

## Catalog of Federal Domestic Assistance Numbers and Titles

The Catalog of Federal Domestic Assistance program numbers and titles for this rulemaking are 64.102, Compensation for Service-Connected Deaths for Veterans' Dependents; 64.109, Veterans Compensation for Service-Connected Disability; 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death; 64.127, Monthly Allowance for Children of Vietnam Veterans Born with Spina Bifida; and 64.128, Vocational Training and Rehabilitation for Vietnam Veterans' Children with Spina Bifida or Other Covered Birth Defects.

### List of Subjects in 38 CFR Part 3

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

Approved: January 8, 2008.

**Gordon H. Mansfield,**

*Deputy Secretary of Veterans Affairs.*

For the reasons set out in the preamble, VA proposes to amend 38 CFR part 3 as follows:

### PART 3—ADJUDICATION

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

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

2. Amend § 3.307(a)(6)(iii) by revising the last sentence to read as follows:

**§ 3.307 Presumptive service connection for chronic, tropical or prisoner-of-war related disease, or disease associated with exposure to certain herbicide agents; wartime and service on or after January 1, 1947.**

(a) \* \* \*

(6) \* \* \*

(iii) \* \* \* For the purposes of this section, “service in the Republic of Vietnam” includes only service on land, or on an inland waterway, in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975.

3. Amend § 3.313 by revising the section heading and adding at the beginning of the first sentence of paragraph (a) “For purposes of this section,” to read as follows:

**§ 3.313 Presumption of service connection for non-Hodgkin's lymphoma based on service in Vietnam.**

(a) \* \* \* For the purposes of this section, \* \* \*

\* \* \* \* \*

4. Amend 3.814(c)(1) by revising the last sentence to read as follows:

**§ 3.814 Monetary allowance under 38 U.S.C. chapter 18 for an individual suffering from spina bifida whose biological father or mother is or was a Vietnam veteran.**

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \* For the purposes of this section, “service in the Republic of Vietnam” includes only service on land, or on an inland waterway, in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975.

\* \* \* \* \*

5. Amend 3.815(c)(1) by revising the last sentence to read as follows:

**§ 3.815 Monetary allowance under 38 U.S.C. chapter 18 for an individual with disability from covered birth defects whose biological mother is or was a Vietnam veteran; identification of covered birth defects.**

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \* For the purposes of this section, “service in the Republic of Vietnam” includes only service on land, or on an inland waterway, in the Republic of Vietnam during the period beginning on February 28, 1961, and ending on May 7, 1975.

\* \* \* \* \*

[FR Doc. E8-8091 Filed 4-15-08; 8:45 am]

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## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Parts 3 and 20

RIN 2900-AM77

### Board of Veterans' Appeals: Expedited Claims Adjudication Initiative—Pilot Program

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of Veterans Affairs (VA) proposes to launch an initiative for accelerated claims and appeals processing at four VA facilities, based on volunteer participation by eligible claimants. The purposes of this proposed initiative are to provide a model to streamline the VA claims adjudication and appeals process systemwide and to obtain resolution of individual claims and appeals at the earliest time possible in order to provide final decisions to veterans and their families with regard to their claims for benefits. If this initiative is successful at the four trial sites, the data obtained from this initiative may provide a basis for expanding some, or all, of the program nationwide, and ultimately

help accelerate the processing of all claims and appeals.

**DATES:** Comments must be received by VA on or before June 16, 2008.

**ADDRESSES:** Written comments may be submitted through <http://www.Regulations.gov>; by mail or hand-delivery to the Director, Regulations Management (00REG), Department of Veterans Affairs, 810 Vermont Avenue, NW., Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. (This is not a toll-free number.)

Comments should indicate that they are submitted in response to “2900-AM77—Expedited Claims Adjudication Initiative—Pilot Program.” Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m. Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at <http://www.Regulations.gov>.

### FOR FURTHER INFORMATION CONTACT:

Steven L. Keller, Senior Deputy Vice Chairman, Board of Veterans' Appeals (012), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 565-5978. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** Within the Department of Veterans Affairs is a Veterans Benefits Administration (VBA or Administration) whose primary function is the administration of nonmedical VA benefits programs that provide assistance to veterans and their dependents and survivors. 38 U.S.C. 7701(a). VBA is under the Under Secretary for Benefits, who is directly responsible to the Secretary for the operations of the Administration. 38 U.S.C. 7701(b). VBA's adjudication rules are found at 38 CFR part 3. The Board of Veterans' Appeals (BVA or Board) is an administrative body within VA that decides appeals from decisions of Agencies of Original Jurisdiction (AOJs) of claims for veterans' benefits, as well as occasional cases of original jurisdiction. The Board is under the administrative control and supervision of a Chairman who is directly responsible to the Secretary. 38 U.S.C. 7101(a). The Board's Appeals Regulations are found at 38 CFR part 19, and its Rules of Practice are found at 38 CFR part 20.

The VA claims adjudication and appeals process is designed with many

procedural protections for claimants. As a result of these procedural protections, the amount of time it takes to process an initial claim and an appeal can be unnecessarily lengthened due to various statutory and regulatory response periods. Often, a case may sit without any action occurring while waiting for one of these response periods to end.

