this certification is that this amendment would not directly affect any small entities. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this final rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Order 12866

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

Unfunded Mandates

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

Catalog of Federal Domestic Assistance Numbers and Titles

The Catalog of Federal Domestic Assistance program numbers and titles for this proposal are 64.100, Automobiles and Adaptive Equipment for Certain Disabled Veterans and Members of the Armed Forces; 64.101, Burial Expenses Allowance for Veterans; 64.102, Compensation for Service-Connected Deaths for Veterans' Dependents; 64.104, Pension for Non-Service-Connected Disability for Veterans; 64.105, Pension to Veterans Surviving Spouses, and Children; 64.106, Specially Adapted Housing for Disabled Veterans; 64.109, Veterans Compensation for Service-Connected Disability; and 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death.

List of Subjects in 38 CFR Part 3

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

Approved: May 26, 2006.

Gordon H. Mansfield,

Deputy Secretary of Veterans Affairs.

■ For the reasons set out in the preamble, 38 CFR part 3 is amended as set forth below:

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

■ 1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

■ 2. Section 3.156 is amended by:
■ a. Adding a paragraph heading to paragraph (a).
■ b. Adding a paragraph heading to paragraph (b).
■ c. Revising paragraph (c).

The additions and revision read as follows:

§ 3.156 New and material evidence.

(a) *General.* * * *

(b) *Pending claim.* * * *

(c) *Service department records.* (1) Notwithstanding any other section in this part, at any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim, notwithstanding paragraph (a) of this section. Such records include, but are not limited to:

(i) Service records that are related to a claimed in-service event, injury, or disease, regardless of whether such records mention the veteran by name, as long as the other requirements of paragraph (c) of this section are met;

(ii) Additional service records forwarded by the Department of Defense or the service department to VA any time after VA's original request for service records; and

(iii) Declassified records that could not have been obtained because the records were classified when VA decided the claim.

(2) Paragraph (c)(1) of this section does not apply to records that VA could not have obtained when it decided the claim because the records did not exist when VA decided the claim, or because the claimant failed to provide sufficient information for VA to identify and obtain the records from the respective service department, the Joint Services Records Research Center, or from any other official source.

(3) An award made based all or in part on the records identified by paragraph (c)(1) of this section is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later, or such other date as may be authorized by the provisions of this part applicable to the previously decided claim.

(4) A retroactive evaluation of disability resulting from disease or injury subsequently service connected on the basis of the new evidence from the service department must be supported adequately by medical evidence. Where such records clearly support the assignment of a specific rating over a part or the entire period of time involved, a retroactive evaluation will be assigned accordingly, except as it may be affected by the filing date of the original claim.

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

* * * * *

■ 3. Section 3.400 is amended by:
■ a. Revising the heading of paragraph (q).
■ b. Removing paragraph (q)(1) heading.
■ c. Redesignating paragraph (q)(1)(i) as new paragraph (q)(1).
■ d. Removing paragraph (q)(2).
■ e. Redesignating paragraph (q)(1)(ii) as new paragraph (q)(2).

The revision reads as follows:

§ 3.400 General.

* * * * *

(q) New and material evidence (§ 3.156) other than service department records. * * *

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[FR Doc. E6–14746 Filed 9–5–06; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 4

RIN 2900–AL26

Schedule for Rating Disabilities; Guidelines for Application of Evaluation Criteria for Certain Respiratory and Cardiovascular Conditions; Evaluation of Hypertension With Heart Disease

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the Department of Veterans Affairs (VA) Schedule for Rating Disabilities by adding guidelines for the evaluation of certain respiratory and cardiovascular conditions and by explaining that hypertension will be evaluated separately from hypertensive and other types of heart diseases.

DATES: *Effective Date:* This amendment is effective October 6, 2006.

Applicability Date: The provisions of this final rule shall apply to all applications for benefits received by VA on or after the effective date of this final rule.

FOR FURTHER INFORMATION CONTACT: Maya Ferrandino, Consultant, Regulations Staff (211D), Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Ave., NW., Washington, DC 20420, (202) 273–7211.

SUPPLEMENTARY INFORMATION: On August 22, 2002, VA published in the **Federal Register** (67 FR 54394) a proposal to amend those portions of the Schedule for Rating Disabilities that address cardiovascular and respiratory conditions by providing guidelines for the evaluation of these conditions and by explaining that hypertension will be evaluated separately from hypertensive and other types of heart diseases. Interested persons were invited to submit written comments on or before October 21, 2002. We received a combined comment from the American College of Chest Physicians, the American Thoracic Society, and the National Association for Medical Direction of Respiratory Care.

