servicing of guaranteed and insured loans and loans sold under 38 CFR 36.4600, the holder has the primary servicing responsibility. However, VA has the responsibility to see that the servicing efforts of holders are consistent with VA policies and guidelines. In those cases in which early payment of the delinquency appears unlikely, supplemental servicing by VA will be conducted to determine whether the holder may have overlooked any relief measures. Since there are ordinarily financial losses to both the borrower and the Government resulting from the foreclosure of a guaranteed loan, supplemental servicing can protect the interest of each by assuring that appropriate relief is extended to those borrowers whose loans can be reinstated within a reasonable period of time. VA Loan Service Representatives complete VA Form 26–6808 during the course of personal contacts with delinquent obligors. The information acquired may form the basis of VA's intercession with the holder for the acceptance of specially arranged repayment plans or other forbearance aimed at assisting the obligor in retaining his or her home.

Affected Public: Individuals or households.

Estimated Annual Burden: 16,667 hours.

Estimated Average Burden Per Respondent: 25 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 40,000.

Dated: April 22, 2004.

By direction of the Secretary:

Loise Russell,

Director, Records Management Service.

[FR Doc. 04–10136 Filed 5–4–04; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0546]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: National Cemetery Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The National Cemetery Administration (NCA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to determine gravesite availability.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before July 6, 2004.

ADDRESSES: Submit written comments on the collection of information to Mechelle Powell, National Cemetery Administration (41D1), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail *mechelle.powell@mail.va.gov.* Please refer to ''OMB Control No. 2900–0546'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Mechelle Powell at (202) 273–5181 or FAX (202) 273–6695.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–21), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, NCA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of NCA's functions, including whether the information will have practical utility; (2) the accuracy of NCA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Gravesite Reservation Survey (2 Year), VA Form 40–40.

OMB Control Number: 2900–0546.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form Letter 40–40 is sent biennially to individuals holding gravesite set-asides to ascertain their wish to retain their set-aside, or relinquish it. Gravesite reservation surveys are necessary as some holders become ineligible, are buried elsewhere, or simply wish to cancel a gravesite set-aside for them. The survey is conducted to assure that gravesite set-asides do not go unused.

Affected Public: Individuals or households; Business or other for-profit.

Estimated Annual Burden: 3,000.

Estimated Average Burden Per Respondent: 10 minutes.

Frequency of Response: Biennially.

Estimated Number of Respondents: 18,000.

Dated: April 21, 2004.

By direction of the Secretary.

Loise Russell,

Director, Records Management Service.

[FR Doc. 04–10137 Filed 5–4–04; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Summary of Precedent Opinions of the General Counsel

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Department of Veterans Affairs (VA) is publishing a summary of legal interpretations issued by the Department's Office of General Counsel involving veterans' benefits under laws administered by VA. These interpretations are considered precedential by VA and will be followed by VA officials and employees in future claim matters. They are being published to provide the public, and, in particular, veterans' benefit claimants and their representatives, with notice of VA's interpretations regarding the legal matters at issue.

FOR FURTHER INFORMATION CONTACT: Susan P. Sokoll, Law Librarian, Department of Veterans Affairs (026H), 810 Vermont Ave., NW, Washington, DC 20420. (202) 273–6558.

SUPPLEMENTARY INFORMATION: VA regulations at 38 CFR 2.6(e)(8) and 14.507 authorize the Department's Office of General Counsel to issue written legal opinions having precedential effect in adjudications and appeals involving veterans' benefits under the laws administered by VA. The General Counsel's interpretations on legal matters, contained in such opinions, are conclusive as to all VA officials and employees not only in the matter at issue but also in future adjudications and appeals, in the absence of a change in controlling statute or regulation or a superseding written legal opinion of the General Counsel.

VA publishes summaries of such opinions in order to provide the public with notice of those interpretations of the General Counsel, which must be, followed in future benefit matters and to

assist veterans' benefit claimants and their representatives in the prosecution of benefit claims. The full text of such opinions, with personal identifiers deleted, may be obtained by contacting the VA official named above or by accessing them on the Internet at *http://www1.va.gov/OGC/*.

VAOPGCPREC 11–2001

Question Presented

When a veteran is ineligible for burial in a national cemetery by operation of 38 U.S.C. 2411, may a headstone or marker or a memorial headstone or marker be provided under 38 U.S.C. 2306(a) or (b) for placement in a state, local, or private cemetery?

Held

A veteran who cannot qualify for a headstone or marker under 38 U.S.C. 2306(a), because he or she is not eligible for burial in a national cemetery due to 38 U.S.C. 2411, also cannot qualify for a memorial headstone or marker under U.S.C. 2306(b), in the event his or her remains are unavailable.

EFFECTIVE DATE: June 7, 2001.

VAOPGCPREC 12–2001

Question Presented

What did the United States Court of Appeals for the Federal Circuit hold in *Roberson* v. *Principi*, No. 00–7009, 2001 U.S. App. LEXIS 11008 (Fed. Cir. May 29, 2001)?