In an effort to help accelerate the processing of all claims and appeals by providing a model to streamline the claims adjudication and appeals process systemwide, VA proposes to launch a pilot program known as the Expedited Claims Adjudication (ECA) Initiative (Initiative) at four VA facilities. The goal of this proposed Initiative is to obtain resolution of individual claims and appeals at the earliest time possible by greatly reducing the time that a case sits without any action occurring while waiting for a statutory or regulatory response period to run. By eliminating unnecessary waiting time in this Initiative, VA would provide faster final decisions to veterans and their families with regard to their claims for benefits. The data obtained from this Initiative may provide a basis for expanding the Initiative to other VA facilities in an effort to accelerate processing time for all claims and appeals in the VA adjudication system as a whole. The Initiative will last for a period of 2 years from the effective date of the final implementing regulations, and claimants would have the opportunity to voluntarily elect participation in the Initiative during this 2-year period. All claims for which participation in the Initiative is properly elected would be processed in accordance with these rules, unless participation is revoked or VA terminates the Initiative.

Participation in the Initiative would be strictly voluntary. The proposed ECA Initiative would be predicated on the claimant agreeing, at the beginning of the claims process, to waive certain identified statutory and regulatory time limits and processing actions. To ensure that any waiver executed by the claimant would be knowing and voluntary, participation in the Initiative would only be open to claimants who, at the time of electing to participate in the Initiative, are represented by a recognized Veterans Service Organization (VSO) or an accredited agent or attorney for whom the claimant has properly executed and filed a VA Form 21-22, "Appointment of Veterans Service Organization as Claimant's Representative," or a VA Form 21-22a, "Appointment of Individual as Claimant's Representative," as appropriate. See 38 CFR 14.631. ECA participation may only be elected at the

beginning of the VA claims adjudication process, and not more than 30 days after VA notifies the claimant about participation in the Initiative. Participation would be effectuated only if *both* the claimant and his or her representative sign an ECA Initiative Agreement and Waiver of Rights (ECA Agreement) certifying that the claimant has consulted with his or her representative to determine if participation in the Initiative is in his or her best interest.

As noted above, in order to participate in the Initiative under this proposed rule, a claimant would have to waive certain procedural protections provided in VA statutes and regulations in order to allow VA to process his or her case on an accelerated basis. These procedural protections may consist of time limits, as well as other identified processing issues and actions. A claimant's decision to participate in the ECA would be revocable at any time in the VA claims or appeals process. There would be no penalty for revocation of ECA participation. Rather, upon express or implied revocation of ECA participation, the claimant's case would continue to be processed, from that point forward, using ordinary and established procedures under current statutes and regulations governing claims adjudication. In other words, the claimant's case would then fall into the regular stream of cases, and be processed in the same manner as if ECA participation had not been elected and would continue being processed from the date on which express revocation was received by VA or the date of the claimant's action that constituted an implied revocation of ECA participation under proposed § 20.1509(c). The claimant's case would essentially continue from the same point in the adjudication process that it was when it left the ECA.

Under this proposed Initiative, VBA would process claims from ECA participants at the following four designated regional offices: Nashville, Tennessee; St. Paul, Minnesota; Philadelphia, Pennsylvania; and Seattle, Washington. ECA participants would have to reside within the local jurisdiction of one of the four participating VA regional offices in order to be eligible to participate in the Initiative. The jurisdiction of the Nashville, St. Paul, and Seattle regional offices extends to residents of Tennessee, Minnesota, and Washington, respectively. The jurisdiction of the Philadelphia regional office extends to residents of the 40 easternmost counties of Pennsylvania and residents of the seven southernmost counties of New

Jersey. These four regional offices were selected as they are all high performing stations with experienced leadership that have successfully handled pilot programs in the past without an adverse impact on customer service or the efficient processing of claims not covered by such programs. The four selected regional offices also represent a diverse cross section of all regional offices in terms of claims volume. Such diversity will provide VA with greater insight as to the potential success of the Initiative should future consideration be given to expanding it to the entire VA system.

Due to the unique procedural nature of the ECA, and the legal and procedural complexities associated with certain types of claims, during the duration of the 2-year pilot program, under proposed § 20.1502(c) participation in the ECA would only be available for claims for disability compensation benefits under 38 CFR parts 3 and 4, excluding matters that involve survivor benefits (such as claims for Dependency and Indemnity compensation, see 38 CFR 3.5, and claims for burial benefits, see 38 CFR 3.1600 through 3.1612) and simultaneously contested claims (including matters related to insurance). As outlined in proposed § 20.1502(c), for the duration of the 2-year pilot program, the Initiative would be available for original claims for disability compensation benefits, as well as claims for an increased disability rating, claims to reopen previously-denied compensation benefits claims, and requests for revision of an AOJ decision based on clear and unmistakable error.

