Liberation and Protection of Albanian Lands (KKCMTSH), were determined by the Director of OFAC, under the delegated authority of the Secretary of the Treasury, to meet the criteria set forth under Section 1(a)(ii) of Executive Order 13219 for persons with respect to which transactions are subject to the economic sanctions set out under the Order. All property and interests in property, including but not limited to all accounts, that are or come within the United States or that are or come within the possession or control of U.S. persons, including their overseas branches, that are owned or controlled by these organizations are with limited exceptions blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in. This blocking includes, but is not limited to, the prohibition of the making or receiving by a United States person of any contribution or provision of funds, goods, or services to or for the benefit of these organizations.

Designations of these organizations blocked pursuant to the Order are effective upon the date of determination by the Director of OFAC. Public notice of blocking is effective upon the date of filing with the **Federal Register**, or upon prior actual notice.

Because this rule involves a foreign affairs function, Executive Order 12866 and the provisions of the Administrative Procedure Act (5 U.S.C. 553), requiring notice of proposed rulemaking, opportunity for public participation, and delay in effective date, are inapplicable. Because no notice of proposed rulemaking is required for this rule, the Regulatory Flexibility Act (5 U.S.C. 601–612) does not apply.

For the reasons set forth in the preamble, and under the authority of 3 U.S.C. 301, 50 U.S.C. 1601–1651, 50 U.S.C. 1701–1706, and E.O. 13219 of June 26, 2001, the appendices to 31 CFR chapter V are amended as set forth below:

Appendices to Chapter V

Appendix A—[Amended]

1. Appendix A to 31 CFR chapter V is amended by adding the following names of organizations inserted in alphabetical order:

AKSH (see ALBANIAN NATIONAL ARMY) [BALKANS]
ALBANIAN NATIONAL ARMY (a.k.a. ANA; a.k.a. AKSH) [BALKANS]
ANA (see ALBANIAN NATIONAL ARMY) [BALKANS]
KKCMTSH (see NATIONAL COMMITTEE FOR THE LIBERATION AND PROTECTION OF ALBANIAN LANDS) [BALKANS]
NATIONAL COMMITTEE FOR THE LIBERATION AND PROTECTION OF ALBANIAN LANDS (a.k.a. KKCMTSH) [BALKANS]

Dated: January 2, 2002.

R. Richard Newcomb,

Director, Office of Foreign Assets Control.

Approved: January 31, 2002.

Jimmy Gurulé,

Under Secretary (Enforcement), Department of the Treasury.

[FR Doc. 02–8358 Filed 4–2–02; 4:29 pm]

BILLING CODE 4810–25–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 20

RIN 2900–AL11

Board of Veterans' Appeals Rules of Practice: Claim for Death Benefits by Survivor

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the Department of Veterans Affairs' (VA) Rules of Practice at the Board of Veterans' Appeals (Board) to clarify that the general rule that the Board is not bound by prior dispositions during the veteran's lifetime of issues involved in the survivor's claim does not apply to claims for ''enhanced'' Dependency and Indemnity Compensation (DIC). This amendment is necessary to eliminate confusion between the Board's current rule and another rule relating to DIC for survivors of certain veterans rated totally disabled at the time of death.

DATES: Effective Date: May 6, 2002.

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

In a document published in the **Federal Register** on December 21, 2001 (66 FR 65861), VA proposed to amend the Board's practice rule concerning claims for death benefits by survivors of veterans. The Board's rule states that, with certain exceptions, issues involved in a survivor's claim for death benefits will be decided without regard to any prior disposition of those issues during the veteran's lifetime. We proposed to add an exception to clarify that this rule does not apply to claims for ''enhanced'' DIC under 38 U.S.C. 1311(a)(2).

This amendment is necessary to comply with the order of the United States Court of Appeals for the Federal Circuit in *National Organization of Veterans' Advocates, Inc.* v. *Secretary of Veterans Affairs*, 260 F.3d 1365 (Fed. Cir. 2001) (*NOVA*). In the case, the court noted that § 20.1106 was apparently inconsistent with another VA regulation, 38 CFR 3.22. The court ordered VA to issue regulations to either remove or explain the apparent inconsistency.

The public comment period ended on January 22, 2002. We received comments from three veterans service organizations. Two commenters submitted comments concerning both the proposed rule and a final rule published in the **Federal Register** of January 21, 2000 (65 FR 3388), revising the VA adjudication regulation at 38 CFR 3.22. Although any revision of § 3.22 would be beyond the scope of the proposed rule, we will address the comments concerning § 3.22 in this notice because the interpretation stated in § 3.22 is closely related to the proposed rule, as indicated in our December 2001 notice of proposed rule making (NPRM) and the Federal Circuit's *NOVA* decision.

Based on the rationale set forth in the proposed rule and in this document, we adopt the provisions of the proposed rule as a final rule.

Consistent Interpretation of 38 U.S.C. 1318(b) and 1311(a)(2)

In the *NOVA* decision, the Federal Circuit concluded that 38 CFR 3.22 and 38 CFR 20.1106 stated apparently inconsistent interpretations of virtually identical statutes codified at 38 U.S.C. 1318(b) and 38 U.S.C. 1311(a)(2), respectively. Both statutes authorize payment of certain DIC benefits to survivors of veterans who were, at the time of death ''entitled to receive'' disability compensation for a service-connected disability that was rated totally disabling for a specified number of years immediately preceding death. The court concluded that § 3.22 interprets 38 U.S.C. 1318(b) as providing that the question of whether the veteran was ''entitled to receive'' such benefits would be governed by VA decisions during the veteran's lifetime, except where such decisions are found to contain a clear and unmistakable error (CUE). The court concluded that § 20.1106 interprets 38 U.S.C. 1311(a)(2), as requiring VA to disregard all decisions during the veteran's lifetime. The court directed VA to conduct rulemaking to either revise one

of its regulations to harmonize its interpretation of the statutes or to explain the basis for the apparent inconsistency in its interpretation of those statutes.

One commenter asserts that VA has failed to explain why the current regulations, as construed by the court, are not correct, and has failed to explain why it is necessary to revise § 20.1106. This comment appears to suggest that VA should retain its current regulations despite the apparent inconsistency identified in the *NOVA* case. VA does not agree. As stated in our December 2001 NPRM, we believe that 38 U.S.C. 1318(b) and 1311(a)(2) must be construed in the same manner. As the Federal Circuit noted in *NOVA*, both statutes contain ''virtually identical language.'' The court further stated that it is a well-established rule of statutory construction that identical language in different parts of a statute is intended to have the same meaning, and that ''[t]hat rule applies with equal force where, as here, the words at issue are used in two different sections of a complex statutory scheme and those two sections serve the same purpose, namely, the award of DIC benefits to survivors.'' Further, as stated in our December 21, 2001 NPRM, the legislative history of section 1311(a)(2) makes clear that it was modeled on section 1318(b) and intended to have the same meaning. VA finds no basis for departing from the usual rule that identical statutory language must be given the same meaning. Accordingly, we make no change based on this comment.

