–96; VAOPGCPREC 7–99. Section 9014(a) does not refer to facts found or adjudications made after that date, but specifies applicability to claims filed after that date. As noted above, section 1310(a) requires the death of a veteran from a ''service-connected'' disability as a prerequisite to a survivor's entitlement to DIC. Section 1318(b) requires that a veteran have been in receipt of or entitled to receive compensation for a ''service-connected'' disability at the time of death in order for a survivor to qualify for DIC under that provision. Thus, regardless of whether, for compensation purposes, service connection was legally established in a claim filed on or before June 9, 1998, for a disability resulting from the use of tobacco products during service, the effect of section 9014(a) is that such disability may not be considered service connected with respect to a DIC claim filed after that date.

With regard to the commenter's reliance on use of the word ''attributable'' rather than ''attributed'' in 38 U.S.C. 1103(a) and proposed 38 CFR 3.300(a), the word ''attributable'' is defined by Webster's Third New International Dictionary of the English Language 141 (1981), to mean ''capable of being attributed.'' Thus, under section 1103(a), if a veteran's service-connected disability or death is capable of being attributed to the use of tobacco products, service connection is precluded. A veteran's disability which was ''attributed'' to use of tobacco products during service prior to June 9, 1998, would necessarily be ''capable of being attributed'' to use of tobacco products. Therefore, use of the word ''attributable'' does not support the commenter's conclusion that a DIC claim filed after June 9, 1998, based upon a veteran's disability which was attributed to tobacco use during his or her lifetime is not precluded by section 1103(a).

Secondary Service Connection

Section 3.300(c) of the proposed regulations provides that, for claims received by VA after June 9, 1998, a disability that is proximately due to or the result of an injury or disease previously service-connected on the basis of the veteran's use of tobacco products during service will not be service-connected. We also proposed to amend section 3.310(a) concerning secondary service connection to provide

that it is subject to the provisions of section 3.300(c).

One commenter stated that section 3.300(c) of the proposed regulation violates the intent of 38 U.S.C. 1103 that claims for secondary service connection based on a disability which was service-connected due to tobacco use in service before June 10, 1998, are not barred by 38 U.S.C. 1103. The commenter stated that service connection on a secondary basis relies only on its link to the primary condition, already lawfully service-connected, without regard to the cause of the primary disability. Therefore, the commenter contends a claim for service connection for a disability which is proximately due to a disability which was service connected based on the veteran's tobacco use would not be precluded by section 1103 because the cause of the service-connected disability would not be relevant. This commenter also asserted that proposed section 3.300(b)(3), which provides that section 3.300(a) does not apply where secondary service connection is established for ischemic heart disease or other cardiovascular disease under section 3.310(b) is superfluous based upon the contention that 38 U.S.C. 1103(a) only bars claims for direct service connection, not claims for secondary service connection.

We disagree with the commenter's contention that a claim for secondary service connection is not based upon the cause of the disability which was originally service connected. As explained in the notice of proposed rulemaking, 65 FR 7807–7808 (Feb. 16, 2000), 38 CFR 3.310(a) provides for service connection of a disability not itself incurred or aggravated in service but nevertheless resulting from a disease or injury incurred or aggravated in service. Secondarily service-connected disabilities are the result of service-incurred or service-aggravated injury or disease. When a disability is proximately due to or the result of an injury or disease previously service connected on the basis of a veteran's use of tobacco products during service, the secondary condition results from a disease or injury attributable to the use of tobacco products.