For those cases appealed to the Board under the Initiative, the Board would establish teams of attorneys to screen the appeals filed by ECA participants to determine the adequacy of the record for decisional purposes, pursuant to the Board's authority under 38 U.S.C. 7107(f). If the development of the record was inadequate, the Board would take appropriate action, such as solicit a waiver of AOJ consideration of newly-obtained evidence, or remand the case if unavoidable, so that when the appeal reached its place on the Board's docket it would be ready for prompt adjudication. See 38 CFR 19.9. Each appeal in the ECA Initiative would be decided in regular order according to its place on the Board's docket, in accordance with 38 U.S.C. 7107(a)(1). However, nothing in this proposed rule would prevent a claimant from filing a motion to have his or her case advanced on the Board's docket, subject to the provisions of 38 U.S.C. 7107(a)(2).

The ECA Agreement under this proposed rule would cover any claim that is expressly listed on the agreement, including any downstream element of the claim, such as assignment of a disability rating and effective date, and any claim that is inextricably intertwined to a covered claim. *See Dingess/Hartman v. Nicholson*, 19 Vet. App. 473, 484 (2006) (recognizing that a claim for service connection includes five elements: veteran status; existence of a disability; a connection between the veteran's service and the disability; degree of disability; and effective date). ECA participants would agree to a number of conditions that would be outlined in the ECA Agreement that they *and* their representatives would sign. The ECA Agreement would be consistent with the rules that are outlined in proposed subpart P of part 20, title 38. The ECA Agreement would explain the terms of the Initiative, the procedural rights waived under the Initiative, the responsibilities of both the participant and VA under the Initiative, and the right to revoke participation. Except as specifically provided in these proposed rules, claims processed under this Initiative would be adjudicated according to the adjudication procedures outlined in part 3 of title 38, CFR, and appeals would be subject to the Board's Appeals Regulations and Rules of Practice, as outlined in parts 19 and 20 of title 38, CFR. Any matter related to a claim for veterans benefits that is not otherwise covered by these proposed rules would be governed by normal rules pertaining to veterans benefits in title 38, CFR.

Under this proposed rule, upon receipt of a claim for benefits at one of the four participating VA regional offices, as described in proposed § 20.1501(e), VA would promptly mail claimants notice of the opportunity to participate in the ECA Initiative. Election to participate must then be made within 30 days of the date of the notice of the opportunity to participate, as set forth in proposed § 20.1503(a).

The ECA Initiative involves both claims and appeals processing. Because most of the abbreviated processing times at the appeals stage concern established statutory and regulatory time periods governing appeals, we propose to place the rules for the Initiative in new subpart P, part 20, of the Board's Rules of Practice. We propose to include a cross reference to the ECA Initiative in part 3, Adjudication.

The parameters of the proposed rule are highlighted below. For clarity, the descriptions below follow, to the extent possible, the order of claims and

appeals processing, rather than the order of the rules.

#### **Identification of Evidence Upon Filing a Claim**

Proposed § 20.1503(d) would provide that, upon electing participation in the Initiative, participants would agree to promptly identify all relevant evidence, including any VA records, any non-VA Federal records (such as Social Security disability records), and any private records (such as treatment records from a family physician). If the participant requires assistance from VA in obtaining any identified records, the participant would provide VA the appropriate release forms so VA could attempt to promptly obtain the records on behalf of the participant. *See* 38 CFR 3.159(c).

#### **Period To Respond to VA Requests for Information and Evidence**

Under 38 U.S.C. 5103(b)(1) and 38 CFR 3.159(b)(1), a claimant has up to 1 year to respond to a VA request for information and evidence necessary to substantiate a claim for benefits, although if the claimant has not responded to the request within 30 days, VA may decide the claim prior to the expiration of the 1-year period. By electing ECA participation under proposed § 20.1503, ECA participants would agree to waive the right to this 1-year response period and instead agree to respond to a VA request for information and evidence necessary to substantiate their claim(s) within the 60-day period prescribed in proposed § 20.1504(a)(1). Participants would also agree to respond to additional VA requests for evidence within the 30-day period prescribed in proposed § 20.1504(a)(2).

#### **Period To File Notice of Disagreement**

ECA participants would agree under this Initiative that if they receive an adverse VA decision on a claim(s), they will waive the right to the statutory 1-year period to initiate an appeal by filing a Notice of Disagreement (NOD), and instead file a NOD with an adverse VA decision on the claim(s) within the 60-day period prescribed in proposed § 20.1504(a)(4). *See* 38 U.S.C. 7105(b)(1); 38 CFR 20.302(a). If an ECA participant did not file a NOD during this 60-day period, but later decided within the remaining portion of the 1-year appeal period under 38 U.S.C. 7105(b)(1) to file a NOD, he or she could still pursue that appeal. However, the filing of a NOD after the 60-day period would constitute an implied revocation of participation in the ECA initiative under proposed § 20.1509(c). In that case, the covered claims would then proceed in

accordance with established laws and regulations, as if ECA participation had not been elected. Alternatively, under proposed § 20.1509(e), an ECA participant may file a motion for extension of the 60-day period, based on good cause. Such motion must be filed with VA *prior* to the expiration of the 60-day period. Provided that the motion is granted, the participant will remain in the Initiative.

#### **Review by Decision Review Officer**

ECA participants under proposed § 20.1505 would agree that if they file a NOD as to an adverse decision on a covered claim(s), the decision would be reviewed by a Decision Review Officer under the provisions of 38 CFR 3.2600.