Two of the commenters submitted comments concerning both the proposed rule and VA's January 2000 final rule amending 38 CFR 3.22. Because we have concluded that the governing statutes should be interpreted consistently, and because the commenters present the same comments with respect to both the December 2001 proposed rule and the January 2000 final rule, our response to each comment applies to both § 20.1106 and § 3.22, except as otherwise indicated below.

Effect of the NOVA Decision and the Chenery Doctrine on the Validity of 38 CFR 3.22

One commenter asserts that § 3.22 must be revised because the basis for that rule was held to be invalid by the Federal Circuit in the *NOVA* case. In *NOVA*, the Federal Circuit concluded that the language of 38 U.S.C. 1318 was ambiguous as to whether DIC could be awarded where a veteran was ''hypothetically'' entitled to total disability compensation for ten or more years preceding death even though the veteran could not have been actually entitled to such benefits. The commenter asserts that § 3.22 is based solely on a conclusion by VA that the language of 38 U.S.C. 1318 unambiguously prohibits DIC entitlement in such cases. Relying on the principle in *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80 (1943), that an agency action may be upheld solely on the basis stated by the agency, the commenter argues that § 3.22 is rendered invalid by the Federal Circuit's conclusion that 38 U.S.C. 1318(b) is ambiguous.

VA does not agree with this characterization of the basis for § 3.22. The January 2000 final rule notice did not conclude that the language of 38 U.S.C. 1318 unambiguously precludes DIC based on a veteran's ''hypothetical'' entitlement to the underlying benefits. Rather, we stated that the statute was ''most reasonably interpreted'' as prohibiting DIC on that basis. Our conclusion was based on an analysis of the language and legislative history of the statute and the broader context of related provisions of title 38, United States Code, rather than upon a conclusion that the statutory language alone compelled this result.

The statute authorizes payment of DIC in two circumstances: (1) Where a veteran was ''in receipt of'' compensation at the time of death for a service-connected disability that was rated totally disabling for ten years immediately preceding death or for five years from date of discharge to date of death, or (2) where the veteran was ''entitled to receive'' compensation at the time of death for such disability. In its January 2000 rule, VA concluded that the statute was unambiguous only with respect to the first of these bases. We stated that ''[t]he phrase 'in receipt of * * * compensation' unambiguously refers to cases where the veteran was, at the time of death, actually receiving compensation for service-connected disability rated totally disabling for the required period.'' 65 FR 3389.

With respect to the second basis of DIC entitlement under 38 U.S.C. 1318(b), we did not conclude that the statutory language was unambiguous. Instead, we merely stated that ''VA has concluded that the phrase ''entitled to receive * * * compensation'' is most reasonably interpreted as referring to cases where the veteran had established a legal right to receive compensation for the required period under the laws and regulations governing such entitlement, but was not actually receiving the compensation.'' 65 FR 3389. VA explained that this interpretation was based on analysis of the language and legislative history of 38 U.S.C. 1318(b) and the broader statutory context established by related provisions of title 38, United States Code. 65 FR 3389–91. Because our interpretation was not based on the premise that the language of 38 U.S.C. 1318(b) is unambiguous, our interpretation is not inconsistent with the NOVA decision.

VA further disagrees with the commenter's suggestion that the *Chenery* standard applies to interpretations such as that contained in § 3.22. In the *Chenery* case, the Supreme Court stated that ''a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.'' 332 U.S. at 196. This principle has been held inapplicable to interpretive rules ''because the question of interpretation of a federal statute is not 'a determination or judgment which an administrative agency alone is authorized to make.' '' *North Carolina Comm'n of Indian Affairs* v. *Secretary of Labor*, 725 F.2d 238, 240 (4th Cir.), *cert. denied*, 469 U.S. 828 (1984); *see also American Postal Workers Union, AFL–CIO* v. *United States Postal Serv.*, 707 F.2d 548, 561 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984) (''In contrast to agency decisions made pursuant to adjudication and legislative rulemaking, interpretative rules may be sustained on grounds other than those assigned by the agency''). In the *NOVA* decision, the Federal Circuit concluded that § 3.22 is an interpretive rule ''which does no more than interpret the requirements of section 1318.'' 260 F.3d at 1377. Accordingly, the *Chenery* standard does not govern review of the interpretation in § 3.22.

Statutory Basis of Clear and Unmistakable Error Requirement

One commenter asserts that VA's interpretation of 38 U.S.C. 1318(b) and 1311(a)(2) is inconsistent with the language of those statutes. Section 1318(b) authorizes payment of DIC to the survivor of a veteran who, at the time of death was ''in receipt of or entitled to receive (or but for the receipt of retired pay or retirement pay was entitled to receive) compensation at the time of death for a service-connected disability that either (1) was continuously rated totally disabling for a period of 10 or more years immediately preceding death; or (2) if so rated for a lesser period, was so rated continuously for a period of not less than 5 years from the date of such veteran's discharge or other release from

active duty.'' In similar fashion, section 1311(a)(2) provides that a person otherwise entitled to DIC may receive an additional monthly amount of DIC in cases where the veteran ''at the time of death was in receipt of or was entitled to receive (or but for the receipt of retired pay or retirement pay was entitled to receive) compensation for a service-connected disability that was rated totally disabling for a continuous period of at least eight years immediately preceding death.''

VA has interpreted the phrase ''entitled to receive'' to refer to circumstances where a veteran had established a legal right to receive compensation for a service-connected disability rated totally disabling for the specified number of years prior to death, but for some reason was not actually receiving compensation at the time of death. In 38 CFR 3.22(b), we identified seven circumstances in which this requirement would be satisfied. In six of those circumstances, the veteran would have received a total disability rating from VA during his or her lifetime and the rating would have been in effect for the specified number of years prior to death, but the veteran would not have received payment for one of the reasons identified in § 3.22(b). The seventh circumstance is where the veteran did not have a total service-connected disability rating for the specified number of years during his or her lifetime, but would have held a total disability rating for such period if not for clear and unmistakable error (CUE) in a VA decision during the veteran's lifetime. 38 CFR 3.22(b)(3).

The commenter asserts that § 3.22 is invalid because the language of 38 U.S.C. 1318(b) ''does not limit the survivor to only a CUE theory of recovery as the VA announces in its rulemaking''. This comment mischaracterizes the interpretation stated in § 3.22, which clearly provides that CUE is not the only means of establishing entitlement to DIC. As stated above, § 3.22(b) identifies several methods other than a showing of CUE whereby a claimant may establish entitlement to DIC under 38 U.S.C. 1318, where the veteran was not receiving compensation during his or her lifetime.