VA currently uses the ratio of FEV–1 (Forced Expiratory Volume in one second) to FVC (Forced Vital Capacity), or FEV–1/FVC ratio, to evaluate certain respiratory conditions. Proposed 38 CFR 4.96(d)(7) would direct raters to consider a decreased FEV–1/FVC ratio to be normal if the FEV–1 is greater than 100 percent. The rationale was that in that case the FVC would also be high (better than normal), so a decreased ratio would not indicate pathology. The commenter suggested that we not use the ratio but, rather, use 100 percent of predicted value. Because a decreased ratio could indicate pathology, but not disability, the commenter suggested we delete the statement in the preamble to the proposed rule that a decreased ratio is not indicative of pathology. Because the statement noted by the commenter was not part of the proposed regulatory language, but was made in the preamble to the proposed rule, it would have had no regulatory effect. Nevertheless, we agree with the rationale of this suggestion. Therefore, we will address the commenter's suggestion by changing the regulatory language in § 4.96(d)(7) to the following: ''If the FEV–1 and the FVC are both greater than 100 percent, do not assign a compensable evaluation based on a decreased FEV–1/FVC ratio.''

Chronic bronchitis (diagnostic code 6600), pulmonary emphysema (diagnostic code 6603), chronic obstructive pulmonary disease (diagnostic code 6604), interstitial lung disease (diagnostic codes 6825–6833), and restrictive lung disease (diagnostic codes 6840–6845) are evaluated primarily on the basis of pulmonary function tests (PFT's). However, these conditions may also be evaluated based on alternative evaluation criteria, which may include measures of the maximum exercise capacity; the presence of pulmonary hypertension (documented by echocardiogram or cardiac catheterization), cor pulmonale, or right ventricular hypertrophy; episode(s) of respiratory failure; and a requirement for outpatient oxygen therapy. For example, a 100-percent evaluation for these conditions may be based on a maximum exercise capacity test result of less than 15 ml/kg/min oxygen consumption (with cardiac or respiratory limitation), and a 60-percent evaluation may be based on a maximum exercise capacity test result of 15 to 20 ml/kg/min oxygen consumption (with cardiac or respiratory limitation). We proposed that PFT's be required to evaluate this group of respiratory conditions except, among other exceptions, when the results of a maximum exercise capacity test are of record and are 20 ml/kg/min or less. We also proposed that if a maximum exercise capacity test is not of record, the veteran's disability evaluation would be based on alternative criteria. The commenter stated that since most of the patients with these respiratory conditions have a low exercise tolerance, using the results of only effort-dependent tests would make it easy for some marginal patients to qualify for compensation for their respiratory condition. The commenter stated that exercise tests should be considered maximal and should be performed after PFT results do not fully explain symptomatology.

The vast majority of veterans with respiratory diseases are evaluated on the basis of PFT results. Since the disability due to respiratory disease in veterans ranges from minimal to very severe, and veterans of all ages and all degrees of physical conditioning undergo examinations for respiratory disability, it would be speculative to say that most have a low exercise tolerance. The regulations do not require that a maximum exercise capacity test be conducted in any case, and it is not routinely conducted. If there is already a maximum exercise capacity test of record, and the results are 20 ml/kg/min or less, evaluation (at a 60- or 100-percent level, depending on the exact results) may be based on these results. If no maximum exercise capacity test is of record, as would be true in most cases, this regulation directs that evaluation be based on the alternative criteria. In any given case, the examiner may request, based on clinical judgment, that a maximum exercise capacity test be conducted, such as in cases where the PFT's do not fully explain symptomatology. However, the maximum exercise capacity test is not available in some medical facilities, and evaluation will properly be based in some cases on the clinician's assessment of severity based on history, physical findings, and available laboratory tests. We therefore make no change based on this comment.

The commenter stated that the diagnostic codes in the VA rating schedule for the listed conditions in the proposed rule were confusing and suggested that VA use the International Classification of Diseases, Ninth Revision, Clinical Modification (ICD–9–CM) diagnostic coding system that is used throughout the United States in the health care delivery system. For several reasons, we believe that using ICD–9–CM codes is not a reasonable option.