#### **Hearing Before Decision on Claim**

As set forth in proposed § 20.1507(a), ECA participants would agree that, if they request a hearing before VBA, they will only have one hearing on their claim(s), the hearing will be conducted by a Decision Review Officer, and that no hearing will be held until after the participating VA regional office that has jurisdiction over the ECA participant's claim makes an initial decision on the claim. *See* 38 CFR 3.103(c) and 3.2600(c). The reason for this latter requirement is to avoid unnecessary delays that would be caused by waiting to conduct a hearing on a claim that the participating VA regional office may grant when the initial decision is made on the claim.

#### **Period To File Substantive Appeal**

Under current laws and regulations, claimants have 60 days from the date of mailing of the Statement of the Case (SOC) in which to file a Substantive Appeal, or the remainder of the one-year period in which to file the NOD, whichever period is longer. 38 U.S.C. 7105(d)(3); 38 CFR 20.303(b). ECA participants under this proposed rule would agree that if they continue to pursue an appeal in their case, they will waive the right to this time period, and instead file a Substantive Appeal within the 30-day period prescribed in proposed § 20.1504(a)(5). If an ECA participant did not file a Substantive Appeal during this 30-day period, but later decided within the remaining time available under 38 U.S.C. 7105(d)(3) and 38 CFR 20.303(b) to do so, he or she could still file a timely Substantive Appeal. However, the claimant's filing of a Substantive Appeal after the 30-day period would constitute an implied revocation of participation in the ECA Initiative under proposed § 20.1509(c). In that case, the appeal would then proceed in accordance with established

laws and regulations, as if ECA participation had not been elected. Alternatively, under proposed § 20.1509(e), an ECA participant may file a motion for extension of the 30-day period, based on good cause. Such motion must be filed with VA *prior* to the expiration of the 30-day period. Provided that the motion is granted, the participant will remain in the Initiative.

#### **Certification of Appeal to the Board**

Proposed § 20.1504(b) would provide that upon receipt of a timely Substantive Appeal, the participating VA regional office would certify covered claims and transfer the appellate record to the Board within 30 days of receipt of the Substantive Appeal or within 30 days of the receipt of any additional submissions following the Substantive Appeal, but no later than 60 days from receipt of the Substantive Appeal. *See* 38 CFR 19.35 and 19.36.

#### **Period To Submit Requests for a Hearing, Change in Representation, or Additional Evidence After Certification and Transfer of Appeal**

Under 38 CFR 20.1304(a) and (b), claimants have a period of 90 days from notification that their appeal has been certified and transferred to the Board in which to submit: (1) A request for a personal hearing; (2) additional evidence; or (3) a request for a change in representation. ECA participants would agree to waive the right to this 90-day period and instead agree to submit any request for a personal hearing, additional evidence, or request for a change in representation to the Board within the 30-day period prescribed in proposed § 20.1504(a)(6). If following the passing of this 30-day period an ECA participant decided to submit a request for a personal hearing, additional evidence, or a request for a change in representation, he or she could still do so within the remaining available time period provided pursuant to 38 CFR 20.1304, but such would constitute an implied revocation of the claimant's participation in the ECA Initiative pursuant to proposed § 20.1509(c). Alternatively, under proposed § 20.1509(e), an ECA participant may file a motion for extension of the 30-day period, based on good cause. Such motion must be filed with VA *prior* to the expiration of the 30-day period. Provided that the motion is granted, the participant will remain in the Initiative.

#### **Board Hearing**

By law, an appellant must be provided with an opportunity for a hearing before the Board may decide the

appeal. 38 U.S.C. 7107(b). An appellant is provided the following options for a Board hearing: an in-person hearing at the Board's offices in Washington, DC; an in-person hearing before the Board at the local VA regional office; or a hearing before the Board through the use of videoconference technology. *See* 38 U.S.C. 7107(d) and (e); 38 CFR 20.700(e), 20.702(a), and 20.705. As prescribed in proposed § 20.1507(b), ECA participants who appeal an adverse decision on their covered claim(s) to the Board would (1) receive only one hearing before the Board, and (2) the Board, after consulting with the participant and his or her designated representative, would determine the type of hearing that the participant will have so as to schedule it in as short a time as reasonably possible. An in-person hearing at the Board's offices in Washington, DC, would be chosen only if geographically convenient for the participant, or if the participant expressly agrees to travel at his or her own expense to the Board's offices for the hearing. *See* 38 CFR 20.712.