Held

The only holdings in *Roberson* v. *Principi*, No. 00–7009, 2001 U.S. App. LEXIS 11008 (Fed. Cir. May 29, 2001) are the following:

1. Once a veteran: (1) submits evidence of a medical disability; (2) makes a claim for the highest rating possible; and (3) submits evidence of unemployability, the requirement in 38 CFR 3.155(a) that an informal claim ''identify the benefit sought'' has been satisfied and VA must consider whether the veteran is entitled to total disability based upon individual unemployability (TDIU).

2. A veteran is not required to submit proof that he or she is 100% unemployable in order to establish an inability to maintain a substantially gainful occupation, as required for a TDIU award pursuant to 38 CFR 3.340(a).

EFFECTIVE DATE: July 6, 2001.

VAOPGCPREC 13–2001

Question Presented

A. Whether the Due Process Clause of the Fifth Amendment to the United States Constitution prohibits the Department of Veterans Affairs (VA) from relying on field investigation reports in determining a nonresident alien claimant's entitlement to benefits without providing the claimant with the names of informers and field investigators and complete copies of relevant documents.

B. Whether, consistent with fair process principles stated in *Thurber* v. *Brown*, 5 Vet. App. 119, 122–26 (1993), and *Austin* v. *Brown*, 6 Vet. App. 547, 550–55 (1994), the Board of Veterans' Appeals (Board), in rendering a decision regarding entitlement to veterans benefits, may rely upon information provided by informers during the course of field examinations that is not available to a claimant.

C. Whether a claimant's failure to appeal a VA decision regarding disclosure of information pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552, is of legal significance with regard to due process and fair process concerns in the claimant's benefit claim.

D. Whether the Board may conduct a private inspection of evidence and release to a claimant exculpatory information that was redacted by VA in response to a request for release of information pursuant to the FOIA.

Held

A. In order to decide whether disclosure of the names of informers and field investigators and complete copies of relevant documents is required to ensure fair process and compliance with established adjudication procedures (38 CFR 3.103(c) and (d)), the Board of Veterans' Appeals (Board) must consider whether a claimant's ability to rebut negative evidence or challenge the credibility of an informer's or investigator's statement would be impaired where a claimant has not had an opportunity to view the evidence or learn the name of an informer or investigator who has provided information that will be used in the adjudication of a benefit claim.

B. The Department of Veterans Affairs (VA) may assert the informer's privilege and/or the law enforcement information privilege against disclosure to a claimant of the names of informers and field investigators and complete copies of relevant documents upon which the Board intends to rely in making its decision. Where such a privilege is asserted and the Board finds that the privilege would be applicable to the information that VA seeks to withhold, the Board must balance the public interest in protecting the flow of information for purposes of preventing fraud in the payment of veterans benefits against the claimant's right to rebut or challenge the credibility of an informer's statements or information provided in an investigative report in order to decide whether disclosure to a claimant of the name of an informer or field investigator and complete copies of relevant documents upon which the Board intends to rely in making its decision is necessary in a particular case. If the Board finds that the claimant's need for the name of an informer or field investigator outweighs the public's interest in protecting the name from disclosure, the Board should disclose the name to the claimant and may consider the information provided by the informer or field investigator in deciding the claim. If the Board finds that the public's interest in protecting the name of an informer or field investigator outweighs the claimant's need for the information, the Board should not disclose the name and may consider the information provided by the informer or field investigator in deciding the claim. If the Board finds that the claimant's need and the public's interest are of equal weight, it should decide the claim without considering information derived from sources not disclosed to the claimant. Under those circumstances, the Board would have to rely upon other evidence of record in deciding the claim.

C. A claimant's failure to appeal a decision by VA regarding disclosure of public information pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552, is not controlling in assessing the adequacy of the procedures employed in VA's adjudication of a claim for benefits. However, there is a strong correlation between FOIA privileges relating to law enforcement and common law evidentiary privileges, and applicability of the FOIA exemptions may lend support to a claim of privilege by the Government.

D. The Board may review, in private, evidence upon which it intends to rely in order to determine whether particular information should be redacted as privileged. However, at a minimum, the claimant should be informed as fully as possible concerning the Board's action and be given an opportunity to address the issue of the need for full disclosure.

EFFECTIVE DATE: August 31, 2001.

VAOPGCPREC 14–2001

Question Presented

A. May the Board of Veterans' Appeals (Board) itself complete the development it ordered be completed by

an agency of original jurisdiction (AOJ) in a remanded case?

B. May an AOJ to which the Board has remanded a case for development return the case to the Board for completion of the development by the Board?

C. If the Board may recall a remanded case before the AOJ has completed the development ordered in the remand, must the AOJ readjudicate the case and issue a supplemental statement of the case (SSOC) as to any pertinent evidence it has received following the prior remand by the Board?

