revision would eliminate the current requirement that such international traffic be regularly scheduled. Furthermore, any movement of these vehicles in the general direction of an export move or as part of the return movement of the vehicles to their base country shall be considered incidental to the international movement.

In conjunction with the proposed amendments to § 123.14, this document also includes proposed conforming amendments to § 123.16 regarding the return of the qualifying vehicles to the United States.

Comments

Before adopting the proposed amendments, consideration will be given to any written comments that are timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Branch, 1300 Pennsylvania Avenue, NW., 3rd Floor, Washington, DC.

Regulatory Flexibility Act and Executive Order 12866

The proposed rule would greatly relax current cabotage restrictions for both the U.S. and foreign trucking industries, enabling more efficient and economical use of their respective vehicles both internationally and domestically. As such, under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that, if adopted, the proposed amendments will not have a significant economic impact on a substantial number of small entities. Nor would the proposed rule result in a ''significant regulatory action'' under E.O. 12866.

List of Subjects in 19 CFR Part 123

Administrative practice and procedure, Canada, Common carriers, Customs duties and inspection, Imports, International traffic, Motor carriers, Railroads, Trade agreements, Vehicles.

Proposed Amendments to the Regulations

It is proposed to amend part 123, Customs Regulations (19 CFR part 123), as set forth below.

PART 123—CUSTOMS RELATIONS WITH CANADA AND MEXICO

1. The general authority citation for part 123, and the relevant sectional authority citation, would continue to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States (HTSUS), 1431, 1433, 1436, 1448, 1624.

* * * * *

Sections 123.13—123.18 also issued under 19 U.S.C. 1322;

* * * * *

2. It is proposed to amend § 123.14 by revising paragraph (c)(1) to read as follows:

§ 123.14 Entry of foreign-based trucks, busses and taxicabs in international traffic.

* * * * *

(c) * * *

(1) The vehicle may carry merchandise or passengers between points in the United States if such carriage is incidental to the immediately prior or subsequent engagement of that vehicle in international traffic. Any such carriage by the vehicle in the general direction of an export move or as part of the return of the vehicle to its base country shall be considered incidental to its engagement in international traffic.

* * * * *

3. It is proposed to amend § 123.16 by revising paragraph (b) to read as follows:

§ 123.16 Entry of returning trucks, busses, or taxicabs in international traffic.

* * * * *

(b) *Use in local traffic.* Trucks, busses, and taxicabs in use in international traffic, which may include the incidental carrying of merchandise or passengers for hire between points in a foreign country, or between points in this country, shall be admitted under this section. However, such vehicles taken abroad for commercial use between points in a foreign country, otherwise than in the course of their use in international traffic, shall be considered to have been exported and must be regularly entered on return.

Approved: March 31, 1998.

Samuel H. Banks,

Acting Commissioner of Customs.

John P. Simpson,

Deputy Assistant Secretary of the Treasury.

[FR Doc. 98–13217 Filed 5–18–98; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–209322–82]

RIN 1545–AU99

Return of Partnership Income; Hearing Cancellation

AGENCY: Internal Revenue Service, Treasury.

ACTION: Cancellation of notice of public hearing on proposed regulations.

SUMMARY: This document provides notice of cancellation of a public hearing on proposed regulations relating to partnership returns.

DATES: The public hearing originally scheduled for Tuesday, May 19, 1998, beginning at 10:00 a.m., is cancelled.

FOR FURTHER INFORMATION CONTACT: Mike Slaughter of the Regulations Unit, Assistant Chief Counsel (Corporate), 202) 622–7190 (not a toll-free number).

SUPPLEMENTARY INFORMATION: The subject of the public hearing is proposed regulations under section 6031 and 6063 of the Internal Revenue Code. A notice of proposed rulemaking and notice of public hearing appearing in the **Federal Register** on Monday, January 26, 1998 (63 FR 3677), announced that the public hearing would be held on Tuesday, May 19, 1998, beginning at 10:00 a.m., in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

The public hearing scheduled for Tuesday, May 19, 1998, is cancelled.

Michael L. Slaughter,

Acting Chief, Regulations Unit, Assistant Chief Counsel (Corporate).

[FR Doc. 98–13221 Filed 5–18–98; 8:45 am]

BILLING CODE 4830–01–U

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 20

RIN 2900–AJ15

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

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend the Rules of Practice of the Board of Veterans' Appeals (Board) to implement the provisions of section 1(b) of Pub. L.