The commenter further asserts that ''[u]nder the plain language of the statute, a survivor is given the opportunity to show that the veteran would have been entitled to receive a different decision on a claim made during the veteran's lifetime.'' We understand this comment to allege that the plain language of 38 U.S.C. 1318(b) entitles a survivor to a de novo determination of a veteran's entitlement to benefits, without regard to whether there was CUE in a decision denying service connection or denying a total disability rating during the veteran's lifetime. VA does not agree. As this commenter noted in another comment, the Federal Circuit in its *NOVA* decision concluded that the language of 38 U.S.C. 1318(b) is ambiguous as to whether Congress intended to authorize DIC in cases where VA lacked authority to pay benefits to the veteran during his or her lifetime but a survivor alleges that the veteran was ''hypothetically'' entitled to have received certain benefits. *NOVA*, 260 F.3d at 1377.

One commenter asserts that VA has failed to explain the meaning of the language of 38 U.S.C. 1318(b). Another commenter states that ''[t]he natural reading of § 1318(b) is that a survivor is given the opportunity to demonstrate—under any potential legal or factual theory of entitlement—that the deceased veteran was entitled to a total rating for the 10 year period before death.'' Although the scope of this commenter's proposed interpretation of 38 U.S.C. 1318(b) is not clear, we infer that the commenter is advocating the same interpretation alleged by the petitioners in the *NOVA* case. In that case, the petitioners alleged that it was irrelevant whether the veteran was actually entitled to receive benefits for the specified period preceding death under the statutes and regulations defining VA's authority to pay such benefits. Rather, the petitioners asserted that even if the veteran had never filed a claim for VA benefits or if VA had denied a total disability rating to the veteran, a survivor could receive DIC under 38 U.S.C. 1318(b) by showing that the veteran was ''hypothetically'' entitled to a total disability rating for ten or more years prior to death.

In its January 2000 final-rule notice and its December 2001 NPRM, VA explained the bases for its conclusion that 38 U.S.C. 1318(b) and 1311(a)(2) authorize DIC only if the veteran's entitlement to benefits was established by ratings during the veteran's lifetime or is established by a finding that there was CUE in a decision during the veteran's lifetime that prevented the veteran from receiving total disability compensation for the specified period. The commenter has identified no error in the explanation stated in those notices. One commenter asserts that VA's interpretation is incorrect for the reason that 38 U.S.C. 1318(b) and 1311(a)(2) do not contain the terms ''clear and unmistakable error.'' However, the fact that the statutes do not expressly enumerate each circumstance that would satisfy the statute's requirements does not preclude VA from identifying those circumstances in its regulations interpreting those statutes. It is obvious that 38 U.S.C. 1318(b) and 1311(a)(2) do not expressly refer to CUE or to any of the other bases identified by VA as circumstances where a veteran may be considered to have been ''entitled to receive'' compensation. Because the statutory language is ambiguous, VA has reviewed the relevant statutory context and the legislative history and concluded that the statutes are most reasonably construed to require that the veteran's entitlement to benefits have been established under the statutes and regulations specifying VA's authority to pay benefits to veterans for any period. The bases for this conclusion, already stated in our January 2000 final-rule notice and our December 2001 NPRM, are summarized below.

38 U.S.C. 1318(b) requires not only that the veteran have been ''entitled to receive'' compensation at the time of death, but that the veteran have been entitled to receive such compensation for ''a service connected disability that was rated totally disabling for a continuous period of ten or more years immediately preceding death.'' 38 U.S.C. 1311(a)(2) contains a similar requirement, but specifies a period of eight, rather than ten years immediately preceding death. The requirement that the disability have been continuously ''rated'' totally disabling for a specified number of years prior to death suggests that Congress intended to authorize DIC in cases where the veteran had established entitlement to a total disability rating for such period, as distinguished from cases where a veteran theoretically could have established entitlement to a total rating for such period but had not done so. If Congress intended to permit DIC in cases where the veteran had not obtained a total disability rating, there would have been no reason for Congress to require that the disability have been ''rated'' totally disabling for a ''continuous period'' of ten or more years immediately preceding death. Rather, Congress could have achieved that objective more clearly by omitting the term ''rated'' and thereby authorizing DIC whenever the veteran's disability is shown to have been totally disabling for a specified period, irrespective of whether it had been rated as such. Because every term of a statute must be presumed to have meaning and effect, we conclude that the term ''rated'' reflects Congress' intent to authorize DIC only in cases where a

total disability rating was in effect for the specified period during the veteran's lifetime.

The requirements that the veteran have been ''entitled to receive'' disability compensation at the time of death and that the disability have been continuously ''rated'' totally disabling for a specified period are most reasonably construed in the connection with the statutory provisions in title 38, United States Code, prescribing the circumstances under which a veteran may be entitled to receive total disability compensation for any period. Inasmuch as Congress has established numerous specific provisions governing VA's authority to award such benefits for any period, it would be anomalous if the terms ''entitled to receive'' and ''rated'' in 38 U.S.C. 1318(b) and 1311(a)(2) were construed to refer to entitlement and ratings established by some other unspecified means outside the established statutory scheme.

Generally, if a veteran had not established entitlement to a total disability rating for the specified period during his or her lifetime, VA would be precluded from awarding a retroactive total-disability rating for such period posthumously. This is because VA benefits generally may be awarded only prospectively from the date on which VA receives a claim for such benefits and because final VA decisions denying service connection or awarding less than a total disability rating are generally final and not subject to retroactive correction. *See* 38 U.S.C. 5110, 7104(b), 7105(c); 38 CFR 3.104, 3.105. Accordingly, if ratings during the veteran's lifetime did not establish the veteran's entitlement to a total disability rating for the specified period prior to death, the veteran generally could not have been ''entitled to receive'' compensation at the time of death for a disability that was continuously ''rated totally disabling'' for such period.

A limited exception to this general rule applies where it is shown that a clear and unmistakable error was committed in VA decisions on a veteran's claim. Where such error is established, VA may correct the error and, as a matter of law, the decision correcting the error ''has the same effect as if the decision had been made on the date of the prior decision.'' 38 U.S.C. 5109A(b); 7111(b); 38 CFR 3.105(a). Pursuant to these statutes, a posthumous decision correcting CUE and assigning a total disability rating for a retroactive period of ten or more years prior to a veteran's death has precisely ''the same effect'' as if a decision during the veteran's lifetime had awarded a total disability rating for that period. In such cases, the veteran must be deemed, as a matter of law, to have been ''entitled to receive'' compensation at the time of death for a disability that was continuously ''rated totally disabling'' for the specified period.