Held

A. Section 19.9(a) of title 38, Code of Federal Regulations, currently requires the Board of Veterans' Appeals (Board) to remand a case to the agency of original jurisdiction (AOJ) if the Board determines that additional evidence, clarification of the evidence, or correction of a procedural defect is essential for a proper appellate decision. Provided that § 19.9(a) is amended to permit the Board either to remand the case to the AOJ or to direct its own personnel to undertake the action necessary, the Board may itself complete the evidentiary development it ordered to be completed by the AOJ in a remanded case, subject to any regulatory requirements for vacating remand orders that may be established.

B. Section 19.38 to title 38, Code of Federal Regulations, requires the AOJ to which the Board has remanded a case to complete the development ordered in the remand. The subordinate status of AOJs relative to the Board and the nature of the statutory and regulatory adjudication and appeal scheme require that AOJs abide by the Board's decision to remand a case for development. Accordingly, an AOJ may not itself return a case remanded to it by the Board before it has completed (or attempted to complete) the development ordered in the remand. However, the Board may vacate its previous remand order, recall the remanded case, and complete the necessary development itself. Before any Board remand order is vacated, however, 38 CFR 20.904 should be amended to expressly authorize this action and, preferably, to specify standards to guide the exercise of discretion by the Board. Under such a regulation, if the Board would rather itself conduct the development of a case that it has already remanded to an AOJ, it could vacate the remand order and call the case back to the Board, regardless of whether the AOJ has completed the ordered development.

C. Section 19.31 of title 38, Code of Federal Regulations, generally requires the AOJ to issue a supplemental statement of the case (SSOC) following development pursuant to a remand by the Board unless the Board specifies that a SSOC is not required. Provided that § 19.31 is amended so as not to require a SSOC if pertinent evidence is developed pursuant to a Board remand in a case that is recalled by the Board, the AOJ need not readjudicate the case or issue a SSOC as to any such evidence. In addition, 38 CFR 20.903 should be amended to assure that the appellant is given adequate notice and an opportunity to respond if the Board intends to rely on additional evidence developed by the AOJ in a claim remanded and then recalled by the Board.

Caution: However, see *Disabled American Veterans* v. *Secretary of Veterans Affairs*, 327 F.3d 1339 (Fed. Cir. 2003), which invalidated VA regulations permitting the Board of Veterans' Appeals to consider evidence that was not already considered by the agency of original jurisdiction, without obtaining the appellant's waiver of the right to initial consideration by the agency of original jurisdiction.

EFFECTIVE DATE: December 14, 2001.

VAOPGCPREC 1–2002

Question Presented

May an individual receive concurrent Chapter 35 Survivors' and Dependents' Educational Assistance program benefits when both parents are permanently and totally (P&T) disabled due to a service-connected condition?

Held

Chapter 35 educational assistance allowance may not be paid concurrently to a child by reason of the P&T service-connected disability of more than one parent.

EFFECTIVE DATE: January 25, 2002.

VAOPGCPREC 2–2002

Question Presented:

Does 38 U.S.C. 5301(a) prohibit the Department of Veterans Affairs (VA) from deducting from benefit payments, at the direction of the beneficiary, dental-insurance premiums to be paid to a private insurer as part of the Civilian Health and Medical Program of VA (CHAMPVA)?

Held

Section 5301(a) of title 38, United States Code, prohibits the assignment of payments of Department of Veterans Affairs (VA) benefits due or to become due, except to the extent specifically authorized by law. In the absence of a specific statutory exception, VA may not deduct from VA benefits, at the direction of the beneficiary, premiums charged for dental insurance provided by a private insurer through a contract with the Department of Defense.

EFFECTIVE DATE: March 5, 2002.

VAOPGCPREC 3–2002

Question Presented

Can a Committee on Waivers and Compromises continue to consider a veteran's request for waiver of indebtedness if the veteran dies while the waiver request is pending?

Held

A Committee on Waivers and Compromises can continue consideration of a request for waiver of indebtedness brought by a veteran-debtor notwithstanding the death of the veteran-debtor while the waiver proceeding is pending.

EFFECTIVE DATE: March 7, 2002.

VAOPGCPREC 4–2002

Question Presented

Whether a former member of the Army Reserve who received two anthrax inoculations during inactive duty training and who alleges suffering from chronic fatigue and chronic Lyme-like disease as a result of these inoculations may be considered to have been disabled by an injury in determining whether the member incurred disability due to active service.

Held

If evidence establishes that an individual suffers from a disabling condition as a result of administration of an anthrax vaccination during inactive duty training, the individual may be considered disabled by an ''injury'' incurred during such training as the term is used in 38 U.S.C. 101 (24), which defines ''active military, naval, or air service'' to include any period of inactive duty training during which the individual was disabled or died from an injury incurred or aggravated in line of duty. Consequently, such an individual may be found to have incurred disability in active military, naval, or air service for purposes of disability compensation under 38 U.S.C. 1110 or 1131.

EFFECTIVE DATE: May 14, 2002.

VAOPGCPREC 5–2002

Question Presented

Whether all regulations found in Part 4 of title 38, Code of Federal Regulations, are exempt from judicial review under 38 U.S.C. 502 or 7252(c).