First, ICD–9–CM and the VA rating schedule serve very different purposes. The ICD–9–CM is used by medical professionals in diagnosing medical conditions. The rating schedule is used by VA personnel in assigning evaluations to conditions that have been diagnosed by medical professionals for VA compensation purposes. The rating schedule is not simply a listing of conditions and symptoms. It includes evaluation criteria for each of the more than 700 disabilities listed. VA also rates disabilities not listed in the rating schedule to the most analogous disability that is listed there. Also, despite its length, the ICD–9–CM does not include certain conditions that VA must commonly evaluate, such as specific muscle injuries. For example, the criteria under diagnostic code 5301 in the rating schedule govern the evaluation of injuries to muscle group I (trapezius, levator scapulae, and serratus magnus). There are 23 muscle groups listed in the VA rating schedule that govern the evaluation of injuries to those muscle groups, and each of the 23

muscle groups has its own set of evaluation criteria based on the severity of the injuries affecting specific muscle functions. Six of them refer to various muscle injuries of the shoulder and upper arm. In contrast, ICD–9–CM code 959.2 covers injuries to the axilla and scapular region of the ''Shoulder and upper arm,'' which is as specific as ICD–9–CM gets for these injuries. Over 350,000 veterans are currently evaluated under VA's muscle injury criteria, which are commonly used for evaluating residuals of combat injuries, such as gunshot and shell fragment wounds. Such VA diagnostic codes are therefore of great importance to VA in evaluating veterans with combat wounds, and also provide useful information for statistical purposes.

Other problems would arise from replacing VA's diagnostic codes with the ICD–9–CM codes. ICD–9–CM's high level of specificity for some conditions would make use by raters difficult, since in some cases a specific code would apply, while in others only the general code would be required for rating purposes. Another issue is that VA has special codes for certain combined disabilities—loss or loss of use of an arm and loss or loss of use of a leg, for example—which have special significance for VA rating purposes, but which have no equivalent in ICD–9–CM. For these reasons, VA does not believe that using ICD–9–CM codes to indicate veterans' disabilities for purposes of compensation would be feasible or useful. We therefore make no change based on this comment.

VA appreciates the comment submitted in response to the proposed rule. Based on the rationale stated in the proposed rule and in this document, the proposed rule is adopted with the changes noted.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

Regulatory Flexibility Act

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

Executive Order 12866

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

Unfunded Mandates

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

Catalog of Federal Domestic Assistance Numbers

The Catalog of Federal Domestic Assistance program numbers and titles for this proposal are 64.104, Pension for Non-Service-Connected Disability for Veterans, and 64.109, Veterans Compensation for Service-Connected Disability.

List of Subjects in 38 CFR Part 4

Disability benefits, Pensions, Veterans.

Approved: May 26, 2006.

Gordon H. Mansfield,

Deputy Secretary of Veterans Affairs.

■ For the reasons set out in the preamble, 38 CFR part 4, subpart B, is amended as set forth below:

PART 4—SCHEDULE FOR RATING DISABILITIES

Subpart B—Disability Ratings

■ 1. The authority citation for part 4 continues to read as follows:

Authority: 38 U.S.C. 1155, unless otherwise noted.

■ 2. Section 4.96 is amended by adding paragraph (d) to read as follows:

§ 4.96 Special provisions regarding evaluation of respiratory conditions.

* * * * *

(d) *Special provisions for the application of evaluation criteria for diagnostic codes 6600, 6603, 6604, 6825–6833, and 6840–6845.*

(1) Pulmonary function tests (PFT's) are required to evaluate these conditions except:

(i) When the results of a maximum exercise capacity test are of record and are 20 ml/kg/min or less. If a maximum exercise capacity test is not of record, evaluate based on alternative criteria.

(ii) When pulmonary hypertension (documented by an echocardiogram or cardiac catheterization), cor pulmonale, or right ventricular hypertrophy has been diagnosed.

(iii) When there have been one or more episodes of acute respiratory failure.

(iv) When outpatient oxygen therapy is required.

(2) If the DLCO (SB) (Diffusion Capacity of the Lung for Carbon Monoxide by the Single Breath Method) test is not of record, evaluate based on alternative criteria as long as the examiner states why the test would not be useful or valid in a particular case.

(3) When the PFT's are not consistent with clinical findings, evaluate based on the PFT's unless the examiner states why they are not a valid indication of respiratory functional impairment in a particular case.

(4) Post-bronchodilator studies are required when PFT's are done for disability evaluation purposes except when the results of pre-bronchodilator pulmonary function tests are normal or when the examiner determines that post-bronchodilator studies should not be done and states why.

(5) When evaluating based on PFT's, use post-bronchodilator results in applying the evaluation criteria in the rating schedule unless the post-bronchodilator results were poorer than the pre-bronchodilator results. In those cases, use the pre-bronchodilator values for rating purposes.

(6) When there is a disparity between the results of different PFT's (FEV–1 (Forced Expiratory Volume in one second), FVC (Forced Vital Capacity), etc.), so that the level of evaluation would differ depending on which test result is used, use the test result that the examiner states most accurately reflects the level of disability.