#### **Consideration of Evidence Submitted After Statement of Case**

Under current laws and regulations, claimants have the right to have the AOJ consider evidence submitted or received after issuance of an SOC. 38 U.S.C. 7104(a). Claimants also have the right to issuance of a Supplemental Statement of the Case (SSOC) if there are material changes in, or additions to, the information in the SOC or any prior SSOC. 38 U.S.C. 7104(a), 7105(d); 38 CFR 19.9(a), (b)(3), 19.31, 19.37, 20.800, 20.903(b) and 20.1304(c). As prescribed in proposed § 20.1508(b)(2), if ECA participants or their representative submit additional evidence after the SOC is issued, and continue to pursue their appeal by filing a timely Substantive Appeal, they are deemed to have waived their right to initial review of this evidence by the AOJ, including readjudication of their claim and issuance of any required SSOC. Rather, as an ECA participant, they will agree to have any such evidence reviewed by the Board in the first instance. In agreeing to this waiver by virtue of electing to participate in the Initiative, claimants would acknowledge that their claim may be granted or denied based on the Board's consideration of this new evidence in the first instance. By executing an ECA Agreement with their representatives, ECA participants would essentially be offering such waiver at the outset of the claims process. Because participants and their representatives are already aware of the evidence they are submitting, an additional waiver of

AOJ review of such evidence, outside of that waiver already contained in the ECA Agreement, would be unnecessary.

If, however, VA obtains new relevant evidence in an appeal that was not submitted by the participant or his or her authorized representative, under proposed § 20.1508(b)(1) VA would provide a copy of the new evidence to the participant and his or her representative and solicit from the appellant a waiver of AOJ review of the new evidence pursuant to the procedures outlined in § 20.1304(c). In other words, unlike evidence submitted by the appellant or representative, AOJ review of evidence obtained by VA would not be automatically waived by virtue of the execution of an ECA Agreement. Rather, VA would actively solicit a waiver of AOJ review of such evidence, as such waiver would not be inherent in ECA participation. If the appellant declines to provide a waiver at that time, his or her participation in the Initiative would end. The claim would then be processed using ordinary and established procedures under the rights afforded under current statutes and regulations applicable from that point forward.

#### **Screening and Review by the Board**

The Board is statutorily required to consider and decide appeals in the order in which they are placed on its docket (with limited exceptions). 38 U.S.C. 7107(a). Under this Initiative, as explained in proposed § 20.1506, the Board would use its statutory authority to screen ECA cases that are appealed to the Board to ensure that the record is adequate for decisional purposes. 38 U.S.C. 7107(f). If the record is found to be inadequate, appropriate action would be taken by the Board pursuant to 38 CFR 19.9, including but not limited to: soliciting a waiver from the participant permitting the Board to review new evidence obtained by VA in the first instance; seeking clarification from the participant of matters such as hearing requests and representation; and, where necessary, remanding the case for further development. A case screened by the Board for appellate review would be finally decided in docket order (a remand is not a final order) and would not be advanced on the Board's docket except as provided in 38 CFR 20.900(c).

#### **Extension of Time Limits**

Under current law, certain time limits may be extended upon request, for good cause shown. *See, e.g.*, 38 CFR 3.109(b), 20.303, 20.1304(b). The ECA Initiative is intended to streamline the claims and appeals process. One of the primary vehicles used to accomplish this goal is

the shortening of various time limits typically available to claimants, as outlined above. Because the Initiative is predicated on abbreviated time limits, extension requests are inconsistent with the goals of the program, as they would lengthen the claims and appeals process. Nevertheless, VA recognizes the pro-claimant nature of the veterans benefits adjudication system, and realizes that extensions are sometimes both unavoidable and necessary to properly process a claim and/or an appeal. Accordingly, under proposed § 20.1509(c)(3), a participant's request for an extension of any of the time limits modified by the Initiative will serve as an implied revocation of participation in the program, *unless* the participant shows on motion that there is good cause for the extension request. Examples of such extenuating circumstances include, but are not limited to, illness on the part of the participant or representative of such severity that precludes action during the relevant period, and death or withdrawal of a representative. If the extension request is not granted, the request itself would serve as an implied revocation of participation in the Initiative, and from the date of the action constituting the implied revocation the participant's claim would be adjudicated as if he or she had not elected to participate in the Initiative (i.e. under existing claims adjudication procedures).

#### Waiver of Procedural Matters

Inherent in the execution of the ECA Agreement is the waiver of several procedural rights typically afforded to claimants in the VA system, most notably time periods allotted under existing law to take certain actions, such as the time period for filing a NOD or Substantive Appeal, or the period to respond to a VA request for additional evidence. All of these time periods are specifically outlined in proposed § 20.1504, and would be identified in the ECA Agreement signed by the participant and his or her representative.

However, there are other procedural processing issues that may arise in a case that would not be specifically outlined in either the ECA Agreement or this proposed rule, and for which a waiver would not have been secured by virtue of participation in the Initiative. It would be virtually impossible to separately identify in the ECA Agreement or this proposed rule all potential processing issues that may arise, yet without the participant's waiver of any procedural defects that may develop, the claims adjudication

process could be unnecessarily prolonged. For example, if a Veterans Claims Assistance Act (VCAA) notice letter sent to a claimant contained a minor defect, the claims adjudication process would need to be delayed while a corrective VCAA letter was sent to the claimant and a reasonable period was allowed for reply (typically 60 days).

Such delay is inconsistent with the objectives of the Initiative, which seeks to streamline the claims and appeals process and eliminate unnecessary waiting periods in claims processing. This proposed rule therefore provides a mechanism for the waiver of any procedural processing issues not specifically addressed in the ECA Agreement. Proposed § 20.1508(a) provides that an ECA participant would be required to waive any specifically identified procedural processing issues and actions when requested by VA in writing or at a hearing. In such circumstances, VA would provide the ECA participant with a clear explanation of the right being waived.