Held

Placement of a regulation in Part 3 or Part 4 of the CFR is not determinative of its susceptibility to judicial review. Whether a section in Part 4 of the CFR is considered part of the ''schedule of ratings'' must be assessed on a case-by-case basis. Generally, the prohibition on judicial review, under 38 U.S.C. 502 or 7252(c), of the schedule of ratings or disabilities refers only to the provisions that prescribe the average impairments of earning capacities, divided into ten grades of disability upon which payments of compensation are based, adopted and adjusted under 38 U.S.C. 1155.

EFFECTIVE DATE: May 17, 2002.

VAOPGCPREC 6–2002

Question Presented

A. May the Department of Veterans Affairs (VA) sever service connection of a disability erroneously and recently granted but with an effective date more than ten years earlier than the date of the decision granting service connection?

B. If such a grant of service connection is protected from severance, must VA retroactively award compensation for that disability, if otherwise in order?

Held

A. Section 1159 of title 38, United States Code, and its implementing regulation, 38 CFR 3.957, protect a grant of service connection (unless the grant was based on fraud or military records clearly show that the person concerned did not have the requisite service or character of discharge) that has been in effect for ten years or longer, as computed from the effective date of the establishment of service connection. Those provisions protect even service connection erroneously and recently granted, but with an effective date more than ten years before the date of the decision establishing service connection. The Department of Veterans Affairs (VA) may not sever such a grant of service connection (in the absence of fraud or lack of requisite service or character of discharge).

B. Sections 1110 and 1131 of title 38, United States Code, direct the payment of compensation in accordance with the provisions of chapter 11, title 38, United States Code, to a veteran with the requisite service who is disabled by a service-connected disability, unless the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs. In the absence of the veteran's own willful misconduct or abuse of alcohol or drugs, VA must pay, in accordance with the provisions of chapter 11, compensation otherwise in order for a disability that was erroneously service connected, where service connection is protected from severance.

EFFECTIVE DATE: July 11, 2002.

VAOPGCPREC 7–2002

Question Presented

A. When the benefits of a veteran's surviving spouse are terminated pursuant to 38 U.S.C. 5313B because the surviving spouse is a fugitive felon, may benefits be paid to the surviving spouse's dependent children?

B. When the benefits of a veteran's child are terminated pursuant to 38 U.S.C. 5313B because the child is a fugitive felon, and there are other children of the veteran in receipt of benefits, how are the other children's benefits affected?

Held

A. If a surviving spouse of a veteran becomes a fugitive felon and consequently loses eligibility for dependency and indemnity compensation (DIC) or improved death pension benefits by operation of 38 U.S.C. 5313B, additional benefits payable to the surviving spouse for children of the veteran would cease. Statutes governing DIC, 38 U.S.C. 1313(a), and improved death pension, 38 U.S.C. 1542, provide independent eligibility for a veteran's children where there is no surviving spouse eligible for benefits. Thus, the children may receive benefits in their own right.

B. If a veteran's child in receipt of improved death pension benefits loses eligibility for those benefits by operation of 38 U.S.C. 5313B upon becoming a fugitive felon, the improved pension benefits payable to other children of the veteran would not be affected. Similarly, in the case of DIC, as long as the child who loses eligibility under 38 U.S.C. 5313B continues to meet the definition of child for title 38 purposes, the shares of other children receiving DIC will not increase.

EFFECTIVE DATE: December 2, 2002.

VAOPGCPREC 1–2003

Question Presented

A. What effect does the decision of the United States Court of Appeals for the Federal Circuit in *Disabled American Veterans* v. *Secretary of Veterans Affairs,* Case Nos. 02–7304, –7305, –7316 (Fed. Cir. May 1, 2003) (*DAV* decision), have on the authority of the Board of Veterans' Appeals (Board) to develop evidence with respect to cases pending before the Board on appeal?

B. May the Board adjudicate claims where new evidence has been obtained if the appellant waives initial consideration of the new evidence by first-tier adjudicators in the Veterans Benefits Administration (VBA)?

C. What effect does the *DAV* decision have on the Board's authority to send claimants the notice required by 38 U.S.C. 5103(a) in cases pending before the Board on appeal?

D. Is the Board required to identify and readjudicate any claims decided before May 1, 2003 (the date of the *DAV* decision) in which the Board applied the regulatory provisions that the Federal Circuit held invalid in the *DAV* decision?

Held

A. The decision of the United States Court of Appeals for the Federal Circuit in *Disabled American Veterans* v. *Secretary of Veterans Affairs,* Case Nos. 02–7304, –7305, –7316 (Fed. Cir. May 1, 2003) (DAV decision), does not prohibit the Board of Veterans' Appeals (Board) from developing evidence in a case on appeal before the Board, provided that the Board does not adjudicate the claim based on any new evidence it obtains unless the claimant waives initial consideration of such evidence by first-tier adjudicators in the Veterans Benefits Administration (VBA). Existing statutes and regulations may reasonably be construed to authorize the Board to develop evidence in such cases. If considered necessary or appropriate to clarify the Board's authority, the Secretary of Veterans Affairs may expressly delegate to the Board the authority to develop evidence in accordance with 38 U.S.C. 5103A.