This analysis of 38 U.S.C. 1318(b) and 38 U.S.C. 1311(a)(2) in relation to the surrounding statutory context points strongly in favor of the conclusion that the statute authorizes DIC only if the veteran's entitlement to a total disability rating for the specified period had been established during the veteran's lifetime or is established by posthumous correction of CUE. We note that the Federal Circuit expressed reservations about certain aspects of this analysis. In a footnote in the *NOVA* case, the court stated that reliance on the statutory requirement that the disability have been ''rated'' totally disabling for a specified number of years prior to death would ''logically also preclude the filing of a claim based on clear and unmistakable error in the initial rating decision.'' *NOVA*, 260 F.3d at 1377 n.12. In our view, however, according significance to the term ''rated'' would not preclude DIC in cases involving posthumous correction of CUE. By statute, a total disability rating assigned in the context of correcting a CUE must have the same effect as if the corrected decision had been issued on the date of the prior decision. 38 U.S.C. 5109A(b), 7111(b). In such cases, a veteran's disability must be deemed as a matter of law to have been ''rated'' totally disabling for the pre-death period covered by the corrected decision. In contrast, where a veteran had never claimed compensation or where VA denied a total rating and CUE is not shown, there would be no legal authority for concluding that the veteran's disability was ''rated'' totally disabling for the specified number of years prior to death. Accordingly, sections 1318(b) and 1311(a)(2) may be viewed as authorizing DIC in such cases only if the term ''rated'' is found to have no meaning and effect in the statute. Our interpretation comports with the statutory scheme for awarding veterans' benefits and is consistent with the well-established rule that a statute must be construed so that none of its terms or phrases is rendered meaningless. *See United States* v. *Menasche*, 348 U.S. 528, 538–39 (1955).

This contextual analysis of the statutes finds strong support in the legislative history of 38 U.S.C. 1318(b). The phrase ''entitled to receive'' was added to 38 U.S.C. 1318(b) in response to an opinion by VA's General Counsel concluding that a prior version of that statute precluded DIC awards in cases where the veteran did not have a total disability rating for ten years immediately preceding death, even though the veteran would have held a total disability rating for that period if not for CUE committed by VA. In amending the statute, Congress explained that its intent was ''to provide that the requirement that the veteran have been in receipt of compensation for a service-connected disability rated as total for a period of 10 years prior to death (or for 5 years continuously from the date of discharge) is met if the veteran would have been in receipt of such compensation for such period but for a clear and unmistakable error regarding the award of a total disability rating.'' Explanatory Statement of Compromise Agreement, 128 Cong. Rec. H7777 (1982), reprinted in 1982 U.S.C.C.A.N. 3012, 3013. Similarly specific statements appear in reports of the House and Senate Veterans Affairs Committees, and nothing in the legislative history suggests any different scope or purpose for this statutory language. Thus, Congress clearly intended to authorize DIC in cases where retroactive correction of CUE results in assignment of a total disability rating for the specified period preceding the veteran's death.

By clearly stating its intent that DIC may be awarded if there was CUE in the prior final decision that prevented the veteran from receiving total disability compensation for the specified period, Congress necessarily indicated that the prior decisions would remain final and controlling in the absence of CUE. The detailed discussion of CUE in the legislative history would have been unnecessary and illogical if Congress had intended VA to ignore any final decisions during the veteran's lifetime. Accordingly, the legislative history discussing CUE cases comports with our contextual analysis of 38 U.S.C. 1318(b) and 1311(a)(2).

We note further that Congress's stated purpose for providing DIC in cases of certain non-service-connected deaths was to ensure a level of income to survivors in circumstances where totally-disabled veterans and their families had depended on VA disability compensation for support during the veteran's lifetime. Prior to 1978, DIC was payable only for service-connected deaths. In 1978, Congress enacted Public Law 95–479 to permit DIC in cases where the death was not service connected but the veteran, at the time of death, was in receipt of compensation for a service-connected disability that was rated totally disabling for a continuous period of ten or more years immediately preceding death. The

Senate Committee on Veterans' Affairs explained the purpose of this legislation as follows:

> The appropriate Federal obligation to these survivors should, in the Committee's view, be the replacement of the support lost when the veteran dies. For example, assume that a veteran who is totally blind from service-connected causes dies at the age of 55 from a heart attack, having been so disabled from the age of 22—a period of 33 years. During that period, his wife and he depended upon his disability compensation for income support, but, because his death is not service connected, she would not receive DIC.

S. Rep. No. 1054, 95th Cong., 2nd Sess. 28 (1978), reprinted in, 1978 U.S.C.C.A.N. 3465, 3486. As explained above, Congress amended the statute in 1982 to include CUE cases. The 1982 amendment does not significantly undermine the general purpose to replace the benefit payments lost when a totally-disabled veteran dies, but recognizes a limited exception based on the concern that ''the existence of a clear and unmistakable error should not defeat entitlement to the survivors' benefits.'' S. Rep. No. 550, 97th Cong., 2d Sess., 35 (1982), reprinted in 1982 U.S.C.C.A.N. 2877, 2898. In contrast, the interpretation suggested by the commenter would significantly undermine the statute's purpose by extending benefits to survivors of veterans who had never even applied for VA disability compensation or who had been denied total disability compensation under circumstances not involving CUE.

For the foregoing reasons and the reasons stated in our January 2000 final-rule notice and our December 2001 notice of proposed rule making, we conclude that analysis of the language and history of 38 U.S.C. 1318(b) and 1311(a)(2), and consideration of the pertinent statutory context in title 38, United States Code, clearly establish that those statutes authorize DIC in cases where the veteran's entitlement to total disability compensation for the specified number of years prior to death was established by ratings during the veteran's lifetime or by correction of CUE in such decisions, which, by operation of statute, has the same effect as if the veteran's entitlement had been established by ratings during the veteran's lifetime.

Effect of Principle of Resolving Interpretive Doubt in Favor of Veterans

Two commenters assert that § 3.22 is invalid because VA's final-rule notice of January 2000 failed to consider the principle stated in *Brown* v. *Gardner,* 513 U.S. 115, 118 (1994), that ''interpretive doubt is to be resolved in the veteran's favor.'' For the reasons explained below, we do not believe that this principle requires any change in VA's interpretation of 38 U.S.C. 1318(b) and 1311(a)(2).

In the *NOVA* case, the Federal Circuit concluded that the text of 38 U.S.C. 1318(b) is ambiguous. However, the existence of textual ambiguity, alone, does not conclusively establish that there is ''interpretive doubt'', nor does it require reference solely to the principle stated in *Gardner* without consideration of other indicators of legislative intent. In interpreting any statute, ''[t]he goal is to identify ''that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law.' '' *Smith* v. *Brown,* 35 F.3d 1516, 1523 (Fed. Cir. 1994) (quoting *West Va. Univ. Hosps.* v. *Casey,* 499 U.S. 83, 100–01 (1991)). The process of identifying the meaning of any statute requires consideration of the statute's language, the context of the surrounding statutory scheme, and the history of the statutory language, in addition to canons of statutory construction such as that cited by the commenters. *Smith,* 35 F.3d at 1523–24. The Federal Circuit has explained the analysis as follows:

> We must first carefully investigate the matter to determine whether Congress's purpose and intent on the question at issue is judicially ascertainable. We do so by employing the traditional tools of statutory construction; we examine the statute's text, structure, and legislative history, and apply the relevant canons of interpretation. If we ascertain that Congress had an intention on the precise question at issue, that intention is the law and must be given effect, and the only issue is whether the agency acted in accordance with that intent.