105–111 (Nov. 21, 1997), which permits challenges to Board decisions on the grounds of ''clear and unmistakable error'' (CUE). The amendments would provide specific application procedures; establish decision standards based on case law; and eliminate as duplicative the Board Chairman's discretionary review under ''reconsideration'' on the basis of obvious error. These changes are necessary to implement the new statutory provisions, which permit a claimant to demand review by the Board to determine whether CUE exists in an appellate decision previously issued by the Board, with a right of review of such determinations by the U.S. Court of Veterans Appeals.

DATES: Comments must be received on or before July 20, 1998.

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. Comments should indicate that they are submitted in response to ''RIN 2900–AJ15.'' All written comments will be available for public inspection at the above address in the Office of Regulations Management, Room 1158, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays).

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

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

This document proposes to amend the Board's Rules of Practice to implement the provisions of section 1(b) of Pub. L. 105–111 (Nov. 21, 1997), which permits a claimant to demand review by the Board to determine whether ''clear and unmistakable error'' (CUE) exists in an appellate decision previously issued by the Board, with a right of review of such determinations by the U.S. Court of Veterans Appeals.

The VA Appeals Process in General

The Secretary of Veterans Affairs decides all questions of law and fact necessary to a decision under a law that affects the provision of benefits by the Secretary to veterans, or the dependents or survivors of veterans. 38 U.S.C. 511(a). The Secretary has delegated most of these decisions to ''agencies of original jurisdiction'' (AOJs), typically the 58 regional offices (ROs) maintained by the Department of Veterans Affairs (VA). See 38 CFR 2.6(b) (delegation to Under Secretary for Benefits).

Decisions under 38 U.S.C. 511(a) are subject to one review on appeal to the Secretary. 38 U.S.C. 7104(a). Final decisions on those appeals are made by the Board. *Id.* A decision by an AOJ that is not appealed within one year becomes final, and can be reopened only with ''new and material evidence.'' 38 U.S.C. 5108, 7105(c).

The appeals process begins when a claimant files a ''notice of disagreement,'' which must be filed within one year of the decision. 38 U.S.C. 7105 (a) and (b). The VA office that made the decision reviews the claim and, if benefits are not granted, provides the claimant with a ''statement of the case.'' *Id.* 7105(d)(1). The claimant then must file a formal appeal with the Board. *Id.* 7105(d)(3). The Board decides appeals on the entire record in the case. *Id.* 7104(a). The Board may make a final decision—allowing or denying the appeal—or may remand the matter to the AOJ for development of additional factual material. 38 CFR 19.9.

If an appellant does not agree with the Board's final decision, and the notice of disagreement in the case was filed on or after November 18, 1988, the appellant has 120 days to appeal the Board's decision to the U.S. Court of Veterans Appeals. 38 U.S.C. 7266(a); Pub. L. 100–687, Div. A, § 402, reprinted at 38 U.S.C. 7251 note. (As enacted, the Veterans' Judicial Review Act, which established the Court of Veterans Appeals, permitted judicial review of Board decisions only in cases in which a notice of disagreement was filed on or after the effective date of the Act, i.e., November 18, 1988.)

Other Remedies

Once a VA decision has become final—whether by completion or abandonment of the appeals process described above—there are, generally, three ways to revive the claim.

First, if a claimant submits new and material evidence, VA will reopen and reconsider the claim. 38 U.S.C. 5108. Such claims are subject to the full range of appellate procedures described above.

Second, if a claim decision is final because there was never a formal appeal filed with the Board, and the determination was made by an RO, a claimant may allege that the decision was the result of CUE. 38 CFR 3.105(a). Such claims are subject to the full range of appellate procedures described above. *Russell* v. *Principi,* 3 Vet. App. 310 (1992). However, prior to enactment of Pub. L. 105–111, a final unappealed RO decision that is subsequently reopened with new and material evidence and adjudicated on the merits by the Board could not later be the subject of a claim of CUE. *Donovan* v. *Gober,* 10 Vet. App. 404 (1997).

Finally, if there has been a final Board decision on a claim, an appellant may request that the Chairman of the Board order ''reconsideration'' under 38 U.S.C. 7103. If the Chairman orders reconsideration, the prior decision is vacated, and a panel of Board members makes a new decision based on the entire record. The panel decision is subject to appeal to the Court of Veterans Appeals only if the notice of disagreement filed in connection with the original matter was filed on or after November 18, 1988. The Chairman's decision not to grant reconsideration is not subject to appeal independently of the underlying Board decision. *Mayer* v. *Brown,* 37 F.3d 618, 620 & n.3 (Fed. Cir. 1994) (holding that there was no jurisdiction to review the Chairman's denial of a motion for reconsideration absent jurisdiction over the underlying Board decision, but reserving judgment on the issue of whether the Chairman's decision can ever be subject to judicial review).