Should the participant fail to provide such waiver, or if such waiver is not received within 30 days of the waiver request, or if any request for an extension of time to respond pursuant to proposed § 20.1509(c)(3) is not granted, the participant would be deemed to have revoked participation in the Initiative and the claim(s) would thereafter be processed as though the participant had not elected participation in the Initiative. As noted above, such waiver would not be required for matters that have already been waived by virtue of participation in the Initiative.

#### Revocation of ECA Participation and Compliance With Initiative Requirements

One of the key features of the Initiative is its reliance on voluntary participation. As such, the Initiative would provide for both express and implied revocation of participation in the program.

Under proposed § 20.1509(b), an ECA participant would be able to expressly revoke participation in the Initiative at any time by submitting a written revocation request to the appropriate participating VA regional office or the Board, as appropriate. As of the date the revocation request is received, the claim(s) would be processed using the claims adjudication procedures outlined in the existing statutory and regulatory scheme.

Proposed § 20.1509(c) would provide that a participant's failure to comply with the terms of the executed Agreement and Waiver of Rights would

have the same effect as express revocation—that of terminating participation in the Initiative and having the claims processed using established claims adjudication and appeals procedures. Participation in the Initiative would be implicitly revoked if a participant: (1) Fails to comply with any of the time limits outlined in proposed § 20.1504(a); (2) fails to waive initial AOJ consideration of any evidence obtained by VA that was not considered in the SOC; (3) requests an extension of any of the time limits in § 20.1504(a), unless good cause is found pursuant to proposed § 20.1509(c)(3); or (4) fails to comply with the terms of the ECA Agreement, as determined by VA.

Proposed § 20.1509(d) would also provide that if an ECA participant dies during the pendency of his or her claim, participation would be impliedly revoked.

Under proposed § 20.1509(a), unless the participant expressly or impliedly revokes his or her participation in the Initiative, all covered claims, i.e., all eligible claims for which ECA participation has been elected, would be processed by VA or the Board in accordance with the provisions of this proposed rule until a final VA decision of the agency of original jurisdiction or the Board has been issued.

#### Termination of the Initiative

Proposed § 20.1510 would provide that VA may terminate the Initiative at any time. Proposed § 20.1510 would also explain that if VA terminates the Initiative, VA would notify participants and their representatives in writing and inform them that any covered claims will be processed from the date of termination in the same manner as if the participant had not elected to participate in the Initiative.

#### Paperwork Reduction Act

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

#### Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. It will not affect any small organizations or small governmental jurisdictions, and will not have a significant economic impact on these small entities. Therefore, pursuant to 5 U.S.C. 605(b), this proposed rule is exempt from the initial and final regulatory flexibility

analysis requirement of 5 U.S.C. 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 Executive Order classifies a “significant regulatory action,” requiring review by the Office of Management and Budget (OMB) unless OMB waives such review, as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

The economic, interagency, budgetary, legal, and policy implications of this proposed rule have been examined and it has been determined to be a significant regulatory action under Executive Order 12866, as it raises novel legal or policy issues arising out of legal mandates.

#### 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 an 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 1 year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

#### Catalog of Federal Domestic Assistance Numbers

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; 64.103, Life Insurance for Veterans; 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; 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death; 64.114, Veterans Housing-Guaranteed and Insured Loans; 64.115, Veterans Information and Assistance; 64.116, Vocational Rehabilitation for Disabled Veterans; 64.117, Survivors and Dependents Educational Assistance; 64.118, Veterans Housing-Direct Loans for Certain Disabled Veterans; 64.119, Veterans Housing-Manufactured Home Loans; 64.120, Post-Vietnam Era Veterans’ Educational Assistance; 64.124, All-Volunteer Force Educational Assistance; 64.125, Vocational and Educational Counseling for Servicemembers and Veterans; 64.126, Native American Veteran Direct Loan Program; 64.127, Monthly Allowance for Children of Vietnam Veterans Born with Spina Bifida; and 64.128, Vocational Training and Rehabilitation for Vietnam Veterans’ Children with Spina Bifida or Other Covered Birth Defects.

#### List of Subjects

##### 38 CFR Part 3

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

##### 38 CFR Part 20

Administrative practice and procedure, Claims, Veterans.

Approved: December 27, 2007.

**James B. Peake,**

*Secretary of Veterans Affairs.*

**Editorial Note:** This document was received at the Office of the Federal Register on April 11, 2008.

For the reasons set forth in the preamble, VA proposes to amend 38 CFR parts 3 and 20 as follows:

### PART 3—ADJUDICATION

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

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

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

2. Add § 3.161 to read as follows:

#### § 3.161 Expedited Claims Adjudication Initiative—Pilot Program.

Rules pertaining to the Expedited Claims Adjudication Initiative Pilot Program are set forth in part 20, subpart P, of this chapter.

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

### PART 20—BOARD OF VETERANS’ APPEALS: RULES OF PRACTICE

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

**Authority:** 38 U.S.C. 501(a), and as noted in specific sections.

4. Add subpart P to read as follows:

#### Subpart P—Expedited Claims Adjudication Initiative—Pilot Program

Sec.

