

of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

#### Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

#### Environment

We have analyzed this proposed rule under Commandant Instruction M16475.1D and Department of Homeland Security Management Directive 5100.1, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, we believe that this rule should be categorically excluded, under figure 2–1, paragraph (32)(e), of the Instruction, from further environmental documentation. Under figure 2–1, paragraph (32)(e), of the Instruction, an “Environmental Analysis Check List” is not required for this rule. Comments on this section will be considered before we make the final decision on whether to categorically exclude this rule from further environmental review.

#### List of Subjects in 33 CFR Part 117

Bridges.

#### Regulations

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 117 as follows:

#### PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for part 117 continues to read as follows:

**Authority:** 33 U.S.C. 499; Department of Homeland Security Delegation No. 0170.1; 33 CFR 1.05–1(g); section 117.255 also issued under the authority of Pub. L. 102–587, 106 Stat. 5039.

2. Revise § 117.233 to read as follows:

##### § 117.233 Broad Creek.

(a) The draw of the Conrail Bridge, mile 8.0 at Laurel, shall open on signal if at least four hours notice is given.

(b) The draws of the Poplar Street Bridge, mile 8.2, and the US 13A Bridge, mile 8.2, all at Laurel, shall open on signal if at least 48 hours notice is given.

3. Add new § 117.234 to read as follows:

##### § 117.234 Cedar Creek.

The SR 36 Bridge, mile 0.5 in Cedar Beach, shall open on signal; except that from April 1 through November 30 from 2 a.m. to 4 a.m.; and from December 1 through March 31 from 6:30 p.m. to 6 a.m., the draw shall open on signal if at least four hours notice is given.

4. Revise § 117.243 to read as follows:

##### § 117.243 Nanticoke River.

(a) The draw of the Norfolk Southern Railway Bridge, mile 39.4 in Seaford, will operate as follows:

(1) From March 15 through November 15, the draw will open on signal for all vessels except that from 11 p.m. to 5 a.m. at least 2½ hours notice will be required.

(2) At all times, from November 16 through March 14, the draw will open on signal if at least 2½ hours notice is given.

(3) When notice is required, the owner operator of the vessel must provide the train dispatcher with an estimated time of passage by calling (717) 215–0379 or (609) 412–4338.

(b) The draw of the SR 13 Bridge, mile 39.6 in Seaford, shall open on signal, except that from April 1 through October 31, from 6 p.m. to 8 a.m.; and from November 1 through March 31, Monday to Friday; and from November 1 through March 31, on Saturday and Sunday, from 3:30 p.m. to 7:30 a.m., the draw shall open on signal if at least four hours notice is given.

Dated: June 16, 2006.

**Larry L. Hereth,**

*Rear Admiral, U.S. Coast Guard, Commander, Fifth Coast Guard District.*

[FR Doc. E6–10247 Filed 6–28–06; 8:45 am]

**BILLING CODE 4910–15–P**

#### DEPARTMENT OF VETERANS AFFAIRS

#### 38 CFR Part 3

**RIN 2900–AM28**

#### Accrued Benefits

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of Veterans Affairs (VA) proposes to amend its adjudication regulation regarding accrued benefits. The amendments are the result of changes in statute and to clarify existing regulatory provisions.

**DATES:** Comments must be received by VA on or before August 28, 2006.

**ADDRESSES:** Written comments may be submitted by: mail or hand-delivery to the Director, Regulations Management (00REG1), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; fax to (202) 273–9026; or e-mail through [www.Regulations.gov](http://www.Regulations.gov). Comments should indicate that they are submitted in response to “RIN 2900–AM28.” All comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 273–9515 for an appointment.

**FOR FURTHER INFORMATION CONTACT:** Maya Ferrandino, Consultant, Policy and Regulations Staff, Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273–7211.

**SUPPLEMENTARY INFORMATION:** Section 104 of the Veterans Benefits Act of 2003 (the “Act”), Public Law 108–183, amended 38 U.S.C. 5121, which addresses payment of certain accrued benefits upon the death of a beneficiary. To ensure consistency with statutory changes and for clarification purposes, VA proposes to amend its regulations regarding accrued benefits.