Board decisions are not subject to a CUE challenge under 38 CFR 3.105(a). *Smith (William)* v. *Brown,* 35 F.3d 1516, 1521 (Fed. Cir. 1994). Further, unappealed RO decisions can be ''subsumed'' in subsequent Board decisions, so that the RO decisions are no longer subject to the review otherwise available under 38 CFR 3.105(a). *Donovan* v. *Gober,* 10 Vet. App. 404 (1997).

''Clear and Unmistakable Error''

The term ''clear and unmistakable error'' originated in veterans regulations some 70 years ago, *see generally Smith (William)* v. *Brown, 35 F.3d 1516, 1524–25 (Fed. Cir. 1994), and is now incorporated in VA regulations governing VA RO determinations. 38 CFR 3.105(a). The term has been interpreted by the Court of Veterans Appeals over the past several years.*

CUE is a very specific and rare kind of error. *Fugo* v. *Brown,* 6 Vet. App. 40, 43 (1993). It is the kind of error, of fact or of law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error. *Fugo,* 6 Vet. App. at 43.

A determination that there was CUE must be based on the record and the law

that existed at the time of the prior decision. *Russell* v. *Principi,* 3 Vet. App. 310, 314 (1992). Either the correct facts, as they were known at the time, were not before the adjudicator or the statutory or regulatory provisions extant at the time were incorrectly applied. *Russell,* 3 Vet. App at 313. With respect to Board decisions issued on or after July 21, 1992, the Court of Veterans Appeals has held that documents which were actually in VA's possession—even though not physically before the adjudicator—are constructively a part of the record. *Bell* v. *Derwinski,* 2 Vet. App. 611 (1992); *Damrel* v. *Brown,* 6 Vet. App. 242, 245–46 (1994).

In order for there to be a valid claim of CUE, there must have been an error in the prior adjudication of the appeal which, had it not been made, would have manifestly changed the outcome at the time it was made. *Russell,* 3 Vet. App. at 313. Thus, even where the premise of error is accepted, if it is not absolutely clear that a different result would have ensued, the error complained of cannot be clear and unmistakable. *Fugo,* 6 Vet. App. at 43–44.

A new medical diagnosis that ''corrects'' an earlier diagnosis ruled on by previous adjudicators is the kind of ''error'' that could not be considered an error in the original adjudication. *Russell,* 3 Vet. App. at 314. A claim of CUE that asserts no more than a disagreement as to how the facts were weighed or evaluated is insufficient. *Russell,* 3 Vet. App. at 313. Mere allegations of failure to follow regulations or failure to give due process, or any other general, non-specific claims of error, are insufficient to raise a claim of CUE. *Fugo,* 6 Vet. App. at 44. An allegation that the Secretary did not fulfill the duty to assist is insufficient to raise the issue of CUE. *E.g., Crippen* v. *Brown,* 9 Vet. App. 412, 418 (1996).

Once there is a final decision on the issue of CUE because the RO decision was not timely appealed, or because a Board decision not to revise or amend the original RO decision was not appealed, or because the Court of Veterans Appeals has rendered a decision on the issue in that particular case, that particular claim of CUE may not be raised again. *Russell,* 3 Vet. App. at 315.

The ''benefit of the doubt'' rule of 38 U.S.C. 5107(b) does not apply to determinations as to whether there was CUE. *Russell,* 3 Vet. App. at 314.

''Two Tracks'' for CUE Claims

The Court of Veterans Appeals has held that it has jurisdiction to review claims of CUE with respect to RO determinations based on the regulatory right assigned in 38 CFR 3.105(a). *Russell* v. *Principi,* 3 Vet. App. 310 (1992).

However, the CUE challenge available under 38 CFR 3.105(a) does not apply to Board decisions. *Smith (William)* v. *Brown,* 35 F.3d 1516, 1521 (Fed. Cir. 1994); *Wright* v. *Brown,* 9 Vet. App. 300, 303–04 (1996). Because an RO decision appealed to the Board is ''subsumed'' in a Board decision on the merits, such an RO decision would no longer be subject to a CUE challenge. *Donovan* v. *Gober,* 10 Vet. App. 404 (1997). The Court has held that even unappealed RO decisions are ''subsumed''—and thus not subject to CUE challenges—if such claims are later reopened and decided on the merits by the Board. *Chisem* v. *Gober,* 10 Vet. App. 526 (1997).