20.1500 Rule 1500. Expedited Claims Adjudication Initiative.

20.1501 Rule 1501. Definitions.

20.1502 Rule 1502. Eligibility.

20.1503 Rule 1503. Election, identification of evidence, and representation.

20.1504 Rule 1504. Time limits.

20.1505 Rule 1505. Review of initial benefits claim decision.

20.1506 Rule 1506. Board review of cases.

20.1507 Rule 1507. Hearings.

20.1508 Rule 1508. Waiver.

20.1509 Rule 1509. Compliance and revocation of participation.

20.1510 Rule 1510. Termination of the Initiative.

#### Subpart P—Expedited Claims Adjudication Initiative—Pilot Program

##### § 20.1500 Rule 1500. Expedited Claims Adjudication Initiative.

(a) *Purpose.* The Expedited Claims Adjudication Initiative is a pilot program designed to streamline the claims adjudication and appeals process. This subpart establishes procedures governing this Initiative.

(b) *Outline of Initiative.* This Initiative allows eligible claimants to voluntarily participate in an alternative claims adjudication program as set forth in this subpart, which is predicated on the claimant’s waiver of certain identified statutory and regulatory time limits, procedural rights, and processing issues that may arise.

(c) *Scope.* Except as specifically provided in this subpart, claims processed under this Initiative will be adjudicated according to the procedures outlined in part 3 of this chapter, and appeals will be processed according to the Appeals Regulations and Rules of Practice, as outlined in parts 19 and 20 of this chapter. Any matter not otherwise covered by this subpart will be governed by existing rules in this title.

(d) *Duration.* The Secretary will accept an executed Agreement and

Waiver of Rights as provided in § 20.1503 of this part for a period not to exceed 2 years from the effective date of the Initiative.

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

**§ 20.1501 Rule 1501. Definitions.**

For purposes of this subpart, the following definitions apply:

(a) *Initiative* means the Expedited Claims Adjudication Initiative as promulgated by this subpart.

(b) *Participant* means any eligible claimant who elects to participate in the Initiative by executing, with his or her representative, an Expedited Claims Adjudication Initiative Agreement and Waiver of Rights as provided in § 20.1503 of this part.

(c) *Covered claim or covered claims* means any claim or claims, as described in § 20.1502(c) of this part, that a participant elects to have processed under the rules governing the Initiative, including any downstream element of the claim(s), such as assignment of a disability rating and effective date, and any claim that is inextricably intertwined with a covered claim.

(d) *Representative* means a representative of a recognized Veterans Service Organization or an accredited attorney or agent, as set forth in part 14 of this chapter, for whom a claimant has properly executed and filed a VA Form 21–22, “Appointment of Veterans Service Organization as Claimant’s Representative,” or a VA Form 21–22a, “Appointment of Individual as Claimant’s Representative,” as required by § 14.631 of this chapter.

(e) *Participating VA regional office* means one of the following four VA regional offices: Nashville, Tennessee; St. Paul, Minnesota; Seattle, Washington; and Philadelphia, Pennsylvania. The jurisdiction of the Nashville, St. Paul, and Seattle regional offices extends to residents of Tennessee, Minnesota, and Washington, respectively. The jurisdiction of the Philadelphia regional office extends to residents of the 40 easternmost counties of Pennsylvania and residents of the seven southernmost counties of New Jersey. For purposes of this Initiative only, the jurisdiction of these regional offices extends only to a covered claim, as described in § 20.1502(c) of this part.

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

**§ 20.1502 Rule 1502. Eligibility.**

To participate in the Initiative, a claimant must:

(a) At the time the Agreement and Waiver of Rights is executed, have a representative, as defined in § 20.1501(d) of this part;

(b) Reside within the jurisdiction of a participating VA regional office, as defined in § 20.1501(e) of this part; and

(c) File one of the following types of claims for VA disability compensation as outlined in parts 3 and 4 of this chapter at a participating VA regional office:

(1) Original claim;

(2) Claim for an increased rating;

(3) Claim to reopen a previously denied claim based on the submission of new and material evidence as provided in § 3.156 of this chapter; or

(4) Requests for revision of a decision of an agency of original jurisdiction under § 3.105 of this chapter based on clear and unmistakable error.

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

**§ 20.1503 Rule 1503. Election, identification of evidence, and representation.**

(a) *When and how election made.* Upon the filing of a claim described in § 20.1502(c) of this part, VA will promptly notify the claimant in writing of the opportunity to participate in the Initiative and provide the claimant with an Agreement and Waiver of Rights. A claimant may elect to participate in the Initiative by filing an executed Agreement and Waiver of Rights as provided in paragraphs (b) and (c) of this section within 30 days of the date of the notice of the opportunity to participate in the Initiative. An election to participate in the Initiative can be revoked at any time in accordance with § 20.1509 of this part.

(b) *Execution of agreement.* To participate in the Initiative, a claimant and his or her representative must execute an Agreement and Waiver of Rights on a form prescribed by the Secretary. The claimant will specifically identify in the Agreement and Waiver of Rights all claims he or she wishes to have processed under the Initiative.