Prior to its amendment by section 104 of the Act, the introductory portion of 38 U.S.C. 5121(a) read as follows:

Except as provided in sections 3329 and 3330 of title 31, periodic monetary benefits (other than insurance and servicemen’s indemnity) under laws administered by the Secretary to which an individual was entitled at death under existing ratings or decisions, or those based on evidence in the file at date of death (hereinafter in this section and section 5122 of this title referred to as “accrued benefits”) and due and unpaid for a period not to exceed two years, shall, upon the death of such individual be paid as follows \* \* \*.

38 U.S.C. 5121(a) (2002).

VA traditionally construed 38 U.S.C. 5121(a) as providing only one type of benefit to survivors: Accrued benefits. The United States Court of Appeals for Veterans Claims (CAVC) in *Bonny v. Principi*, 16 Vet. App. 504 (2002), interpreted section 5121(a) differently. The CAVC's analysis includes the following:

The comma in the middle of paragraph (a), between "decisions" and "or," and the use of the conjunction "or" after the comma, indicate that the separated phrases state substantive alternatives. 38 U.S.C. 5121(a). The paragraph provides for payment of (1) periodic monetary benefits to which an individual was entitled at death under existing ratings or decisions, which the Court will call "benefits awarded but unpaid", or (2) periodic monetary benefits based on evidence in the file at the date of an entitled individual's death and due and unpaid for a period not to exceed two years, which are called "accrued benefits" for purposes of sections 5121 and 5122. *Id.*

\* \* \* \* \*

The important distinction between the two types of periodic monetary benefits is that one type of benefits is due to be paid to the veteran at his death and one type is not. As to the former, when the benefits have been awarded but not paid pre-death, an eligible survivor is to receive the entire amount of the award. The right to receive the entire amount of periodic monetary benefits that was awarded to the eligible individual shifts to the eligible survivor when payment of the award was not made before the eligible individual died. This interpretation of 38 U.S.C. 5121(a) is completely consistent with the plain language of the statute, as previously quoted and interpreted herein.

As to the latter type of periodic monetary benefits, what is determinative regarding accrued benefits is that evidence in the individual's file at the date of death supports a decision in favor of awarding benefits. Because the benefits cannot be awarded to the deceased individual, an eligible survivor can claim a portion of those accrued benefits.

*Bonny*, 16 Vet. App. at 507–08. The CAVC's analysis recognized two kinds of benefits under 38 U.S.C. 5121, which the court called "accrued benefits" and "benefits awarded but unpaid."

Section 104(a) of the Act removed the two-year limitation on accrued benefits payable under 38 U.S.C. 5121. Section 104(c) of the Act made "technical amendments" to 38 U.S.C. 5121, including removal of the comma after "or decisions" in the introductory text of paragraph (a). This is the same comma relied upon by the CAVC in *Bonny* for interpreting 38 U.S.C. 5121 to require a distinction between accrued benefits and "benefits awarded but unpaid." Therefore, an important question is whether Congress intended to change the interpretation of 38 U.S.C. 5121 required by the *Bonny* decision by

removing this comma. Based on the following analysis, we believe that it did.

The Act resulted from enactment of House bill H.R. 2297, as amended, 108th Cong. (2003). The "Explanatory Statement on Senate Amendment to House Bill, H.R. 2297, as Amended" notes that the Act reflects a compromise agreement reached by the House and Senate Committees on Veterans' Affairs on provisions of a number of House and Senate bills affecting veterans' benefits. Section 104 of the Act was based on portions of two of these bills, section 6 of H.R. 1460, 108th Cong. (2003), and section 105 of S. 1132, as amended, 108th Cong. (2003). See 149 Cong. Rec. S15,133–34 (daily ed. Nov. 19, 2003).

The removal of the comma in question in 38 U.S.C. 5121(a) comes from section 105(b) of S. 1132, as passed by the Senate. See 149 Cong. Rec. S13,745 (daily ed. Oct. 31, 2003). S. 1132 was also based on a number of other bills, including S. 1188, 108th Cong. (2003). A principal purpose of S. 1188 was to amend 38 U.S.C. 5121 "to repeal the two-year limitation on the payment of accrued benefits that are due and unpaid by the Secretary of Veterans Affairs upon the death of a veteran or other beneficiary under laws administered by the Secretary." 149 Cong. Rec. S7,476 (daily ed. June 5, 2003). As originally drafted, S. 1188 did not include the "technical amendments" in section 104(c) of the Act.