The Effect of the Legislation

Section 1(b) of Pub. L. 105–111 changed existing law by providing that a decision by the Board is subject to revision on the grounds of CUE. The statute provides that such review may be instituted by the Board on the Board's own motion or upon request of the claimant, and that such a request may be made at any time after the Board decision is made. The Board is to decide all such requests on the merits, without referral to any adjudicative or hearing official acting on behalf of the Secretary.

The statute also provides that, notwithstanding the notice of disagreement requirements for judicial review (described earlier in this document), judicial review is available with respect to any Board decision on a claim alleging that a previous determination of the Board was the product of CUE if that claim is filed after, or was pending before VA, the Court of Veterans Appeals, the Court of Appeals for the Federal Circuit, or the Supreme Court on the date of the enactment of the Act (November 21, 1997).

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

Implementing Regulations

The proposed regulations restate statutory provisions, restate legal standards reflecting court decisions, and establish procedures for requesting revision of a Board decision.

The proposed regulations would also eliminate the use of the Board's reconsideration process for challenges based on ''obvious error,'' 38 CFR 20.1000(a), while continuing that process based on (1) the discovery of new and material evidence in the form of relevant records or reports of the service department concerned, or (2) an allegation that an allowance of benefits by the Board has been materially influenced by false or fraudulent evidence submitted by or on behalf of the appellant. Since the ''obvious error of fact or law'' standard of current 38 CFR 20.1000(a) is the same standard as that of CUE, *Smith (William)* v. *Brown,* 35 F.3d 1516, 1526 (Fed. Cir. 1994), and since the new remedy under Pub. L. 105–111 provides for a Board decision and judicial review, there is no longer any need—particularly in light of the Board's limited resources—for what is a duplicative remedy.

Accordingly, the proposed regulations would amend 38 CFR 20.1000, relating to motions for reconsideration, by deleting paragraph (a), which provides that obvious error of fact or law is a basis for reconsideration. The proposed regulations would also amend 38 CFR 20.1001(a), relating to filing motions for reconsideration, to eliminate a reference to allegations of obvious errors of fact or law.

The proposed regulations would create a new subpart O in part 20 of title 38, Code of Federal Regulations, devoted specifically to revision of Board decisions on grounds of CUE.

Proposed Rule 1400 (38 CFR 20.1400) would begin the review process with a motion, either by a party to the decision being challenged or by the Board. In addition, because it would be inappropriate for an inferior tribunal to review the actions of a superior, *Smith (William)* v. *Brown,* 35 F.3d 1516, 1526 (Fed. Cir. 1994); *Duran* v. *Brown,* 7 Vet. App. 216, 224 (1994), the rule would provide that a Board decision on an issue decided by a court of competent jurisdiction on appeal is not subject to revision on the grounds of clear and unmistakable error.

Proposed Rule 1401 (38 CFR 20.1401) would define the terms ''issue'' and

''party'' for purposes of the proposed subpart. Generally, the term ''issue'' would be defined as a matter upon which the Board made a final decision (other than a decision under the proposed subpart) which was appealable under Chapter 72 of title 38, United States Code, or which would have been appealable if the Notice of Disagreement with respect to such matter had been received by the agency of original jurisdiction on or after November 18, 1988. The purposes of this definition are to clarify (1) that only final, outcome-determinative decisions of the Board are subject to revision on the grounds of CUE, so as to avoid, in the interests of judicial economy, atomization of Board decisions into myriad component parts; and (2) the scope of the finality referred to in proposed Rule 1409(c) (38 CFR 20.1409(c)), discussed later in this document. For example, since a Board remand is in the nature of a preliminary order and does not constitute a final Board decision, *Zevalkink* v. *Brown*, 6 Vet. App. 483, 488 (1994), *aff'd*, 102 F.3d 1236 (Fed. Cir. 1996), cert. denied, 117 S. Ct. 2478 (1997); 38 CFR 20.1100(b), it is not appealable under Chapter 72 of title 38, United States Code, and would not be subject to revision on the grounds of CUE. Similarly, since the jurisdiction of the Court of Veterans Appeals is limited to ''decisions'' of the Board, 38 U.S.C. 7252(a), individual findings of fact or conclusions of law, 38 U.S.C. 7104(d)(1), would not be subject to revision on the grounds of CUE except as part of such revision of the decision they support. At the same time, as discussed in connection with proposed Rule 1409 later in this document, once there is a final decision on a motion under this proposed subpart, the prior Board decision on the underlying ''issue'' would no longer be subject to revision on grounds of CUE.

Proposed Rule 1401 would also define ''party'' as any party to the Board proceeding that resulted in the final Board decision which is the subject of a motion under the proposed subpart. Because 38 U.S.C. 7111(c), as added by Pub. L. 105–111, limits the right to initiate CUE review to the Board and to claimants, the term would not include officials authorized to file administrative appeals pursuant to § 19.51 of this title.

