access to keys in the computerized key security system (*i.e.*, system administrator) to ensure that table game drop and count keys are restricted to authorized employees.

(ii) In the event of an emergency or the key box is inoperable, access to the emergency manual key(s) (a.k.a. override key), used to access the box containing the table game drop and count keys, requires the physical involvement of at least three persons from separate departments, including management. The date, time, and reason for access, must be documented with the signatures of all participating employees signing out/in the emergency manual key(s).

(iii) The custody of the keys issued pursuant to paragraph (u)(2)(ii) of this section requires the presence of two persons from separate departments from the time of their issuance until the time of their return.

(iv) Routine physical maintenance that requires accessing the emergency manual key(s) override key) and does not involve the accessing of the table games drop and count keys, only requires the presence of two persons from separate departments. The date, time and reason for access must be documented with the signatures of all participating employees signing out/in the emergency manual key(s).

(3) For computerized key security systems controlling access to table games drop and count keys, accounting/audit personnel, independent of the system administrator, will perform the following procedures:

(i) Daily, review the report generated by the computerized key security system indicating the transactions performed by the individual(s) that adds, deletes, and changes user's access within the system (*i.e.*, system administrator). Determine whether the transactions completed by the system administrator provide an adequate control over the access to the table games drop and count keys. Also, determine whether any table games drop and count key(s) removed or returned to the key cabinet by the system administrator was properly authorized.

(ii) For at least one day each month, review the report generated by the computerized key security system indicating all transactions performed to determine whether any unusual table games drop and count key removals or key returns occurred.

(iii) At least quarterly, review a sample of users that are assigned access to the table games drop and count keys to determine that their access to the assigned keys is adequate relative to their job position.

(iv) All noted improper transactions or unusual occurrences are investigated with the results documented.

(4) Quarterly, an inventory of all count room, table game drop box release, storage rack and contents keys is performed, and reconciled to records of keys made, issued, and destroyed. Investigations are performed for all keys unaccounted for, with the investigations being documented.

(v) *Emergency drop procedures.* Emergency drop procedures shall be developed by the Tribal gaming regulatory authority, or the gaming operation as approved by the Tribal gaming regulatory authority.

(w) *Equipment standards for gaming machine count.* (1) A weigh scale calibration module shall be secured so as to prevent unauthorized access (*e.g.*, prenumbered seal, lock and key, etc.).

(2) A person independent of the cage, vault, gaming machine, and count team functions shall be required to be present whenever the calibration module is accessed. Such access shall be documented and maintained.

(3) If a weigh scale interface is used, it shall be adequately restricted so as to prevent unauthorized access (passwords, keys, etc.).

(4) If the weigh scale has a zero adjustment mechanism, it shall be physically limited to minor adjustments (*e.g.*, weight of a bucket) or physically situated such that any unnecessary adjustments to it during the weigh process would be observed by other count team members.

(5) The weigh scale and weigh scale interface (if applicable) shall be tested by a person or persons independent of the cage, vault, and gaming machine departments and count team at least quarterly. At least annually, this test shall be performed by internal audit in accordance with the internal audit standards. The result of these tests shall be documented and signed by the person or persons performing the test.

(6) Prior to the gaming machine count, at least two employees shall verify the accuracy of the weigh scale with varying weights or with varying amounts of previously counted coin for each denomination to ensure the scale is properly calibrated (varying weights/coin from drop to drop is acceptable).

(7) If a mechanical coin counter is used (instead of a weigh scale), the Tribal gaming regulatory authority, or the gaming operation as approved by the Tribal gaming regulatory authority, shall establish and the gaming operation shall comply, with procedures that are equivalent to those described in paragraphs (u)(4), (u)(5), and (u)(6) of this section.

(8) If a coin meter count machine is used, the count team member shall record the machine number denomination and number of coins in ink on a source document, unless the meter machine automatically records such information.

(i) A count team member shall test the coin meter count machine prior to the actual count to ascertain if the metering device is functioning properly with a predetermined number of coins for each denomination.