On July 10, 2003, the Senate Committee on Veterans' Affairs held a hearing on a number of the bills that would become the sources of S. 1132. Persons who testified at that hearing included Daniel L. Cooper, VA's Under Secretary for Benefits, whose statement to the Committee included the following comment concerning S. 1188:

In addition, we note one technical change needed in section 2 of S. 1188 should it be enacted. The comma in current section 5121(a) following "existing ratings or decisions" should be deleted to clarify, for purposes of 38 U.S.C. 5121(b) and (c) and 5122, that the term "accrued benefits" includes both benefits that have been awarded to an individual in existing ratings or decisions but not paid before the individual's death, as well as benefits that could be awarded based on evidence in the file at the date of death.

S. Rep. No. 108–169, at 46–47 (2003).

Further, in its discussion of section 105 of S. 1132, the Committee noted that:

At the Committee's hearing on July 10, 2003, Under Secretary Cooper commented as follows: "The distinction the *Bonny* decision draws between the two categories of

claimants—those whose claims had been approved and those whose entitlement had yet to be recognized when they died—is really one without a difference. In either case, a claimant's estate is deprived of the value of benefits to which the claimant was, in life, entitled."

*Id.* at 8.

Based on this legislative history, we conclude that Congress' purpose in removing the comma from the introductory paragraph of 38 U.S.C. 5121(a) was to provide for only one type of benefit under section 5121, removing the distinction between accrued benefits and "benefits awarded but unpaid" that resulted from the *Bonny* decision.

The interplay between *Bonny* and section 104 of the Act is also affected by the fact that different portions of section 104 of the Act became effective at different times. Because there is no specific effective date in the Act for section 104(c) (the "technical amendments" which include removal of the comma that was a basis for the CAVC's interpretation of 38 U.S.C. 5121 in *Bonny*), that portion of the Act became effective when the Act was signed into law on December 16, 2003. On the other hand, under section 104(d) of the Act, the amendment to 38 U.S.C. 5121(a) removing the provision restricting benefits to those that were due and unpaid "for a period not to exceed two years" applies to deaths occurring on or after December 16, 2003.

These factors lead to consideration of what, if any, viability the *Bonny* distinctions between accrued benefits and "benefits awarded but unpaid" still have. For the reasons discussed in the following paragraphs, we conclude that these distinctions are still applicable in a very limited number of cases. Particularly because of the differences in effective date provisions for different provisions of section 104 of the Act, sorting this out involves looking at the time line for when the deceased beneficiary died and when claims for 38 U.S.C. 5121 benefits were received and decided.

Based on the plain language of the Act, we believe the *Bonny* division of 38 U.S.C. 5121 benefits clearly does not apply if the deceased beneficiary died on or after December 16, 2003. Effective on that date, the statutory basis for *Bonny's* interpretation of 38 U.S.C. 5121 as creating two different types of VA benefits was removed. In any event, there would be little benefit to claimants for preserving the distinction in such cases because the two-year benefit limitation has been repealed in cases where the deceased beneficiary died on or after December 16, 2003.

For claims filed on or after December 16, 2003, VA must apply 38 U.S.C. 5121 as amended by the Act. However, the two-year limitation applies to all 38 U.S.C. 5121 accrued benefit claims VA received on or after December 16, 2003, if the deceased beneficiary died before December 16, 2003. This is true because (1) the Act removed the statutory underpinnings of the *Bonny* decision effective on December 16, 2003, but (2) Congress very clearly intended the removal of the two-year limitation in amended 38 U.S.C. 5121 to be effective only where the deceased beneficiary died on or after December 16, 2003.

The last question is how VA should apply 38 U.S.C. 5121 to cases where the deceased beneficiary died before December 16, 2003, and a claim for section 5121 benefits was pending on December 16, 2003. We propose that the Act's amendments do not apply in such cases.