Proposed Rule 1402 (38 CFR 20.1402) would clarify that motions under proposed subpart O are not appeals and, accordingly, not subject to the provisions of parts 19 and 20 of Chapter I, Title 38, Code of Federal Regulations, to the extent those provisions relate to the processing and disposition of appeals.

Proposed Rule 1403 (38 CFR 20.1403) would set forth the standards for what constitutes CUE, as well as the record to be reviewed. The various standards and the specific examples of situations that are not CUE are drawn directly from court opinions cited earlier in this document under the heading ''Clear and Unmistakable Error.'' In addition, the rule would provide that CUE does not include the otherwise correct application of a statute or regulation where, subsequent to the Board decision challenged, there has been a change in the interpretation of the statute or regulation. This latter provision is borrowed in part from 38 CFR 3.105, discussed earlier in this document, relating to CUE in RO decisions. An interpretation of a statute or regulation could, in light of future interpretations—whether by the General Counsel or a court—be viewed as erroneous. That would not, however, be the kind of error required for CUE, i.e., an error about which reasonable persons could not differ. See VAOPGCPREC 25–95, 61 FR 10,063, 10,065 (1996) (holding that the Board's application of a subsequently invalidated regulation in a decision does not constitute obvious error or provide a basis for reconsideration of the decision).

Proposed Rule 1404 (38 CFR 20.1404) would establish filing and pleading requirements for motions for revision of a Board decision based on CUE. The rule would require specific pleading of the error, and provide that motions which fail to do so would be denied, although motions that merely fail to identify the claimant, the Board decision challenged, or the issue(s) being challenged, or which are unsigned, would be dismissed without prejudice to a proper filing. The proposed rule would also provide that a request transmitted to the Board by the Secretary pursuant to 38 U.S.C. 7111(f) (generally relating to claims for CUE filed with the Secretary) would be treated as a motion filed under this rule.

Proposed Rule 1405 (38 CFR 20.1405) would provide that motions to revise Board decisions on the grounds of CUE would be docketed in the order received and be assigned in accordance with the appellate assignment procedures in 38 CFR 19.3. The proposed rule, following the current standards applicable to reconsideration decisions, would prohibit assignment of the motion to any Board member who participated in the decision which is the subject of the motion. 38 U.S.C. 7103(b)(2); 38 CFR 19.11(c). Since a CUE determination must be made on the facts before the Board at the time the original decision was made, the rule would also provide that no new evidence would be considered in connection with the motion (although material included on the basis of proposed Rule 1403(b)(2), discussed above, would not be considered new evidence) and that the Board may, for good cause shown, grant a request for a hearing for the purpose of argument only. Nevertheless, the proposed rule would permit the Board, subject to the limitation on new evidence, to use the various AOJs to ensure completeness of the record. The Board would also be permitted to seek the opinion of the General Counsel, with notice to the party to the decision and an opportunity to respond. In accordance with the specific requirements of the new statute, the rule would prohibit referral of the motion to the AOJ or any hearing officer acting on behalf of the Secretary for the purpose of making a decision. Finally, in order to facilitate judicial review, the rule would require decisions on these motions to include separately stated findings of fact and conclusions of law, and the reasons and bases for those findings and conclusions. Cf. 38 U.S.C. 7104(d); 38 CFR 19.7(b) (''reasons and bases'' requirement for appellate decisions).

Proposed Rule 1406 (38 CFR 20.1406), following the new statute, would provide that a decision of the Board that revises a prior Board decision on the grounds of CUE has the same effect as if the decision had been made on the date of the prior decision. The proposed rule would also provide that decisions that discontinue or reduce benefits would be subject to the laws and regulations governing such discontinuances or reductions based solely on administrative error or errors in judgment. See generally 38 U.S.C. 5112(b)(10) (reduction or discontinuance on such bases effective on the date of last payment).

Proposed Rule 1407 (38 CFR 20.1407) would provide special procedural rules in those cases where the Board, on its own motion, reviews a prior decision on the grounds of CUE. The rule would provide for notification to the party to the prior Board decision and that party's representative, with a period of 60 days to file a brief or argument. Nevertheless, failure of a party to so respond would not affect the finality of the Board's decision on the motion.

Proposed Rule 1408 (38 CFR 20.1408) would provide special rules in the case of challenges to Board decisions in simultaneously contested claims. See 38 U.S.C. 7105A. Generally, the rule would require notice to all parties to such

Board decisions, with limited time for non-moving parties to respond.