Boyer v. *West,* 210 F.3d 1351, 1355 (Fed. Cir. 2000) (quoting *Delverde, SRL* v. *United States,* 202 F.3d 1360, 1363 (Fed. Cir. 2000)).

For the reasons explained previously, we conclude that the language, context, and legislative history of 38 U.S.C. 1318(b) and 38 U.S.C. 1311(a)(2), viewed together, clearly evince Congress's intent to authorize DIC in cases where the veteran's entitlement to total disability compensation for the specified number of years prior to death was established by ratings during the veteran's lifetime or by correction of CUE in such decisions. We have considered the principle that interpretive doubt should be resolved in favor of veterans. However, ''clear evidence of legislative intent prevails over other principles of statutory construction.'' *Johns-Manville Corp.* v. *United States,* 855 F.2d 1556, 1559 (Fed. Cir. 1988), *cert. denied,* 489 U.S. 1066 (1989); *see also National R.R. Passenger Corp.* v. *National Ass'n of R.R. Passengers,* 414 U.S. 453, 458 (1974) (''even the most basic principles of statutory construction must yield to clear contrary evidence of legislative intent.''); *Smith* v. *Brown,* 35 F.3d at 1526 (claimant ''cannot rely upon the generous spirit that suffuses the law generally to override the clear meaning of a particular provision''). Where congressional intent is clear from examination of the statutory language, context, and history, resort to canons of statutory construction is therefore unnecessary. *See Smith,* 35 F.3d at 1525–26. VA has concluded that the language, context, and history of 38 U.S.C. 1318(b) and 1311(a)(2) clearly establish Congress' intent that decisions during the veteran's lifetime will govern the issue of a survivor's entitlement to DIC unless it is shown that there was CUE in such decisions warranting retroactive assignment of a total disability rating for the specified period. Because we conclude that any textual ambiguity in section 1318(b) is resolved by the evidence of congressional intent provided by the legislative history and statutory context, there is no basis for applying the principle of resolving interpretive doubt in the veteran's favor.

Effect of Procedural and Substantive Requirements Governing CUE Claims

One commenter argues that § 3.22 is unreasonable to the extent it requires a showing of CUE in cases where the veteran's entitlement was not established during his or her lifetime, because the CUE requirement imposes ''virtually insurmountable barriers on establishing entitlement to DIC benefits under [38 U.S.C.] 1318(b). The specific ''barriers'' identified by the commenter are the following: (1) CUE requires a showing that either the correct facts as they were known at the time of the prior decision were not before the adjudicator or that statutory and regulatory provisions extant at that time were incorrectly applied; (2) CUE must be an outcome determinative error in the prior decision; (3) a determination of CUE must be based on the record and law existing at the time of the prior decision; and (4) CUE must be pleaded with ''some degree of specificity''. In claims where CUE is alleged in a prior final decision of the Board of Veterans' Appeals, the commenter cites the following additional concerns: (1) A claimant's right to retain paid counsel is limited by statute and regulation; (2) a CUE claimant may not submit additional evidence to show CUE; (3) personal hearings on CUE claims are authorized only for ''good cause'; (4) a

previously decided CUE claim may not be reopened based on new and material evidence; (5) the ''benefit of the doubt'' rule for weighing evidence does not apply to CUE claims; (6) the statutory requirement that VA notify claimants of the information and evidence necessary to substantiate a claim does not apply to CUE claims; and (7) once a claim of CUE in a decision has been finally decided, a claimant cannot thereafter raise a new CUE attack on the same decision.

The ''barriers'' identified by the commenter are substantive and procedural requirements applicable to all CUE claims, not just those pertinent to DIC claims under 38 U.S.C. 1318(b) and 1311(a)(2). These requirements derive from regulations and judicial precedents concerning CUE claims generally. Inasmuch as this comment argues that requirements relating to CUE claims should not be applied to claims under 38 U.S.C. 1318(b) and 1311(a)(2), it is essentially the same as the previously-addressed comment asserting that those statutes cannot reasonably be construed to require a showing of CUE in any circumstance. As explained above, VA does not agree. Having concluded that Congress intended to require a showing of CUE in cases where the veteran's entitlement was not established by ratings during his or her lifetime, we find no basis for concluding that persons seeking to show CUE for purposes of establishing DIC entitlement under 38 U.S.C 1318(b) or 1311(a)(2) are exempt from the generally applicable legal requirements governing all CUE claims, and the commenter has identified no basis for such a distinction.

The same commenter asserts that § 3.22 is invalid because VA has failed to consider whether it is reasonable to impose the procedural and substantive requirements associated with CUE claims upon individuals seeking DIC under 38 U.S.C. 1318(b). This comment provides no basis for changing VA's interpretation of 38 U.S.C. 1318(b) and 1311(a)(2). In interpreting those statutes, VA's role is limited to discerning the meaning of the statutes through analysis of their language, context, and history. VA may not alter the meaning of the statutes or ignore congressional intent based on an analysis as to whether a different course of action would be more reasonable. Such an analysis involves policy determinations that are inappropriate in the context of interpreting a federal statute. *See Splane* v. *Secretary of Veterans Affairs,* 216 F.3d 1058, 1063 (Fed. Cir. 2000).

The statement that the CUE requirements present ''virtually insurmountable barriers'' to DIC entitlement may be viewed as suggesting that VA's interpretation yields absurd results that Congress could not have intended. We do not agree that these requirements impose ''virtually insurmountable barriers'' to establishing DIC entitlement. Most of the procedural and substantive requirements identified by the commenter have been upheld by the Federal Circuit as reasonable requirements implementing the statutory provisions governing CUE claims. *See Disabled American Veterans* v. *Gober,* 234 F.3d 682 (Fed. Cir. 2000); *Yates* v. *West,* 213 F.3d 1372 (Fed. Cir. 2000); *Bustos* v. *West,* 179 F.3d 1378 (Fed. Cir. 1999). Although the standards for establishing CUE are generally more demanding than the standards for showing error in a direct appeal of a VA decision, they are not insurmountable. The United States Court of Appeals for Veterans Claims has noted the heightened standards reasonably reflect the fact that CUE involves a collateral attack on a final decision. *See Fugo* v. *Brown,* 6 Vet. App. 40, 44 (1993).