VA's General Counsel addressed retroactive application of a new statute in VAOPGCPREC 7-2003 (2003), holding:

In *Kuzma v. Principi*, 341 F.3d 1327 (Fed. Cir. 2003), the United States Court of Appeals for the Federal Circuit [(Federal Circuit)] overruled *Karnas v. Derwinski*, 1 Vet. App. 308 (1991), to the extent it conflicts with the precedents of the Supreme Court and the Federal Circuit. *Karnas* is inconsistent with Supreme Court and Federal Circuit precedent insofar as *Karnas* provides that, when a statute or regulation changes while a claim is pending before [VA] or a court, whichever version of the statute or regulation is most favorable to the claimant will govern unless the statute or regulation clearly specifies otherwise. Accordingly, that rule adopted in *Karnas* no longer applies in determining whether a new statute or regulation applies to a pending claim. Pursuant to Supreme Court and Federal Circuit precedent, when a new statute is enacted or a new regulation is issued while a claim is pending before VA, VA must first determine whether the statute or regulation identifies the types of claims to which it applies. If the statute or regulation is silent, VA must determine whether applying the new provision to claims that were pending when it took effect would

produce genuinely retroactive effects. If applying the new provision would produce such retroactive effects, VA ordinarily should not apply the new provision to the claim. If applying the new provision would not produce retroactive effects, VA ordinarily must apply the new provision.

As to the first criterion, with respect to the technical corrections in section 104(c), the Act does not "identify[] the types of claims to which it applies." The question then becomes whether applying the Act's provisions to claims pending before VA on December 16, 2003, would produce a "genuinely retroactive" effect. For the reasons stated below, we believe that it would. Therefore, VA will not apply the Act's amendments to claims for 38 U.S.C. 5121 benefits pending before VA on December 16, 2003.

Determining whether applying changes in the law would produce a genuinely retroactive effect is a complex undertaking. However, as discussed in VAOPGCPREC 7-2003:

[S]tatutes or regulations that restrict the bases for entitlement to a benefit might have disfavored retroactive effects as applied to some claims that were pending when they took effect. For example, if a veteran was entitled to benefits based on the law existing when he or she filed an application with VA, and a restrictive change in the governing law occurs before VA adjudicates the claim, application of the new restriction might retroactively extinguish the claimant's previously existing right to benefits for periods before the new law took effect. In those circumstances, *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), indicates that the intervening restriction would not apply in determining the claimant's rights for such periods.

We believe that these principles control the question at hand and call for application of 38 U.S.C. 5121 as it existed prior to the Act to claims pending on December 16, 2003.

VA has not contested the holding in *Bonny* and we thus conclude that *Bonny* states the governing interpretation of 38 U.S.C. 5121 prior to the amendments made by the Act. Applying the technical

amendment to section 5121(a) made by the Act to pending claims would limit the amount of benefits some claimants could receive under section 5121(a) subsequent to the *Bonny* decision and prior to enactment of the Act. That is, a claimant who had a claim for "benefits awarded but unpaid" pending on December 16, 2003, would be limited to two years of benefits because the technical amendment of the Act eliminated the *Bonny* division of section 5121(a) benefits and the removal of the two-year limitation applies only in cases in which the deceased beneficiary died on or after December 16, 2003. We believe this would constitute a genuine retroactive effect.

We propose to amend § 3.1000 to reflect the changes to section 5121 made by the Act. As this proposed regulation will be published more than one year after the effective dates prescribed in the Act, we propose not to include information regarding the effective dates in the regulation itself. If the beneficiary died prior to December 16, 2003, and a claim for benefits under 38 U.S.C. 5121 was pending as of December 16, 2003, the claim will be adjudicated under the provisions of § 3.1000, and the VA regulations cited therein, in effect on December 16, 2003. If the beneficiary died prior to December 16, 2003, but VA received a claim for benefits under 38 U.S.C. 5121 on or after December 16, 2003, the claim will be adjudicated under the proposed provisions of § 3.1000, except that the two-year limitation will continue to apply. This is because the basis for the *Bonny* court's interpretation of 38 U.S.C. 5121(a) is no longer viable as of December 16, 2003, but the removal of the two-year limitation is effective only where the beneficiary died on or after December 16, 2003.