Proposed Rule 1409 (38 CFR 20.1409), in accordance with the discussion under ''Clear and Unmistakable Error'' earlier in this document, would provide that, once there is a final decision on a motion under the proposed subpart—whether initiated by a party or by the Board—with respect to a particular issue, the prior Board decision on that issue would no longer be subject to revision on the grounds of CUE and that subsequent motions on such decisions would be dismissed with prejudice. For example, if a party challenged a decision on service connection for failing to apply the proper diagnostic code in the Schedule for Rating Disabilities, 38 CFR part 4, and the Board denied the motion, a subsequent motion which alleged that the Board failed to apply the presumption of sound condition at the time of entry into service, 38 U.S.C. 1111, would be dismissed with prejudice. It would be clearly important that a moving party carefully determine all possible bases for CUE before he or she files a motion under the proposed subpart. Since the effect of a successful challenge is the same no matter when the motion is filed, i.e., the revision has the same effect as if the decision had been made on the date of the earlier decision, there is no particular filing date that must be observed in order to maximize potential benefits. At the same time, because, as the court has observed, CUE is a ''very specific and rare kind of error,'' *Fugo* v. *Brown,* 6 Vet. App. 40, 43 (1993), and because the availability of a CUE challenge does not mean that the issue may be ''endlessly reviewed,'' *Russell* v. *Principi,* 3 Vet. App. 310, 315 (1992) (en banc), we believe that one challenge per decision on an issue is justified not only as a proper statement of the law, but also as a rule serving the interests of judicial economy. The rule would also clarify that a dismissal without prejudice under proposed Rule 1404(a) or a referral to ensure completeness of the record under proposed Rule 1405(e) would not be a final decision of the Board.

Proposed Rule 1410 (38 CFR 20.1410) would provide that, if a Board decision is appealed to a court of competent jurisdiction, the Board will stay any consideration of a motion under this subpart with respect to that Board decision. Generally, once a case has been certified for appeal to the court on a particular issue, the Board no longer has jurisdiction. *Cerullo* v. *Derwinski,* 1 Vet. App. 195 (1991). Processing of the motion under proposed subpart O would continue upon conclusion of the court appeal or an appropriate order from the court.

Proposed Rule 1411 (38 CFR 20.1411) would set forth the relationship between motions under proposed subpart O and certain other statutes. First, in accordance with the discussion under ''Clear and Unmistakable Error'' earlier in this document, the rule would provide that the ''benefit of the doubt'' rule of 38 U.S.C. 5107(b) would not apply to determinations as to whether there was CUE. Second, because review under this proposed subpart is limited to the evidence of record at the time of the Board decision challenge, and because a motion under this subpart would be a collateral challenge to a Board decision rather than a ''claim'' for benefits, *cf. Duran* v. *Brown,* 7 Vet. App. 216, 223–24 (1994) (claim of CUE is a collateral attack on a prior final VA decision), the rule would also provide that a motion under this subpart is not a claim subject to reopening under 38 U.S.C. 5108 (relating to reopening claims on the grounds of new and material evidence). Third, because a motion under proposed subpart O is a statutory challenge to an otherwise final Board decision rather than an ''application for benefits,'' the rule would provide that the notification requirements in 38 U.S.C. 5103(a) (relating to applications for benefits) would not apply to such motions. Finally, because a motion would not be a claim for benefits, and because the notion of a ''well-grounded claim'' would be irrelevant to a motion under proposed subpart O, the rule would provide that the ''duty to assist'' requirements in 38 U.S.C. 5107(a) (relating to VA's duty following the filing of a well-grounded claim) would not apply to such motions.

Attorney Fees

The proposed regulations would also add a new paragraph (4) to Rule 609(c) (38 CFR 20.609(c), relating to payment of a representative's fees in connection with VA proceedings), which would provide that the term ''issue'' referred to in Rule 609(c) would have the same meaning as that term in proposed Rule 1401(a), discussed earlier in this document.

Generally, attorneys may charge a fee in connection with VA proceedings only if (1) there has been a final Board decision on the issue (or issues) involved; (2) the Notice of Disagreement (discussed earlier in this document) which preceded the Board decision with respect to the issue, or issues, involved was received on or after November 18, 1988; and (3) the attorney was retained within one year of the relevant Board decision. 38 U.S.C. 5904(c)(1); 38 CFR 20.609(c).

In the case of a motion under proposed subpart O, it is our view that the issue for purposes of Rule 609 is the issue associated with the Board decision which is being challenged in the motion under proposed subpart O. Accordingly, an attorney could charge a fee in connection with a motion under proposed subpart O if (1) the challenged Board decision was preceded by a notice of disagreement received by the AOJ on or after November 18, 1988, and (2) the attorney was retained not later than one year following the date of the challenged Board decision.