The commenter cites a March 24, 1998, letter from the Acting VA General Counsel to House Veterans Affairs Committee Staff, to support the view that claims for secondary service connection are not barred by 38 U.S.C. 1103(a). The Acting General Counsel's letter stated that an Administration-proposed version of section 1103(a), which was not enacted, would have barred service connection for disabilities ''attributable in whole or in part'' to tobacco use, would have only precluded service connection on the basis that disability resulted from tobacco use and ''would not preclude establishing service connection on any other basis.'' The Acting General Counsel's letter does not provide support for the commenter's contention that VA's contemporaneous construction of its own language indicates that service connection of tobacco-related disabilities on the basis of 38 CFR 3.310(a) was not meant to be barred by 38 U.S.C. 1103(a). Apart from the fact that the letter reflects the Acting General Counsel's understanding of proposed legislative language which was not adopted by Congress, the statement is consistent with the interpretation reflected in section 3.300(b) that 38 U.S.C. 1103 was not intended to prohibit service connection on a basis independent of tobacco use in service. A proximate connection to a disability attributable to tobacco use in service would not provide such a basis.

The commenter also contends that 38 U.S.C. 1103(a) was intended to preclude claims for service connection for postservice disabilities related to service only as a result of nicotine dependence which began in service. We find no evidence of such a limitation in the legislative history of section 1103. As the Acting Secretary of Veterans Affairs explained in his February 4, 1998, testimony before the House Veterans' Affairs Committee and March 31, 1998, testimony before the Senate Veterans' Affairs Committee, section 1103 was intended to preclude service connection for disabilities arising postservice and after any applicable presumptive period if the only connection between the disease and military service is the veteran's own use of tobacco products during service. None of the legislative history cited by the commenter refers to precluding service connection for postservice disabilities only when these disabilities are due to nicotine dependence.

Finally, the commenter asserted that it would be unfair to compensate veterans who were service-connected for a tobacco-related disability before June 10, 1998, when that disability worsens over time, while at the same time denying secondary service connection for a disability proximately due to the original service-connected one. The commenter states that both are ''a natural extension'' of the service-connected disability. We disagree. A claim for an increased rating is predicated on the particular disability which was service connected. A claim for secondary service connection is based upon a new disability which is proximately due to or the result of the original service-connected disability.

Based on the above analysis, we make no change based on these comments.

Disability Becoming Manifest During Active Duty

Section 1103(b) title 38, United States Code, provides in pertinent part that service connection is not prohibited ''for disability or death from a disease or injury which is otherwise shown to have been incurred or aggravated in active military, naval, or air service.'' Proposed section 3.300(b)(1) similarly states that service connection is not prohibited if ''[t]he disability or death resulted from a disease or injury that is otherwise shown to have been incurred or aggravated during service.'' One commenter stated that Congress intended that the term ''otherwise shown'' in section 1103(b) include any disability or death from a disease or injury which became manifest or was aggravated during service, or manifest during a presumptive period, even if it resulted from tobacco use. The commenter recommended that VA's regulation be amended to specify this. The commenter suggested that, unless the term ''otherwise shown'' is clearly defined by the regulation, VA regional office adjudicators may misinterpret and misapply it.

Regarding the definition of ''otherwise shown,'' we believe it was intended to convey that 38 U.S.C. 1103 generally precludes establishment of service connection for a disability or death *on the basis that* it resulted from injury or disease attributable to the veteran's use of tobacco products. However, a review of the legislative history reveals an additional purpose behind 38 U.S.C. 1103(b): To permit claims where the disability manifests while on active duty, even if they are based on tobacco use. In our view, 38 U.S.C. 1103 was not intended to affect a veteran's ability to establish service connection on the basis of any legal presumption, including both statutory and regulatory presumptions. Therefore, section 3.300(b) in the proposed regulations provided that section 3.300(a) does not prohibit service connection for a disability or death if it resulted from a disease or injury otherwise shown to have been incurred or aggravated during service, or that became manifest to the required degree of disability within a period that establishes eligibility for a presumption of service connection under 38 CFR 3.307, 3.309, 3.313, or 3.316, or that may be service-connected under § 3.310(b).

We agree, however, that clarification would be helpful and have therefore

amended proposed section 3.300(b)(1) to state that, ''[f]or purposes of this section, 'otherwise shown' means that the disability or death can be service-connected on some basis other than the veteran's use of tobacco products during service, or that the disability became manifest or death occurred during service.''