(ii) [Reserved]

Signed in Washington, DC, this 21st day of April, 2005.

Philip N. Hogen,

Chairman.

Nelson Westrin,

Vice-Chairman.

Cloyce Choney,

Commissioner.

[FR Doc. 05–8424 Filed 5–3–05; 8:45 am]

BILLING CODE 7565–01–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900–AL90

Presumption of Sound Condition: Aggravation of a Disability by Active Service

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the Department of Veterans Affairs (VA) adjudication regulations regarding the presumption of soundness of a veteran by adding a requirement that, in order to rebut the presumption of soundness of a veteran on entrance into active service, VA must prove not only that the condition existed prior to entrance into active service, but also that it was not aggravated by the veteran's active service. This amendment reflects a change in VA's interpretation of the statute governing the presumption of sound condition, and is based on a recent opinion of VA's General Counsel as well as a recent decision of the United States Court of Appeals for the Federal Circuit. The intended effect of this amendment is to require that VA, not the claimant, prove that the disability preexisted entrance into military service and that the disability was not aggravated by such service before the presumption of soundness on entrance onto active duty is overcome.

DATES: *Effective Date:* May 4, 2005.

Applicability Date: This rule applies to claims that were pending on or filed after the effective date of this rule, May 4, 2005. It does not apply to claims that were finally decided prior to the effective date of this rule or to collateral challenges to final decisions rendered prior to the effective date of this rule.

FOR FURTHER INFORMATION CONTACT: David Barrans, Attorney, Office of General Counsel (022), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, telephone (202) 273–6315.

SUPPLEMENTARY INFORMATION: VA is amending its adjudication regulations at 38 CFR 3.304(b) to reflect a change in the interpretation of the statute governing the presumption of sound condition.

Section 1111 of title 38, United States Code, provides that veterans are presumed to have been in sound condition when they were examined, accepted, and enrolled for service, except as to conditions that were noted at the time, or ''where clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment and was not aggravated by such service.'' Section 1153 of title 38, United States Code, states that ''[a] preexisting disease will be considered to have been aggravated by active military, naval, or air service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease.''

VA's regulation implementing the presumption of sound condition, 38 CFR 3.304(b), historically has stated that the presumption may be rebutted by clear and unmistakable evidence that a condition existed prior to service. Although this appears to ignore the last seven words of 38 U.S.C. 1111 (''and was not aggravated by such service''), VA historically has interpreted those seven words to relate to the presumption of aggravation under 38 U.S.C. 1153. Accordingly, VA's regulation implementing the presumption of aggravation under 38 U.S.C. 1153 also implements the last seven words of section 1111, as VA previously construed those words. That regulation, 38 CFR 3.306(b), states that, when a preexisting disability increased in severity during service, the presumption of aggravation may be rebutted only by clear and unmistakable evidence that the increase was due to the natural progress of the disease. The regulation further states that aggravation will not be conceded when a preexisting disability underwent no increase in severity during service.

Under VA's current regulations, if a condition was not noted at entry but is shown by clear and unmistakable evidence to have existed prior to entry, the burden then shifts to the claimant to show that the condition increased in severity during service. Only if the claimant satisfies this burden will VA incur the burden of refuting aggravation by clear and unmistakable evidence.

VA is revising its interpretation of section 1111 to provide that, if a condition is not noted at entry into service, the presumption of sound condition can be rebutted only if clear and unmistakable evidence shows both that the condition existed prior to service and that the condition was not aggravated by service. Under this interpretation, the burden does not shift to the claimant to establish that a preexisting condition increased in severity during service. Rather, VA alone bears the burden of proving both that the condition existed prior to service and that it was not aggravated by service. If the evidence fails to support either of those findings, the presumption of sound condition is not rebutted.