We note that proposed Rule 609(c)(4) would not affect the ability of an attorney to charge a fee in connection with proceedings before a court, because such charges are not subject to VA's jurisdiction.

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This rule would affect only the processing of claims by VA and would not affect small businesses. Therefore, pursuant to 5 U.S.C. 605(b), this proposed rule is exempt from the initial and final regulatory flexibility analyses requirements of sections 603 and 604.

List of Subjects in 38 CFR Part 19

Administrative practice and procedure, Claims, Veterans.

Approved: May 11, 1998.

Togo D. West, Jr.,

Secretary.

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

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

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

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

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

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

* * * * *

(c) * * *

(4) For the purposes of this section, in the case of a motion under Subpart O of this part (relating to requests for revision of prior Board decisions on the grounds of clear and unmistakable

error), the ''issue'' referred to in this paragraph (c) shall have the same meaning as ''issue'' in Rule 1401(a) (§ 20.1401(a) of this part).

* * * * *

§ 20.1000 [Amended]

3. In subpart K, § 20.1000 is amended by removing paragraph (a) and redesignating paragraphs (b) and (c) as (a) and (b), respectively.

§ 20.1001 [Amended]

4. In subpart K, § 20.1001(a), the second sentence is amended by removing ''alleged obvious error, or errors, of fact or law in the applicable decision, or decisions, of the Board or other appropriate''.

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

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

Sec.

20.1400 Rule 1400. Motions to revise Board decisions.
20.1401 Rule 1401. Definitions.
20.1402 Rule 1402. Inapplicability of other rules.
20.1403 Rule 1403. What constitutes clear and unmistakable error; what does not.
20.1404 Rule 1404. Filing and pleading requirements.
20.1405 Rule 1405. Disposition.
20.1406 Rule 1406. Effect of revision.
20.1407 Rule 1407. Motions by the Board.
20.1408 Rule 1408. Special rules for simultaneously contested claims.
20.1409 Rule 1409. Finality and appeal.
20.1410 Rule 1410. Stays pending court action.
20.1411 Rule 1411. Relationship to other statutes.

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

§ 20.1400 Rule 1400. Motions to revise Board decisions.

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

(b) A Board decision on an issue decided by a court of competent jurisdiction on appeal is not subject to revision on the grounds of clear and unmistakable error.

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

§ 20.1401 Rule 1401. Definitions.

(a) *Issue.* Unless otherwise specified, the term ''issue'' in this subpart means a matter upon which the Board made a final decision (other than a decision under this subpart) which was appealable under Chapter 72 of title 38, United States Code, or which would have been so appealable if the Notice of Disagreement with respect to such matter had been received by the agency of original jurisdiction on or after November 18, 1988.

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

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

§ 20.1402 Rule 1402. Inapplicability of other rules.

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

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

(a) *General.* Clear and unmistakable error is a very specific and rare kind of error. It is the kind of error, of fact or of law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error. Generally, either the correct facts, as they were known at the time, were not before the Board, or the statutory and regulatory provisions extant at the time were incorrectly applied.

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

(2) *Special rule for Board decisions issued on or after July 21, 1992.* For a Board decision issued on or after July 21, 1992, the record that existed when that decision was made includes relevant documents possessed by the Department of Veterans Affairs not later than 90 days before such record was transferred to the Board for review in reaching that decision, provided that the documents could reasonably be expected to be part of the record.

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

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

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

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

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

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

§ 20.1404 Rule 1404. Filing and pleading requirements.

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

(b) *Specific allegations required.* The motion must set forth clearly and specifically the alleged clear and unmistakable error, or errors, of fact or law in the Board decision, the legal or factual basis for such allegations, and why the result would have been manifestly different but for the alleged error. Non-specific allegations of failure to follow regulations or failure to give due process, or any other general, non-specific allegations of error, are insufficient to satisfy the requirement of the previous sentence. Motions which fail to comply with the requirements set forth in this paragraph shall be denied.

(c) *Filing.* A motion for revision of a decision based on clear and unmistakable error may be filed at any time. Such motions should be filed at the following address: Director, Administrative Service (014), Board of

Veterans' Appeals, 810 Vermont Avenue, NW, Washington, DC 20420.

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

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

§ 20.1405 Rule 1405. Disposition.

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

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

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

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

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

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

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

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

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

§ 20.1406 Rule 1406. Effect of revision

A decision of the Board that revises a prior Board decision on the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision. Revision of a prior Board decision under this subpart that results in the discontinuance or reduction of benefits is subject to laws and regulations governing the reduction or discontinuance of benefits by reason of erroneous award based solely on administrative error or errors in judgment.