Injuries From Tobacco Use

One commenter recommended that the proposed section 3.300 be amended to include a definition of the term ''injury,'' so that the regulation would not bar service connection claims based on an incidental or accidental injury arising out of tobacco use, such as a burn. The commenter noted that the ''otherwise shown'' exception in proposed section 3.300(b) permits service connection for injuries attributable to tobacco use which occur during service but nonetheless stated that the regulation invites misinterpretation without this clarification.

We believe that the clarification to section 3.300(b)(1) described above regarding the term ''otherwise shown'' is sufficient to address the commenter's point. We therefore make no other change based on this comment.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3520).

Executive Order 12866

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

Regulatory Flexibility Act

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

The Catalog of Federal Domestic Assistance program numbers are 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: February 5, 2001.

Anthony J. Principi,

Secretary of Veterans Affairs.

For the reasons set forth in the preamble, 38 CFR part 3 is 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.

2. Section 3.300 is added immediately under the undesignated center heading ''Ratings and Evaluations; Basic Entitlement Considerations'' to read as follows:

§ 3.300 Claims based on the effects of tobacco products.

(a) For claims received by VA after June 9, 1998, a disability or death will not be considered service-connected on the basis that it resulted from injury or disease attributable to the veteran's use of tobacco products during service. For the purpose of this section, the term ''tobacco products'' means cigars, cigarettes, smokeless tobacco, pipe tobacco, and roll-your-own tobacco.

(b) The provisions of paragraph (a) of this section do not prohibit service connection if:

(1) The disability or death resulted from a disease or injury that is otherwise shown to have been incurred or aggravated during service. For purposes of this section, ''otherwise shown'' means that the disability or death can be service-connected on some basis other than the veteran's use of tobacco products during service, or that the disability became manifest or death occurred during service; or

(2) The disability or death resulted from a disease or injury that appeared to the required degree of disability within any applicable presumptive period under §§ 3.307, 3.309, 3.313, or 3.316; or

(3) Secondary service connection is established for ischemic heart disease or other cardiovascular disease under § 3.310(b).

(c) For claims for secondary service connection received by VA after June 9, 1998, a disability that is proximately due to or the result of an injury or disease previously service-connected on the basis that it is attributable to the veteran's use of tobacco products during service will not be service-connected under § 3.310(a).

(Authority: 38 U.S.C. 501(a), 1103, 1103 note)

3. In § 3.310, paragraph (a) is amended by removing ''Disability'' and adding, in its place, ''Except as provided in § 3.300(c), disability''.

[FR Doc. 01–8490 Filed 4–5–01; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[MO 114–1114a; FRL–6964–1]

Approval and Promulgation of Implementation Plans; State of Missouri

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is approving as an amendment to the Missouri State Implementation Plan (SIP) a revision to the Missouri construction permit rule. This revision will strengthen the SIP with respect to attainment and maintenance of established air quality standards, ensure consistency between the state and Federally approved rules, and ensure Federal enforceability of the state's air program rule revisions pursuant to section 110 of the Clean Air Act.

DATES: This direct final rule will be effective June 5, 2001 unless EPA receives adverse comments by May 7, 2001. If adverse comments are received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Comments may be mailed to Wayne Kaiser, Environmental Protection Agency, Air Planning and Development Branch, 901 North 5th Street, Kansas City, Kansas 66101.

Copies of documents relative to this action are available for public inspection during normal business hours at the above listed Region 7 location. The interested persons wanting to examine these documents should make an appointment with the office at least 24 hours in advance.

FOR FURTHER INFORMATION CONTACT: Wayne Kaiser, at (913) 551–7603.

I. SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we, us, or our'' is used, we mean EPA. This section provides additional information by addressing the following questions:

What is a SIP?
What is the Federal approval process for a SIP?