Our revised interpretation of section 1111 is based on the extensive analysis of the history of that statute stated in a precedent opinion of VA's General Counsel, VAOPGCPREC 3–2003, and the Federal Circuit's opinion in *Wagner* v. *Principi*, No. 02–7347 (Fed. Cir. June 1, 2004). As the General Counsel and the Federal Circuit noted, the language of section 1111 literally provides that, if a condition was not noted at entry into service, VA bears the burden of showing both that the condition existed prior to service and that it was not aggravated by service. If VA fails to establish either of those facts, the claimant would be entitled to a presumption that he or she entered service in sound condition.

VA has previously refrained from adopting a strictly literal interpretation of section 1111, because such a literal reading compels results that have been described as ''illogical'' by the General Counsel, ''self-contradictory'' by the Federal Circuit, and possibly ''absurd'' by the United States Court of Appeals for Veterans Claims. *See* VAOPGCPREC 3–2003, *Wagner*, slip op. at 8; *Cotant* v. *Principi*, 17 Vet. App. 116, 129 (2003). Among other things, a literal construction of the statute would require VA to presume that a veteran entered service in sound condition even in cases where clear and unmistakable evidence shows the contrary, merely because VA cannot prove the absence of aggravation in service. It is unclear why the question of whether a preexisting disability was aggravated in service should have any bearing on the logically preliminary question of whether there was a preexisting disability at all.

Despite these concerns, VA's General Counsel and the Federal Circuit have concluded that the legislative history of section 1111 strongly suggests that Congress intended what the language of the statute literally requires. The General Counsel also concluded that, although the statute's requirements seemed counterintuitive, they were not so bizarre that Congress could not have intended them.

The rebuttal standard in what is now section 1111 originated in the Act of July 13, 1943, ch. 233, § 9(b), 57 Stat. 554, 556 (Pub. L. 78–144), as an amendment to Veterans' Regulation No. 1(a), part I, para. I(b) (Exec. Ord. No. 6,156) (June 6, 1933). Prior to the amendment, paragraph I(b) stated that the presumption of soundness could be rebutted ''where evidence or medical judgment is such as to warrant a finding that the injury or disease existed prior to acceptance and enrollment.'' In 1943, a bill was introduced in the House to make the presumption of soundness irrebuttable (*see* H.R. 2703, 78th Cong., 1st Sess. (1943)). That bill apparently was introduced in response to the concern that ''a great many men have been turned out of the service after they had served for a long period of time, some of them probably 2 or 3 years, on the theory that they were disabled before they were ever taken into the service'' (89 Cong. Rec. 7463 (daily ed. July 7, 1943) (statement of Cong. Rankin)). The Administrator of Veterans Affairs recommended that the bill be revised to permit rebuttal of the presumption ''where clear and unmistakable evidence demonstrates that the injury or disease existed prior to acceptance and enrollment'' (S. Rep. No. 403, 78th Cong., 1st Sess. 6 (1943)). The Senate thereafter approved an amendment to the bill adopting the Administrator's suggested language, but adding to it the phrase ''and was not aggravated by such active military or naval service.'' That language was approved by the House and was included in the legislation enacted as Public Law 78–144. The provisions of Veterans' Regulation No. 1(a), part I, para. I(b), as amended, were subsequently codified without material change at 38 U.S.C. 311, later renumbered as section 1111.

A Senate Committee Report concerning the 1943 statute stated that ''[t]he language added by the committee, 'and was not aggravated by such active military or naval service' is to make

clear the intention to preserve the right in aggravation cases as was done in Public [Law] No. [73–]141.'' S. Rep. No. 403, at 2. Public Law 73–141, referenced as the model for the Senate amendment, provided for restoration of service-connected disability awards that had been severed under depression-era statutes, and provided that:

> The provisions of this section shall not apply * * * to persons as to whom clear and unmistakable evidence discloses that the disease, injury, or disability had inception before or after the period of active military or naval service, unless such disease, injury, or disability is shown to have been aggravated during service * * * and as to all such cases enumerated in this proviso, all reasonable doubts shall be resolved in favor of the veteran, the burden of proof being on the Government.