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

§ 20.1407 Rule 1407. Motions by the Board

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

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

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

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

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

§ 20.1409 Rule 1409. Finality and appeal.

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

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

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

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

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

§ 20.1410 Rule 1410. Stays pending court action.

The Board will stay its consideration of a motion under this subpart upon receiving notice that the Board decision that is the subject of the motion has been appealed to a court of competent jurisdiction until the appeal has been concluded or the court has issued an order permitting, or directing, the Board to proceed with the motion.

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

§ 20.1411 Rule 1411. Relationship to other statutes.

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

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

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

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

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

[FR Doc. 98–13197 Filed 5–18–98; 8:45 am]
BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[IL169–1b; FRL–6012–8]

Approval and Promulgation of State Implementation Plan; Illinois

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve the March 5, 1998, Illinois State Implementation Plan (SIP) revision request containing amendments to volatile organic material emission control rules for wood furniture coating operations in the Chicago and Metro-East ozone nonattainment areas. In the final rules section of this **Federal Register**, the EPA is approving the State's requests as a direct final rule without prior proposal because EPA views this action as noncontroversial and anticipates no adverse comments. A detailed rationale for approving the State's request is set forth in the direct final rule. The direct final rule will become effective without further notice unless the Agency receives relevant adverse written comment on this proposed rule. Should the Agency receive such comment, it will publish a final rule informing the public that the direct final rule did not take effect and such public comment received will be addressed in a subsequent final rule based on this proposed rule. If no adverse written comments are received, the direct final rule will take effect on the date stated in that document and no further activity will be taken on this proposed rule. EPA does not plan to institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time.

DATES: Written comments on this proposed rule must be received on or before June 18, 1998.

ADDRESSES: Written comments should be mailed to: J. Elmer Bortzer, Chief, Regulation Development Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604.

Copies of the State submittal are available for inspection at: Regulation Development Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604.

FOR FURTHER INFORMATION CONTACT: Mark J. Palermo, Environmental Protection Specialist, Regulation Development Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6082.

SUPPLEMENTARY INFORMATION: For additional information see the direct final rule published in the final rules section of this **Federal Register**.

Dated: April 29, 1998.

Barry C. DeGraff,

Acting Regional Administrator.

[FR Doc. 98–13298 Filed 5–18–98; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[MI67–01–7275; FRL–6014–7]

Approval and Promulgation of Implementation Plans; Michigan

AGENCY: Environmental Protection Agency.

ACTION: Notice of proposed rulemaking.

SUMMARY: In this document, the Environmental Protection Agency (EPA) is proposing to correct the State Implementation Plan (SIP) for the State of Michigan regarding the State's emission limitations and prohibitions for air contaminant or water vapor, pursuant to section 110(k)(6) of the Clean Air Act, as amended in 1990.

In the final rules section of this **Federal Register**, the EPA is approving the State's request as a direct final rule without prior proposal because EPA views this action as noncontroversial and anticipates no adverse comments. A detailed rationale for approving the State's request is set forth in the direct final rule. The direct final rule will become effective without further notice unless the Agency receives relevant adverse written comment on this proposed rule within 30 days of this publication. Should the Agency receive such comment, it will publish a document informing the public that the direct final rule did not take effect and such public comment received will be addressed in a subsequent final rule based on this proposed rule. If no adverse comments are received, the direct final rule will take effect on the date stated in that document and no further activity will be taken on this proposed rule. USEPA does not plan to institute a second comment period on this action. Any parties interested in commenting on this document should do so at this time.

DATES: Comments on this proposed action must be received on or before June 18, 1998.

ADDRESSES: Written comments should be sent to: Carlton T. Nash, Chief, Regulation Development Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.

Copies of the documents relevant to this action are available for public inspection during normal business hours at the following address: United States Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. (Please telephone Victoria Hayden at (312) 886–4023 before visiting the Region 5 Office.)

FOR FURTHER INFORMATION CONTACT: Victoria Hayden, Regulation Development Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, Telephone Number (312) 886-4023.

SUPPLEMENTARY INFORMATION: See the information provided in the Direct Final rule of the same title which is located in the Rules Section of this **Federal Register**.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Reporting and recordkeeping.

Authority: 42 U.S.C. 7401–7671q.

Dated: May 7, 1998.

Robert Springer,

Acting Regional Administrator, Region 5.

[FR Doc. 98–13296 Filed 5–18–98; 8:45 am]
BILLING CODE 6560–50–P