B. The Board may adjudicate claims where new evidence has been obtained if the appellant waives initial consideration of the new evidence by VBA.

C. The *DAV* decision does not prohibit the Board from issuing the notice required by 38 U.S.C. 5103(a) in a case on appeal before the Board. Existing statutes and regulations may reasonably be construed to authorize the Board to provide the required notice in such cases. If considered necessary or appropriate to clarify the Board's authority, the Secretary of Veterans Affairs may expressly delegate to the Board the authority to issue notice required by 38 U.S.C. 5103(a). The content of any notice issued by the Board must adhere to the requirements of 38 U.S.C. 5103 as described by the Federal Circuit in the *DAV* decision.

D. The Board is not required to identify and readjudicate any claims decided by the Board before May 1, 2003 (the date of the *DAV* decision) in which the Board applied the regulatory provisions that the Federal Circuit held invalid in the *DAV* decision. However, if a claim was finally denied by the Board and the claimant subsequently submits requested information or evidence within one year after the date of the request, the Department of Veterans Affairs must review the claim.

EFFECTIVE DATE: May 21, 2003.

VAOPGCPREC 2–2003

Question Presented

Whether Diagnostic Code (DC) 6260, as in effect prior to June 10, 1999, and as amended as of that date, authorizes a single 10% disability rating for tinnitus, regardless of whether tinnitus is perceived as unilateral, bilateral, or in the head, or whether separate disability ratings for tinnitus in each ear may be assigned under that or any other diagnostic code?

Held

Diagnostic Code 6260 (currently codified at 38 CFR 4.87), as in effect prior to June 10, 1999, and as amended as of that date, authorized a single 10% disability rating for tinnitus, regardless of whether tinnitus is perceived as unilateral, bilateral, or in the head. Separate ratings for tinnitus for each ear may not be assigned under DC 6260 or any other diagnostic code.

EFFECTIVE DATE: May 22, 2003.

VAOPGCPREC 3–2003

Question Presented

A. Does 38 CFR 3.304(b), which provides that the presumption of sound condition may be rebutted by clear and unmistakable evidence that an injury or disease existed prior to service, conflict with 38 U.S.C. 1111, which provides that the presumption of sound condition may be rebutted by clear and unmistakable evidence that an injury or disease existed prior to service ''and was not aggravated by such service'?

B. Does 38 CFR 3.306(b), which provides that the presumption of aggravation under 38 U.S.C. 1153 does not apply when a preexisting disability did not increase in severity during service, conflict with 38 U.S.C. 1111?

Held

A. To rebut the presumption of sound condition under 38 U.S.C. 1111, the Department of Veterans Affairs (VA) must show by clear and unmistakable evidence both that the disease or injury existed prior to service and that the disease or injury was not aggravated by service. The claimant is not required to show that the disease or injury increased in severity during service before VA's duty under the second prong of this rebuttal standard attaches. The provisions of 38 CFR 3.304(b) are inconsistent with 38 U.S.C. 1111 insofar as § 3.304(b) states that the presumption of sound condition may be rebutted solely by clear and unmistakable evidence that a disease or injury existed prior to service. Section 3.304(b) is therefore invalid and should not be followed.

B. The provisions of 38 CFR 3.306(b) providing that aggravation may not be conceded unless the preexisting condition increased in severity during service, are not inconsistent with 38 U.S.C. 1111. Section 3.306(b) properly implements 38 U.S.C. 1153, which provides that a preexisting injury or disease will be presumed to have been aggravated in service in cases where there was an increase in disability during service. The requirement of an increase in disability in 38 CFR 3.306(b) applies only to determinations concerning the presumption of aggravation under 38 U.S.C. 1153 and does not apply to determinations concerning the presumption of sound condition under 38 U.S.C. 1111.

EFFECTIVE DATE: July 16, 2003.

VAOPGCPREC 4–2003

Question Presented

A. Who has the authority to consider whether collection of a debt should be suspended or terminated?

B. Is a denial of suspension or termination of collection activity under 31 U.S.C. § 3711 reviewable by the Board of Veterans' Appeals (Board)?

C. If regional-office rating personnel and/or the Board have the authority to consider whether collection of a debt should be suspended or terminated, must the Department of Veterans Affairs (VA) consider this issue in all cases where a debtor has requested a waiver of overpayment?

D. If regional-office rating personnel and/or the Board have the authority to consider whether collection of a debt should be suspended or terminated, then what is the relationship between the criteria for suspending or terminating collection activity and waiving recovery of an overpayment?