We note that the provisions in section 1318(b) permitting payment of DIC in cases involving posthumous correction of CUE were added in 1982 as a liberalizing change, which extended DIC to cases that were previously excluded from that statute. Prior to the 1982 amendment, the statute (then codified at 38 U.S.C. 410(b)) authorized DIC only if the veteran was actually ''in receipt of'' compensation at the time of death for a service-connected disability that was rated totally disabling for a continuous period of ten or more years immediately preceding death. As we previously stated, the purpose of that statute was to provide a source of income to survivors in circumstances where a totally-disabled veteran and his or her family had depended on VA disability compensation during the veteran's lifetime. In revising the statute, Congress clearly stated that its intent was to authorize payment of DIC in cases where a clear and unmistakable VA error was the only obstacle to the veteran's receipt of total disability compensation for the specified period. Thus, rather than imposing an impermissibly high burden on DIC claimants, the statutory language at issue actually extended DIC entitlement to individuals who were previously ineligible for such benefits.

Further, as we have previously stated, Congress' purpose in enacting section 1318(b) was to provide income to survivors to replace the VA disability compensation they depended on as a source of income during the veteran's lifetime. In 1982 Congress extended DIC to circumstances where CUE by VA deprived the veteran and his family of this income during his or her lifetime. We believe it was reasonable for Congress to provide DIC as a replacement for income that the veteran and his or her family received, or that VA incorrectly withheld, during the veteran's lifetime, without extending this benefit to the much broader class of circumstances suggested by the commenter.

There is nothing absurd or unfair in the requirement that the veteran's entitlement to a total disability rating be established in accordance with the statutes and regulations governing the award and duration of total disability ratings. Under this standard, the findings necessary to support an award of DIC under 38 U.S.C. 1318(b) are made by reference to an established factual record and the existing statutory scheme governing entitlement to veterans benefits. In contrast, the alternative suggested by the commenter—i.e., requiring VA to make a de novo determination after a veteran's death as to whether the veteran hypothetically could have received a total disability rating for ten or more years prior to death—would entail potentially difficult burdens in developing evidence concerning the nature and extent of a now-deceased veteran's disability over past periods. Moreover, such findings would necessarily require VA to ignore the statutes and regulations governing the effective dates of disability ratings, which limit VA's authority to assign retroactive disability ratings. There would likely be significant difficulty and uncertainty concerning the assignment of retroactive effective dates for such ratings in the absence of any applicable statutory or regulatory standard. It is reasonable to infer that Congress did not intend to adopt this burdensome and ill-defined standard, particularly since it would go well beyond Congress's stated purpose of providing for DIC in cases where the veteran would have met the statutory criteria but for a CUE committed by VA.

Effect of VA Statutes and Regulations Governing Finality of Decisions, Notice of Decisions, and Procedural Rights of Claimants

Our January 2000 final rule and our December 2001 NPRM stated that final rating decisions issued during a veteran's lifetime will be binding for purposes of determining a survivor's right to enhanced DIC benefits under 38 U.S.C. 1318(b) and 1311(a)(2) unless it is shown that there was CUE in such decisions. One commenter asserts that decisions rendered on a veteran's claim

cannot be considered final and binding with respect to the claimant's survivors, because the survivors were not parties to the veteran's claim. The commenter relies on the following statutes and regulations: 38 U.S.C. 5101, 5104, 5108, 7104(b), and 7105(b)(1) and (c); 38 CFR 3.1(q), 3.103(b) and (f), 3.151, 3.152, 19.25, 19.29(b), 20.3(c), (f), and (g), 20.201, and 20.1103. In general, those provisions require that VA decide ''claims'' presented by a ''claimant'; that VA provide the claimant with notice of its decision and notice of the right to appeal; that if a claimant files an appeal, VA ordinarily must provide a statement of the case to the claimant; and that the Board of Veterans' Appeals must decide all appealed claims. Pursuant to 38 U.S.C. 7105(c) and 38 CFR 20.1103, if a claimant does not timely appeal a regional office decision, the decision is considered final.

The commenter states that ''[a]lthough a survivor's DIC claim under 1311(a) or 1318(b) may be, in some respects, factually derivative of the veteran's prior claim, [the survivor's claim] cannot by definition be considered final until its merits have been decided by VA.'' We believe this comment confuses the procedural issue of a survivor's right to a decision on his or her DIC claim with the substantive issue of what facts the survivor must establish to demonstrate entitlement to DIC. With respect to the first issue, a DIC claim filed by a survivor under 38 U.S.C. 1318(b) or 1311(a)(2) will be adjudicated by VA in accordance with the statutory and regulatory provisions cited by the commenter. The survivor will be notified of VA's decision on the DIC claim and will be notified of the right to appeal that decision. A decision concerning the survivor's claim for DIC benefits will not be considered final until VA has notified the claimant of that decision and either the appeal period has expired or a final decision on any appeal has been rendered. Accordingly, contrary to the commenter's assertion, nothing in our interpretation of the statutes operates to deny a DIC claimant the procedural rights accorded by statute and regulation.

With respect to the second issue, 38 U.S.C. 1318(b) and 1311(a)(2) require, as a condition of entitlement to DIC, a showing that the veteran was in receipt of or entitled to receive compensation for a service-connected disability that was continuously rated totally disabling for a specified number of years prior to the veteran's death. As previously explained, these statutes are most reasonably interpreted as providing that VA decisions during the veteran's lifetime govern that factual issue unless CUE is shown. The procedural statutes and regulations cited by the commenter do not alter our interpretation.

The commenter asserts that the procedural statutes and regulations governing decisions and notice do not provide that decisions during a veteran's lifetime will be binding on the veteran's survivors. We agree, and we note that 38 CFR 20.1106 states that decisions during a veteran's lifetime generally do not govern a survivor's claim for death benefits. However, 38 U.S.C. 1318(b) and 1311(a)(2) themselves clearly require that decisions during a veteran's lifetime will govern for the specific purpose of determining a survivor's entitlement to DIC under those two statutes, because the survivor's entitlement is predicated on extent and duration of ratings assigned during the veteran's lifetime or those that would have been assigned absent CUE. The clearly expressed legislative intent in section 1318(b) and 1311(a)(2) governs our interpretation of those statutes and overrides any contrary inference based on the statutory and regulatory provisions of a more general nature cited by the commenter.

To the extent the commenter suggests that the cited procedural statutes and regulations prohibit our interpretation of 38 U.S.C. 1318(b) and 1311(a)(2), we disagree. In enacting statutes providing benefits to veterans and their survivors, Congress has broad authority to prescribe the circumstances under which such benefits may be paid. *See Atkins* v. *Parker,* 472 U.S. 115, 129 (1984) (Congress has ''plenary power to define the scopes and duration of the entitlement to * * * benefits, and to increase, decrease, or terminate those benefits based on its appraisal of the relative importance of the recipients' needs and the resources available to fund the program''). Congress could, as it did prior to 1982, limit DIC to cases where the veteran had actually received compensation for total service-connected disability for ten or more years prior to death. Similarly, Congress may extend DIC benefits to cases where the veteran's disability had been rated totally disabling for ten or more years prior to death or would have been so rated if not for CUE by VA, as the statutes now provide. Nothing in the procedural statutes or regulations cited by the commenter imposes any limitation on Congress' authority to prescribe the circumstances under which DIC may be paid to a veteran's survivor. Accordingly, we do not believe that any change in our interpretation is warranted by this comment.