Act of March 27, 1943, ch. 100, § 27, 48 Stat. 508, 524. This statute appears to have placed the burden on the government to show by clear and unmistakable evidence both that the disability existed prior to service and that it was not aggravated by service. It is thus consistent with the view that the presumption of soundness enacted in 1943 was intended to place the burden of proof on VA with respect to both issues. That purpose is also reflected in other statements made during the debate on the 1943 legislation. *See* 89 Cong. Rec. 7463 (daily ed. July 7, 1943) (statement of Rep. Rankin) (''It places the burden of proof on the Veterans' Administration to show by unmistakable evidence that the injury or disease existed prior to acceptance and enrollment and was not aggravated by such active military or naval service.'')

Based on the foregoing authorities, VA is revising its regulations at 38 CFR 3.304(b) to provide that, in order to rebut the presumption of sound condition, VA must establish by clear and convincing evidence both that the disability existed prior to service and that it was not aggravated by service. To accomplish this, VA is amending § 3.304(b) by adding, at the end of the first sentence, ''and was not aggravated by such service.''

The effect of this new interpretation is to establish different standards to govern for disabilities that were noted at entry into service and those that were not. If a disability was not noted at entry into service, VA will apply the presumption of sound condition under 38 U.S.C. 1111. If VA fails to establish either that the disability existed prior to service or that it was not aggravated by service, the presumption of sound condition will govern and the disability will be considered to have been incurred in service if all other requirements for service connection are established. In such cases, the presumption of aggravation in 38 U.S.C. 1153 will not apply because VA will presume that the veteran entered service in sound condition. On the other hand, if a condition was noted at entry into service, VA will consider the claim with respect to the presumption of aggravation in section 1153.

This final rule is an interpretative rule explaining how VA construes 38 U.S.C. 1111, and it merely reflects the holding in the Federal Circuit's decision in *Wagner*. Accordingly, there is a basis for dispensing with prior notice and comment and delayed effective date provisions of 5 U.S.C. 552 and 553.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before developing any rule that may result in an expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any given year. This rule would have no such effect on State, local, or tribal governments, or the private sector.

Regulatory Flexibility Act

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

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521).

The Catalog of Federal Domestic Assistance program numbers are 64.102, 64.109 and 64.110.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Health care, Individuals with disabilities, Pensions, Veterans.

Approved: April 4, 2005.

Gordon H. Mansfield,

Deputy 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.

§ 3.304 [Amended]

■ 2. In § 3.304, paragraph (b) introductory text, remove ''thereto.'' and add, in its place, ''thereto and was not aggravated by such service.''

[FR Doc. 05–8899 Filed 5–3–05; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[R05–OAR–2004–MI–0002; FRL–7904–4]

Approval and Promulgation of State Implementation Plans: Michigan: Oxides of Nitrogen

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is approving as a revision to Michigan's Clean Air Act State Implementation Plan (SIP) prepared by Michigan that will limit the emissions of oxides of nitrogen (NO_X) from large stationary sources (i.e., electric generating units, industrial boilers and cement kilns). This SIP, which the Michigan Department of Environmental Quality (MDEQ) submitted for EPA approval on August 5, 2004, meets all of the requirements contained in an EPA rule that was published in the **Federal Register** on October 27, 1998. The federal rule, otherwise known as the Phase I NO_X SIP Call, requires NO_X reductions from sources in 19 States in the eastern half of the country and the District of Columbia. MDEQ's August 5, 2004, submittal also satisfies the conditions described in EPA's conditional approval notice published in the **Federal Register** on April 16, 2004. The effect of this approval is to ensure federal enforceability of the state NO_X plan and to maintain consistency between the state-adopted plan and the approved Michigan SIP. EPA proposed approval of this SIP revision and published a direct final approval on December 23, 2004. EPA received adverse comments on the proposed rulemaking and, therefore, withdrew the direct final rulemaking on February 15, 2005.