Held

A. Various Department of Veterans Affairs (VA) and non-VA personnel have the authority to suspend or terminate collection action under the Federal Claims Collection Act (FCCA) on debts arising out of VA activities, depending upon the amount, nature, and status of the debt. The Department of Justice may suspend or terminate collection on debts of more than $100,000. Designated officials in VA's Office of the General Counsel may suspend or terminate collection on debts of less that $100,000 involving liability for negligent damage to or loss of Government property or for the cost of hospital, medical, surgical, or dental care of a person. The Chief of the Fiscal Activity at individual Veterans Benefits Administration or Veterans Health Administration stations and the Director of VA's Debt Management Center may suspend or terminate collection on debts of up to $100,000 arising out of the operations of their offices. The Secretary of the Treasury, a Federal debt-collection center, a private collection contractor, or the Department of Justice may suspend or terminate collection on debts that have been referred to them for servicing or litigation under the FCCA.

B. The Board of Veterans' Appeals does not have jurisdiction to review discretionary decisions by authorized VA and non-VA officials concerning suspension or termination of collection of a benefit debt.

EFFECTIVE DATE: August 28, 2003.

VAOPGCPREC 5–2003

Question Presented

May the language of 38 CFR 3.157(b)(1) that provides that the date of admission to a Department of Veterans Affairs (VA) or uniformed services hospital will be accepted as the date of receipt of a claim for an increased disability rating be construed as including the date of admission to a private hospital pursuant to the prior authorization of a contractor that administers the Department of Defense's (DoD) TRICARE program?

Held

The provision of 38 CFR 3.157(b)(1) stating that the date of admission to a ''uniformed services hospital will be accepted as the date of receipt of a claim'' for increased benefits is applicable to veterans hospitalized in private facilities at DoD expense under DoD's TRICARE program.

EFFECTIVE DATE: September 15, 2003.

VAOPGCPREC 6–2003

Question Presented

Under 38 U.S.C. 1103, 1110, and 1131, may service connection be established for a tobacco-related disability or death on the basis that the disability or death was secondary to a

service-connected mental disability that caused the veteran to use tobacco products?

Held

Neither 38 U.S.C. 1103(a), which prohibits service connection of a disability or death on the basis that it resulted from injury or disease attributable to the use of tobacco products by the veteran during service, nor VA's implementing regulations at 38 CFR 3.300, bar a finding of secondary service connection for a disability related to the veteran's use of tobacco products after the veteran's service, where that disability is proximately due to a service-connected disability that is not service connected on the basis of being attributable to the veteran's use of tobacco products during service. The questions that adjudicators must resolve with regard to a claim for service connection for a tobacco-related disability alleged to be secondary to a disability not service connected on the basis of being attributable to the veteran's use of tobacco products during service are: (1) Whether the service-connected disability caused the veteran to use tobacco products after service; (2) if so, whether the use of tobacco products as a result of the service-connected disability was a substantial factor in causing a secondary disability; and (3) whether the secondary disability would not have occurred but for the use of tobacco products caused by the service-connected disability. If these questions are answered in the affirmative, the secondary disability may be service connected. Further, the secondary disability may be considered as a possible basis for service connection of the veteran's death, applying the rules generally applicable in determining eligibility for dependency and indemnity compensation.

EFFECTIVE DATE: October 28, 2003.

VAOPGCPREC 7–2003

Question Presented

A. What effect does the decision of the United States Court of Appeals for the Federal Circuit in *Kuzma* v. *Principi,* 341 F.3d 1327 (Fed. Cir. 2003), have upon the rule set forth by the United States Court of Appeals for Veterans Claims (CAVC) in *Karnas* v. *Derwinski,* 1 Vet. App. 308 (1991), concerning the applicability of changes in law?

B. Do the standards governing the retroactive application of statutes and regulations differ from those governing the retroactive application of rules announced in judicial decisions?

C. How should the Department of Veterans Affairs (VA) determine whether applying a new statute or regulation to a pending claim would have a prohibited retroactive effect?

D. In determining the applicability of a change in law, is there a difference between claims that were pending before VA when the change occurred and claims that had already been decided by the Board of Veterans' Appeals (Board) and were pending on direct appeal to a court when that change occurred?

E. If certain provisions of the Veterans Claims Assistance Act of 2000 (VCAA) were held to be inapplicable to claims filed before November 9, 2000 (the date the VCAA was enacted) and still pending before VA on that date, would VA have authority, from sources other than the VCAA, to continue applying its regulations implementing the VCAA to claims filed before that date?

F. Does VAOPGCPREC 11–2000 remain viable in light of the holdings in *Kuzma, Dyment* v. *Principi,* 287 F.3d 1377 (Fed. Cir. 2002), and *Bernklau* v. *Principi,* 291 F.3d 795 (Fed. Cir. 2002)?

Held

A. In *Kuzma* v. *Principi,* 341 F.3d 1327 (Fed. Cir. 2003), the United States Court of Appeals for the Federal Circuit overruled *Karnas* v. *Derwinski,* 1 Vet. App. 308 (1991), to the extent it conflicts with the precedents of the Supreme Court and the Federal Circuit. *Karnas* is inconsistent with Supreme Court and Federal Circuit precedent insofar as *Karnas* provides that, when a statute or regulation changes while a claim is pending before the Department of Veterans Affairs (VA) or a court, whichever version of the statute or regulation is most favorable to the claimant will govern unless the statute or regulation clearly specifies otherwise. Accordingly, that rule adopted in Karnas no longer applies in determining whether a new statute or regulation applies to a pending claim. Pursuant to Supreme Court and Federal Circuit precedent, when a new statute is enacted or a new regulation is issued while a claim is pending before VA, VA must first determine whether the statute or regulation identifies the types of claims to which it applies. If the statute or regulation is silent, VA must determine whether applying the new provision to claims that were pending when it took effect would produce genuinely retroactive effects. If applying the new provision would produce such retroactive effects, VA ordinarily should not apply the new provision to the claim. If applying the new provision would not produce retroactive effects, VA ordinarily must apply the new provision.