Effect of Principles of Collateral Estoppel

One commenter asserts that requiring DIC claimants to show CUE in cases where the veteran's entitlement to the required benefits was not established by ratings during the veteran's lifetime is contrary to judicial principles of collateral estoppel. Collateral estoppel, also known as issue preclusion, is a judicially-developed doctrine providing that ''[w]hen an issue of fact or law is actually litigated and determined by a valid final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.'' Restatement (Second) of Judgments § 27 (1982). The commenter asserts that decisions during the veteran's lifetime cannot be considered controlling in a survivor's claim for DIC because the survivor was not a party to the prior decision.

For the same reasons expressed in response to the previous comment, we conclude that this comment provides no basis for changing our interpretation. In 38 U.S.C. 1318(b) and 1311(a)(2), Congress has provided that decisions during a veteran's lifetime will govern a survivor's entitlement to DIC under those statutes unless CUE is shown. This requirement is imposed by 38 U.S.C. 1318(b) and 1311(a)(2) themselves. Nothing in the judicial doctrine of collateral estoppel imposes a limit on Congress's authority to define the scope of any benefit it provides or to condition DIC entitlement on a showing that the veteran had received a total disability rating for the specified period or would have obtained such a rating if not for CUE in a VA rating decision. *See Mathews* v. *DeCastro,* 429 U.S. 181, 185 (1976) (''Governmental decisions to spend money to improve the public welfare in one way and not another are 'not confided to the courts. The discretion belongs to Congress unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.' '') (quoting *Helvering* v. *Davis,* 301 U.S. 619, 640 (1937)). Accordingly, we will make no change based on this comment.

Alleged Change in VA's Interpretation of 38 U.S.C. 1311(a)(2)

One commenter states that the proposed rule is arbitrary and capricious and an abuse of VA's discretion because it conflicts with our prior interpretation of 38 U.S.C. 1311(a)(2) as identified by the Federal

Circuit in the *NOVA* case. VA does not agree. In *NOVA,* the Federal Circuit concluded that VA has authority to revise its interpretive rules, even where such rules have previously been relied on and interpreted by a court. 260 F.3d at 1373–74. Further the court's remand order expressly stated that VA may revise one of its interpretive rules. The commenter's assertion that the proposed rule is inconsistent with VA's prior interpretation of 38 U.S.C. 1311(a)(2) does not, in itself, establish any error in the proposed rule.

The same commenter also takes issue with the statement in the December 2001 NPRM that the proposed rule does not constitute a change in VA's interpretation of 38 U.S.C. 1311(a)(2). The commenter asserts that this statement is inconsistent with the language of § 20.1106 and the Federal Circuit's decisions interpreting that regulation. This comment provides no basis for changing the proposed rule, because, as noted above, VA has authority to revise its interpretation of section 1311(a)(2) regardless of whether the revision constitutes a change in interpretation or merely a clarification of VA's prior interpretation. Nevertheless, we reiterate that proposed rule does not change the manner in which VA has interpreted and applied 38 U.S.C. 1311(a)(2). In the *NOVA* case and in an earlier decision in *Hix* v. *Gober,* 225 F.3d 1377 (Fed. Cir. 2000), the Federal Circuit concluded that § 20.1106 interprets 38 U.S.C. 1311(a)(2) in a manner that prohibits consideration of decisions rendered during a veteran's lifetime. This conclusion was based on the fact that § 20.1106 states that, except with respect to claims under 38 U.S.C. 1318 and certain other claims, VA will decide issues involved in a survivor's claim for death benefits without regard to any prior disposition of those issues during the veteran's lifetime. Because this regulation states an exception for claims under section 1318 but not for claims under section 1311(a)(2), the Federal Circuit concluded that it represents a determination by VA that decisions during a veteran's lifetime must be ignored in claims under section 1311(a)(2). VA concedes that this is a reasonable reading of the language in § 20.1106. However, as explained in the NPRM, the language of § 20.1106 was not based on any such determination by VA and does not accurately reflect VA's interpretation of 38 U.S.C. 1311(a)(2).

As we explained in the NPRM, VA issued § 20.1106 for the express purpose of allowing the Board ''to review 'de novo' service connection cause of death cases.'' 45 FR 56093 (1980). That regulation was intended to apply only in cases where entitlement to DIC was dependent on a finding that the condition causing the veteran's death resulted from service. It was not intended to apply to claims, such as those under 38 U.S.C. 1318(b) or 1311(a)(2), where entitlement to DIC is dependent on the veteran having been in receipt of or entitled to receive certain benefits for a specified period during the veteran's lifetime. In 1992, VA amended § 20.1106 to expressly state that that rule did not apply to claims under 38 U.S.C. 1318(b). Congress enacted 38 U.S.C. 1311(a)(2) several months after VA amended that regulation. If VA had again amended § 20.1106 to include express reference to section 1311(a)(2), the apparent inconsistency identified in the *NOVA* decision would have been avoided. However, as stated in the NPRM, VA's failure to issue a further amendment following the enactment of 38 U.S.C. 1311(a)(2) was a matter of inadvertence rather than a product of a VA determination that section 1311(a)(2) permits or requires VA to ignore decisions rendered during a veteran's lifetime.

In similar fashion, the same commenter asserts that the NPRM ''pretends that the Federal Circuit did not interpret [section] 20.1106 to allow for 'hypothetical determinations.' For the reasons stated above, we conclude that this comment is incorrect and, in any event, would provide no basis for changing the proposed rule even if it were correct. In the NPRM, we stated that ''[t]he *NOVA* court concluded that 38 CFR 20.1106 interprets * * * 38 U.S.C. 1311(a)(2) to require a posthumous determination of the veteran's 'entitlement' to compensation without regard to whether VA rating decisions during the veteran's lifetime established such entitlement.'' We acknowledge that the Federal Circuit interpreted § 20.1106 to permit DIC under 38 U.S.C. 1311(a)(2) based on a veteran's ''hypothetical'' entitlement to compensation. As explained in the NPRM, however, we are revising § 20.1106 because the Federal Circuit's determination is inconsistent with VA's intent in issuing § 20.1106 and does not actually reflect VA's interpretation of 38 U.S.C. 1311(a)(2).

Compliance with NOVA Order

One commenter asserts that VA has failed to comply with the Federal Circuit's remand order in the *NOVA* case. The commenter states that the Federal Circuit ordered VA to ''provide a reasonable explanation for its decision to interpret sections 1311 and 1318 in different ways''. The commenter further states that ''[w]hile it is true that the Federal Circuit's remand gave the Agency the opportunity to revise 38 CFR 20.1106 to be consistent with the revised version of 38 CFR 3.22, the Agency's Public Notice fails to explain why the amendment to 20.1106 is necessary.'' We disagree with this comment.