To summarize, there are now three potential groups of claimants for accrued benefits under current law, whose eligibility varies as described on this table:

	Deceased beneficiary died prior to December 16, 2003		Deceased beneficiary died on or after December 16, 2003
	Claim pending on December 16, 2003	Claim received on or after December 16, 2003	
Does the one-year time limit to file the claim apply?	(1) Yes for accrued benefits .....	Yes for accrued benefits .....	Yes for accrued benefits
	(2) No for benefits awarded but unpaid.	In this situation "accrued benefits" includes benefits awarded but unpaid.	In this situation "accrued benefits" includes benefits awarded but unpaid.
Does the two-year limitation on the benefit-payable period apply?	(1) Yes for accrued benefits .....	Yes for accrued benefits .....	No.
	(2) No for benefits awarded but unpaid.	In this situation "accrued benefits" includes benefits awarded but unpaid.	This limitation does not apply if a deceased beneficiary died on or after December 16, 2003.

Based on the statutory changes described above, we propose to amend § 3.1000(a) by deleting the comma between the phrases “to which a payee was entitled at his death under existing ratings or decisions” and “or those based on evidence in the file at date of death”. We also propose to delete the phrase “for a period not to exceed 2 years prior to the last date of entitlement as provided in § 3.500(g).” We note that 38 CFR 3.500(g) addresses the effective date of a discontinuance or reduction based on the death of the beneficiary. Because § 3.500(g) is only used in § 3.1000 regarding the two year period, which was repealed by section 104(a) of the Act, and is not applicable otherwise to § 3.1000, we propose to delete the reference to § 3.500(g). We also propose to change the outdated phrase “his death” in current § 3.1000(a) to “his or her death”.

Section 104(b) of the Act also amended section 5121 to provide that surviving parents may claim accrued benefits upon the death of a child who had claimed benefits under 38 U.S.C. chapter 18. Under section 104(d) of the Act, this amendment applies when the child dies on or after December 16, 2003. To ensure consistency with the statute, we propose to include this new provision in § 3.1000. We propose to add this provision as a new § 3.1000(a)(4), and redesignate current § 3.1000(a)(4) as (a)(5), because current § 3.1000(a)(4) is a catch-all default provision, and appropriately should be the last provision in paragraph (a).

The Federal Circuit clarified another aspect of benefits under 38 U.S.C. 5121 in *Jones v. West*, 136 F.3d 1296, 1299 (Fed. Cir. 1998):

Reading [38 U.S.C.] 5101 and 5121 together compels the conclusion that, in order for a surviving spouse to be entitled to accrued benefits, the veteran must have had a claim pending at the time of his death for such benefits or else be entitled to them under an existing rating or decision. Section 5101(a) is a clause of general applicability and mandates that a claim must be filed in order for any type of benefit to accrue or be paid.

Therefore, we additionally propose to amend the definition of “[e]vidence in the file at date of death” in § 3.1000(d)(4) to “evidence in VA’s possession on or before the date of the beneficiary’s death, even if such evidence was not physically located in the VA claims folder on or before the date of death, in support of a claim for VA benefits pending on the date of death.” We also propose to define “claim for VA benefits pending on the date of death” in a new § 3.1000(d)(5) as “a claim filed with VA that had not been finally adjudicated by VA on or

before the date of death.” This statement means that VA would consider a filed claim to have been pending on the date of death, if it had not been adjudicated, or, if the claim had been adjudicated, the time to appeal had not expired or there was no final decision by the Board of Veterans’ Appeals (BVA or Board). We additionally propose to state in new § 3.1000(d)(5) that a claim may include a deceased beneficiary’s claim to reopen a finally disallowed claim based upon new and material evidence or a deceased beneficiary’s claim of clear and unmistakable error in a prior rating or decision.

We note the definition in new § 3.1000(d)(5) does not preclude a survivor from filing an accrued benefits claim based on a decedent’s claim that had been judicially appealed. In that case, the CAVC typically vacates the BVA decision in order to preserve potential accrued benefits claims. For example, the CAVC noted the following in *Sagnella v. Principi*, 15 Vet. App. 242, 246 (2001):

This Court held in *Landicho v. Brown*, 7 Vet. App. 42 (1994), that the appropriate remedy [when a veteran dies while his or her BVA decision is on appeal] is to vacate the Board decision from which the appeal was taken and to dismiss the appeal. *Landicho*, 7 Vet. App. at 54. This ensures that the Board decision and the underlying VA regional office (RO) decision(s) will have no preclusive effect in the adjudication of any accrued-benefits claims derived from the veteran’s entitlements. It also nullifies the previous merits adjudication by the RO because that decision was subsumed in the Board decision.