B. Different standards govern the retroactive application of statutes and regulations and the retroactive application of rules announced in judicial decisions. As a general matter, rules announced in judicial decisions apply retroactively to all cases still open on direct review when the new rule is announced. Statutes and regulations, in contrast, are presumed not to apply in any manner that would produce genuinely retroactive effects, unless the statute or regulation itself provides for such retroactivity.

C. There is no simple test for determining whether applying a new statute or regulation to a particular claim would produce retroactive effects. Generally, a statute or regulation would have a disfavored retroactive effect if it attaches new legal consequences to events completed before its enactment or extinguishes rights that previously accrued. Provisions affecting only entitlement to prospective benefits ordinarily do not produce any retroactive effects when applied to claims that were pending when the new provision took effect. Changes in procedural rules often may be applied to pending cases without raising concerns about retroactivity, but may have a prohibited retroactive effect if applied to cases in which the procedural events governed by the new rule had previously been completed, such as cases pending on appeal to a court when a new rule of agency procedure is issued. In considering whether a new statute or regulation would produce retroactive effects, VA should consider whether the provision is substantive or procedural, whether it would impose new duties with respect to completed transactions or would only affect prospective relief, whether it would attach new legal consequences to events completed before its enactment or extinguish rights that previously accrued, and whether application of the new provision would be consistent with notions of fair notice and reasonable reliance. VA should consider the effects on the Government as well as the claimant and should consider the procedural posture of the pending claim in relation to the foregoing factors. Most statutes and regulations liberalizing the criteria for entitlement to a benefit may be applied to pending claims because they would affect only prospective relief. Statutes or regulations restricting the right to a benefit may have disfavored retroactive effects to the extent their application to a pending claim would extinguish the claimant's

right to benefits for periods before the statute or regulation took effect.

D. In determining whether application of a new statute or regulation would produce retroactive effects, there may be a difference in some circumstances between cases that were pending in different procedural postures on the date the new provision took effect. New provisions affecting procedural matters in many cases would not produce retroactive effects as applied to claims that were pending at a procedural stage to which the new provision applies, but may produce disfavored retroactive effects if applied to pending claims in which the stage of proceedings to which the new provision applies has already been completed. However, the procedural posture of the claim is not the sole determinative factor in all cases. Even among cases in the same procedural posture, distinctions may be drawn based on the circumstances of the particular case and considerations of fairness to the specific parties.

E. Even if applying the amendments made by section 3(a) of the VCAA to claims that were pending before VA on November 9, 2000, were construed to have retroactive effects on VA, VA would have the authority to apply 38 CFR 3.159, the regulation implementing these amendments, to such claims. VA has the authority to provide for the retroactive application of its procedural regulations where such regulations are beneficial to claimants and not inconsistent with the governing statutes and VA has expressly provided for their retroactive application. The provisions of § 3.159 are beneficial to claimants and not inconsistent with the VCAA or any other statute, and VA has expressly provided that they will apply to claims that were pending before VA on November 9, 2000. Consequently, VA has authority to apply its regulations implementing the VCAA to claims filed before the date of enactment of the VCAA and still pending before VA as of that date.

F. In VAOPGCPREC 11–2000, we concluded that all of the VCAA's provisions apply to claims that were filed before November 9, 2000, but had not been finally decided as of the date. Because VA's August 2001 final-rule notice amending 38 CFR 3.159 expressly and validly provided that VA's regulations implementing the VCAA will apply to all claims that were pending before VA as of November 9, 2000, any further reliance on VAOPGCPREC 11–2000 is unnecessary. We hereby withdraw VAOPGCPREC 11–2000.

EFFECTIVE DATE: November 19, 2003.

VAOPGCPREC 8–2003

Question Presented

Must the Department of Veterans Affairs (VA) notify a claimant of the information and evidence necessary to substantiate an issue first raised in a notice of disagreement (NOD) submitted in response to VA's notice of its decision on a claim for which VA has already notified the claimant of the information and evidence necessary to substantiate the claim?

Held

Under 38 U.S.C. 5103(a), the Department of Veterans Affairs (VA), upon receipt of a complete or substantially complete application, must notify the claimant of the information and evidence necessary to substantiate the claim for benefits. Under 38 U.S.C. 7105(d), upon receipt of a notice of disagreement in response to a decision on a claim, the ''agency of original jurisdiction'' must take development or review action it deems proper under applicable regulations and issue a statement of the case if the action does not resolve the disagreement either by grant of the benefits sought or withdrawal of the notice of disagreement. If, in response to notice of its decision on a claim for which VA has already given the section 5103(a) notice, VA receives a notice of disagreement that raises a new issue, section 7105(d) requires VA to take proper action and issue a statement of the case if the disagreement is not resolved, but section 5103(a) does not require VA to provide notice of the information and evidence necessary to substantiate the newly raised issue.