(7) If the FEV–1 and the FVC are both greater than 100 percent, do not assign

a compensable evaluation based on a decreased FEV–1/FVC ratio.

* * * * *

■ 3. Section 4.100 is added to read as follows:

§ 4.100 Application of the evaluation criteria for diagnostic codes 7000–7007, 7011, and 7015–7020.

(a) Whether or not cardiac hypertrophy or dilatation (documented by electrocardiogram, echocardiogram, or X-ray) is present and whether or not there is a need for continuous medication must be ascertained in all cases.

(b) Even if the requirement for a 10% (based on the need for continuous medication) or 30% (based on the presence of cardiac hypertrophy or dilatation) evaluation is met, METs testing is required in all cases except:

(1) When there is a medical contraindication.

(2) When the left ventricular ejection fraction has been measured and is 50% or less.

(3) When chronic congestive heart failure is present or there has been more than one episode of congestive heart failure within the past year.

(4) When a 100% evaluation can be assigned on another basis.

(c) If left ventricular ejection fraction (LVEF) testing is not of record, evaluate based on the alternative criteria unless the examiner states that the LVEF test is needed in a particular case because the available medical information does not sufficiently reflect the severity of the veteran's cardiovascular disability.

■ 4. Section 4.104, diagnostic code 7101 is amended by adding a Note (3) to read as follows:

§ 4.104 Schedule of ratings—cardiovascular system.

* * * * *

7101 * * *

Note (3): Evaluate hypertension separately from hypertensive heart disease and other types of heart disease.

* * * * *

[FR Doc. E6–14732 Filed 9–5–06; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2006–0337–200613(f); FRL–8216–7]

Approval and Promulgation of Implementation Plans for Kentucky: Air Permit Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is now taking final action to approve two of four requested revisions to the State Implementation Plan (SIP) for the Commonwealth of Kentucky submitted to EPA on March 15, 2001. The two revisions being approved today regard two main changes to Kentucky's rules. The first change involves the removal and separation of rule 401 Kentucky Administrative Regulations (KAR) 50:035 (''Permits'') into three separate rules under a new Chapter 52 (Permits, Registrations, and Prohibitory Rules). Specifically, these rules are 52:001 (Definitions for 401 KAR Chapter 52), 52:030 (Federally-enforceable permits for non-major sources), and 52:100 (''Public, affected state, and U.S. EPA review''). The second change involves corrections to grammatical errors in rule 50:032 (''Prohibitory Rule for Hot Mix Asphalt Plants'') and the removal of rule 50:032 from Chapter 50 and adding it to Chapter 52, under 52:090 (''Prohibitory Rule for Hot Mix Asphalt Plants''). This final action also responds to adverse comments submitted in response to EPA's proposed rule published on December 30, 2002. This final action does not address the removal of 401 KAR 50:030 (''Registration of Sources'') or changes made to 401 KAR 52:080 (''Regulatory limit on potential to emit''), that was part of the March 15, 2001, submittal, but which will be addressed in a separate action.

DATES: *Effective Date:* This rule will be effective October 6, 2006.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2006–0337. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: James Hou, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, Region 4, U.S. Environmental Protection Agency, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. The telephone number is (404) 562–8965. Mr. Hou can also be reached via electronic mail at *Hou.James@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Today's Action

EPA is now taking final action to approve two of four requested revisions to the (SIP) for the Commonwealth of Kentucky submitted to EPA on March 15, 2001, and clarified in a letter dated July 18, 2001. The SIP submittal and the letter-clarification were submitted by the Kentucky Department for Environmental Protection, Division of Air Quality. The two revisions being approved today regard two main changes to Kentucky's rules. The first change involves the removal and separation of rule 401 Kentucky Administrative Regulations (KAR) 50:035 (''Permits'') into three separate rules under a new Chapter 52 (Permits, Registrations, and Prohibitory Rules). Specifically, these rules are 52:001 (Definitions for 401 KAR Chapter 52), 52:030 (''Federally-enforceable permits for non-major sources''), and 52:100 (''Public, affected state, and U.S. EPA review''). The second change involves corrections to grammatical errors in rule 50:032 (''Prohibitory Rule for Hot Mix Asphalt Plants'') and the removal of rule 50:032 from Chapter 50 and adding it to Chapter 52, under 52:090 (''Prohibitory Rule for Hot Mix Asphalt Plants''). Today's final action also responds to one set of adverse comments submitted in response to EPA's proposed rule published on December 30, 2002 (67 FR 79543). Today's final action does not address the removal of 401 KAR 50:030