Finally, section 5121(a) authorizes payment to survivors only of periodic monetary benefits that were “due and unpaid” to a deceased beneficiary. Because VA is prohibited by 38 U.S.C. 5304(c) from paying compensation or pension to a veteran for any period in which the veteran received active service pay, no compensation or pension could have been “due” to a veteran for any period for which he or she actually received active service pay. Accordingly, for purposes of determining the amount of benefits payable to a survivor under section 5121(a), compensation or pension benefits could not have been “due and unpaid” to the veteran for any period for which the veteran received active service pay. See VAOPGCPREC 10–2004 (2004). Therefore, we propose to add a new paragraph (i) to § 3.1000 to provide this explanation.

#### Paperwork Reduction Act

This document contains no provisions constituting a collection of information

under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

#### Regulatory Flexibility Act

The Secretary hereby certifies that this proposed 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. This proposed rule would not affect any small entities. Therefore, pursuant to 5 U.S.C. 605(b), this proposed rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

#### Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Order classifies a rule as a significant regulatory action requiring review by the Office of Management and Budget if it meets any one of a number of specified conditions, including: having an annual effect on the economy of \$100 million or more, creating a serious inconsistency or interfering with an action of another agency, materially altering the budgetary impact of entitlements or the rights of entitlement recipients, or raising novel legal or policy issues. VA has examined the economic, legal, and policy implications of this proposed rule and has concluded that it is a significant regulatory action because it may raise novel legal and policy issues under Executive Order 12866.

#### 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 issuing any rule that may result in the 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 year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

#### Catalog of Federal Domestic Assistance Numbers and Titles

The Catalog of Federal Domestic Assistance program numbers and titles for this proposal are 64.102, Compensation for Service-Connected Deaths for Veterans’ Dependents, 64.104, Pension for Non-Service-

Connected Disability for Veterans, 64.105, Pension to Veterans Surviving Spouses, and Children, 64.109, Veterans Compensation for Service-Connected Disability, and 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death.

### List of Subjects in 38 CFR Part 3

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

Approved: March 17, 2006.

**Gordon H. Mansfield,**

*Deputy Secretary of Veterans Affairs.*

For the reasons set out in the preamble, VA proposes to amend 38 CFR part 3 (subpart A) 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. Amend § 3.1000 as follows:

a. In paragraph (a) introductory text, remove “at his death” and add, in its place, “at his or her death”; remove “decisions, or” and add, in its place, “decisions or”; and remove “for a period not to exceed 2 years prior to the last date of entitlement as provided in § 3.500(g)”.

b. Redesignate paragraph (a)(4) as paragraph (a)(5).

c. Add a new paragraph (a)(4).

d. In paragraph (d)(4), add “, in support of a claim for VA benefits pending on the date of death” immediately following “before the date of death”.

e. Add paragraph (d)(5).

f. Add paragraph (i).

The additions read as follows:

**§ 3.1000 Entitlement under 38 U.S.C. 5121 to benefits due and unpaid upon death of a beneficiary.**

(a) \* \* \*

(4) Upon the death of a child claiming benefits under chapter 18 of this title, to the surviving parents.

\* \* \* \* \*

(d) \* \* \*

(5) *Claim for VA benefits pending on the date of death* means a claim filed with VA that had not been finally adjudicated by VA on or before the date of death. Such a claim includes a deceased beneficiary's claim to reopen a finally disallowed claim based upon new and material evidence or a deceased beneficiary's claim of clear and unmistakable error in a prior rating or decision. Any new and material evidence must have been in VA's possession on or before the date of the beneficiary's death.

\* \* \* \* \*

(i) *Active service pay.* Benefits awarded under this section do not include compensation or pension benefits for any period for which the veteran received active service pay.

(Authority: 38 U.S.C. 5304(c))

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