EFFECTIVE DATE: December 22, 2003.

VAOPGCPREC 9–2003

Question Presented

What is the scope of the protection provided by 38 U.S.C. 2305 in claims for burial benefits under 38 U.S.C. chapter 23?

Held

Section 2305 of title 38, United States Code, preserves rights individuals had under laws in effect on December 31, 1957, based on their status as members of particular units or organizations that fell within the scope of the laws defining classes of individuals potentially eligible for burial benefits under chapter 23 of title 38. Veterans with wartime service prior to January 1, 1958, are not exempted by section 2305 from the amendments to eligibility criteria for nonservice-connected burial and funeral allowance currently codified in 38 U.S.C. 2302(a) made by the Omnibus Budget Reconciliation Act of 1981, Pub. L. 97–35, which eliminated wartime service as a basis for eligibility. Burial benefits provided by operation of 38 U.S.C. 2305 are to be paid based on the rates in effect on the date of the veteran's death.

EFFECTIVE DATE: December 23, 2003.

VAOPGCPREC 1–2004

Question Presented

Does the decision of the United States Court of Appeals for Veterans Claims (CAVC) in *Pelegrini* v. *Principi*, No. 01–944, 2004 U.S. App. Vet. Claims LEXIS 11 (Jan. 13, 2004), require that notice provided under 38 U.S.C. 5103(a) contain a request that the claimant provide the Department of Veterans Affairs (VA) with any evidence in his or her possession that pertains to the claim?

Held

Under 38 U.S.C. 5103(a) and 38 CFR 3.159(b)(1), the Department of Veterans Affairs (VA), upon receipt of a complete or substantially complete application, must notify the claimant of the information and evidence necessary to substantiate the claim for benefits and must indicate which portion of that information and evidence the claimant must provide and which portion VA will attempt to obtain for the claimant. In *Pelegrini* v. *Principi*, No. 01–944, 2004 U.S. App. Vet. Claims LEXIS 11 (Jan. 13, 2004), the United States Court of Appeals for Veterans Claims (CAVC) stated that section 3.159(b)(1), explicitly, and section 5103(a), implicitly, require that VA request that the claimant provide any evidence in his or her possession that pertains to the claim. The CAVC's statement that sections 5103(a) and 3.159(b)(1) require VA to include such a request as part of the notice provided to a claimant under those provisions is *obiter dictum* and is not binding on VA. Further, section 5103(a) does not require VA to seek evidence from a claimant other than that identified by VA as necessary to substantiate the claim.

EFFECTIVE DATE: February 24, 2004.

VAOPGCPREC 2–2004

Question Presented

Whether, pursuant to 38 U.S.C. 5103(a) the Department of Veterans Affairs (VA) is required to provide notice of the information and evidence necessary to substantiate a claim for separate ratings for service-connected tinnitus in each ear.

Held

Under 38 U.S.C. 5103(a), the Department of Veterans Affairs is not required to provide notice of the information and evidence necessary to substantiate a claim for separate disability ratings for each ear for bilateral service-connected tinnitus because there is no information or evidence that could substantiate the claim, as entitlement to separate ratings is barred by current Diagnostic Code (DC) 6260 and by the previous versions of DC 6260 as interpreted by a precedent opinion of the General Counsel that is binding on all Department officials and employees.

EFFECTIVE DATE: March 9, 2004.

VAOPGCPREC 3–2004

Question Presented

Does a veteran's entitlement under 38 U.S.C. 1151(a) to compensation for a disability ''as if'' service connected satisfy the requirement of 38 U.S.C. 3901(1)(A) that, to be eligible for automobile benefits under chapter 39, a claimant must be entitled to compensation under chapter 11 for a disability that ''is the result of an injury incurred or disease contracted in or aggravated by active military, naval, or air service''?

Held

Section 1151(a) of title 38, United States Code, authorizes compensation under chapter 11 of title 38 for additional disability caused by Department of Veterans Affairs (VA) hospital care, medical or surgical treatment, or examination, or proximately caused by VA's provision of training and rehabilitation services or by participation in a compensated work therapy program, ''as if'' the disability were service connected. A veteran's entitlement under section 1151(a) to compensation for a disability ''as if'' service connected does not satisfy 38 U.S.C. 3901(1)(A)'s requirement, for eligibility for automobile benefits under chapter 39 of title 38, United States Code, of entitlement to compensation under chapter 11 for a disability that ''is the result of an injury incurred or disease contracted in or aggravated by active military, naval, or air service.''

EFFECTIVE DATE: March 9, 2004.

Dated: April 28, 2004.

By Direction of the Secretary.

Tim S. McClain,

General Counsel.

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