In the *NOVA* case, the Federal Circuit directed VA to conduct expedited rule making either to provide a reasonable explanation for the decision to interpret 38 U.S.C. 1311 and 1318 in different ways, or to revise § 3.22 to harmonize it with § 20.1106, or to revise § 20.1106 to harmonize it with § 3.22. As stated in the NPRM, VA chose the latter of those three options. Having decided to revise § 20.1106, VA was not obligated by the *NOVA* order to provide an explanation for any decision to interpret sections 1311 and 1318 in different ways. Indeed, as previously stated in the NPRM and this document, VA has concluded that those statutes must be interpreted in the same manner.

The December 2001 NPRM and this document clearly explain why revision of § 20.1106 is necessary. Briefly stated, we have concluded that revision of § 20.1106 is necessary because 38 U.S.C. 1311 and 1318 must be construed in the same manner, because the Federal Circuit has concluded that § 3.22 and § 20.1106 currently do not interpret those statutes in the same manner, and because VA has concluded that the Federal Circuit's interpretation of § 20.1106 is inconsistent with our intent in issuing that regulation and is inconsistent with our interpretation of 38 U.S.C. 1311(a)(2).

Suggestion That VA Seek Clarification From Congress

One commenter recommends that VA seek clarification from Congress concerning its intent in enacting 38 U.S.C. 1318(b) and 1311(a)(2). For the reasons stated in the January 2000 final rule, the December 2001 NPRM, and this notice, we conclude that the meaning of those statutes is clear from examination of the language and history of the statutes and their context in the statutory scheme established by Congress. Accordingly, we find no basis for the extraordinary step of asking Congress to clarify its intent in enacting the statutes at issue.

Revision of 38 CFR Part 3

One commenter recommends that we move the provisions of 38 CFR 20.1106 to 38 CFR part 3, or that we add a new provision to part 3 containing provisions similar to those in § 20.1106. We make no change to the proposed

rule based on this comment, although we will consider issuing additional rules in the future consistent with this comment.

Section 20.1106 is located in subpart L of part 20 of title 38, Code of Federal Regulations. Part 20 of title 38 contains the Rules of Practice of the Board of Veterans' Appeals. Subpart L of part 20 contains the Board's rules concerning the finality of decisions of the Board and VA regional offices. Section 20.1106 provides that, with certain exceptions, issues involved in a survivor's claim for death benefits will be decided without regard to any prior disposition of those issues during the veteran's lifetime. This rule has been stated in the Board's rules of practice since 1980. In 1992, we amended the rule to clarify that it did not apply to claims under 38 U.S.C. 1318. This final rule will further amend § 20.1106 to clarify that the rule does not apply to claims under 38 U.S.C. 1311

Part 3 of title 38, Code of Federal Regulations, contains substantive and procedural rules governing adjudication of claims for disability compensation, pension, DIC and other benefits. Part 3 includes 38 CFR 3.22, which states VA's interpretation of 38 U.S.C. 1318, and 38 CFR 3.5(e), which essentially reiterates the statutory provisions of 38 U.S.C. 1311(a)(2) without elaboration. However, part 3 does not include a rule stating the principle in § 20.1106 that, except in cases under 38 U.S.C. 1311 and 1318 and certain other statutes, issues in DIC claims generally will be decided without regard to any prior disposition of such issues during the veteran's lifetime.

The commenter states that the principle stated in § 1106 would apply to all VA decisions on DIC claims, whether such decisions are made by the Board or by a VA regional office. Accordingly, the commenter asserts that those principles should be stated in part 3.

VA agrees that the principle stated in § 20.1106 applies to DIC claims before either a VA regional office or the Board. The principles stated in § 20.1106 reflect VA's interpretation of the statutory provisions applicable to DIC claims before both VA regional offices and the Board. VA has consistently applied that interpretation to DIC claims decided at both regional-office and Board levels, and will continue to do so. However, we will make no change to the proposed rule based on this comment.

In the *NOVA* case, the Federal Circuit concluded that there was an apparent conflict between 38 CFR 3.22 and 38 CFR 20.1106. The court directed VA to conduct expedited rule making to revise either of those regulations or to explain the basis for the apparent inconsistency. The court further directed VA to stay all proceedings involving claims under 38 U.S.C. 1318 pending the completion of such rule making. As stated in our December 2001 NPRM, VA concluded that it was necessary to revise § 20.1106 to remove the apparent inconsistency cited by the court.

In view of the time limit imposed by the court for completing rule making and the fact that DIC claims have been stayed until this rule making is completed, we limited our proposed rule to addressing the apparent inconsistency identified by the Federal Circuit and did not propose additional changes to part 3, such as those recommended by the commenter. We believe it is appropriate to retain the Board's longstanding rule of practice in subpart L of part 20 of title 38, Code of Federal Regulations, because that rule pertains to subject matter addressed by that subpart.

Nevertheless, we understand the commenter's concern that it would be logical to include a provision similar to § 20.1106 in part 3 of title 38 of the CFR, to make clear that the same principles apply to claims before VA regional offices. We will make no change to part 3 in this final rule, because any such change would be beyond the scope of the proposed rule. However, we will consider whether to issue additional rules in the future consistent with this comment.

Unfunded Mandates

The Unfunded Mandates Reform Act 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, or tribal governments, in the aggregate, or by the private sector of $100 million or more in any given year. This rule would have no consequential effect on State, local, or tribal governments.

Paperwork Reduction Act

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

Executive Order 12866

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

Regulatory Flexibility Act

The Secretary hereby certifies that this final 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, inasmuch as this final rule applies to individual claimants for veterans' benefits and does not affect such entities. Therefore, pursuant to 5 U.S.C. 605(b), this final rule is exempt from the initial and final regulatory flexibility analyses requirement of sections 603 and 604.

There is no Catalog of Federal Domestic Assistance number for this final rule.

List of Subjects in 38 CFR Part 20

Administrative practice and procedure, Claims, Veterans.

Approved: March 29, 2002.

Anthony J. Principi,

Secretary of Veterans Affairs.

For the reasons set out in the preamble, 38 CFR part 20 is amended as follows:

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) and as noted in specific sections.

2. Section 20.1106 is revised to read as follows:

§ 20.1106 Rule 1106. Claim for death benefits by survivor-prior unfavorable decisions during veteran's lifetime.

Except with respect to benefits under the provisions of 38 U.S.C. 1311(a)(2), 1318, and certain cases involving individuals whose Department of Veterans Affairs benefits have been forfeited for treason or for subversive activities under the provisions of 38 U.S.C. 6104 and 6105, issues involved in a survivor's claim for death benefits will be decided without regard to any prior disposition of those issues during the veteran's lifetime.

(Authority: 38 U.S.C. 7104(b))

[FR Doc. 02–8201 Filed 4–4–02; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[FRL–7155–9]

National Emission Standards for Hazardous Air Pollutants: Solvent Extraction for Vegetable Oil Production

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule; amendments.