(c) *Where to file.* The executed Agreement and Waiver of Rights must be filed with the participating VA regional office that has jurisdiction over the claim.

(d) *Identification of relevant evidence.* Upon executing the Agreement and Waiver of Rights, the participant will identify all relevant evidence in support of his or her claim(s), including any VA records, non-VA Federal records (such as Social Security disability records), and any private records (such as treatment records from a family physician) within the time prescribed in § 20.1504(a)(1). If the participant requires assistance from VA in obtaining any identified records, the participant will provide VA the appropriate release form so VA may attempt to promptly

obtain the records on behalf of the participant.

(e) *Effect of change in representation on the election.* If a participant changes or terminates representation after having made a valid election to participate in the Initiative, participation in the Initiative will continue under the terms of the signed Agreement and Waiver of Rights, unless the participant indicates, in writing, pursuant to § 20.1509(b) of this part, that he or she wishes to revoke participation.

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

**§ 20.1504 Rule 1504. Time limits.**

The following time limits will be applicable to all covered claims:

(a) *Time limits to be observed by the participant.* The participant will comply with the following time limits for all covered claims:

(1) *Response to initial notice letter.* The time limit for responding to the notification required by § 3.159(b)(1) of this chapter regarding the information and medical or lay evidence necessary to substantiate a claim will be 60 days.

(2) *Subsequent requests by VA for additional information and evidence.* The time limit for responding to any subsequent request by VA for additional information or evidence will be 30 days.

(3) *VA request for waiver.* The time limit for responding to a VA request for waiver as set forth in § 20.1508 of this part, will be 30 days.

(4) *Notice of Disagreement.* The time limit for filing a Notice of Disagreement pursuant to § 20.302(a) of this part will be 60 days.

(5) *Substantive Appeal.* The time limit for filing a Substantive Appeal pursuant to § 20.302(b) of this part will be 30 days.

(6) *Following certification of appeal to the Board.* Following the issuance of notification that the appeal has been certified and transferred to the Board, the time limit for taking the following actions pursuant to § 20.1304 of this part will be 30 days:

(i) Request a hearing before the Board,  
(ii) Request a change in representation, or  
(iii) Submit additional evidence or argument.

(b) *Time limit to be observed by the participating VA regional office.* The participating VA regional office shall certify covered claims and transfer the appellate record to the Board as set forth in §§ 19.35 and 19.36 of this chapter within 30 days of the receipt of the Substantive Appeal, or within 30 days of receipt of any additional submissions following the Substantive Appeal, but no later than 60 days from the receipt of the Substantive Appeal.



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

**§ 20.1505 Rule 1505. Review of initial benefits claims decision.**

If a participant files a Notice of Disagreement as to a covered claim, the decision of the participating VA regional office will be reviewed by a Decision Review Officer under the provisions set forth in § 3.2600 of this chapter.

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

**§ 20.1506 Rule 1506. Board review of cases.**

(a) The Board will screen cases that are certified and transferred to the Board under the Initiative to determine whether the record is adequate for decisional purposes. If the Board determines that the record is inadequate, the Board will take appropriate action pursuant to § 19.9 of this chapter.

(b) A case screened by the Board for purposes of determining the adequacy of the record will be decided in docket order and will not be advanced on the Board's docket except as provided in § 20.900(c) of this part.

(Authority: 38 U.S.C. 7107(a), (f))

**§ 20.1507 Rule 1507. Hearings.**

(a) *Before the participating VA regional office.* Upon request, a participant is entitled to a hearing by a Decision Review Officer before the participating VA regional office as provided in §§ 3.103(c) and 3.2600(c) of this chapter, subject to the following limitations:

(1) No hearing will be conducted prior to the initial adjudication of the claim by the participating VA regional office.

(2) Only one hearing on a claim will be conducted at the participating VA regional office and the hearing will be conducted by a Decision Review Officer in accordance with § 3.2600 of this chapter.

(b) *Before the Board.* Upon request, a participant is entitled to a hearing before the Board as provided in §§ 20.700 through 20.717, and 20.1304, subject to the following limitations:

(1) Only one hearing before the Board will be conducted.

(2) After consultation with the participant and his or her representative, the Board will determine whether the hearing will be conducted in person in Washington, DC, at the participating VA regional office with jurisdiction over the claim, or by electronic equipment as set forth in § 20.700(e) of this part. The Board's determination will be based primarily on the type and place of hearing which will allow for scheduling at the earliest

possible date. An in-person hearing will be conducted in Washington, DC, only if geographically convenient for the participant and his or her representative, or if the participant agrees to travel to Washington, DC, at his or her own expense.

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

**§ 20.1508. Rule 1508. Waiver.**

(a) *General.* When requested by VA, a participant will waive, in writing, identified procedural processing issues and actions relating to covered claims. VA will provide the participant with a clear explanation, in writing, as to what rights he or she may be waiving. If a hearing on appeal is conducted, the waiver may be formally and clearly entered on the record at the time of hearing. A response to a written waiver request from VA must be filed within the 30-day period prescribed in § 20.1504(a)(3) of this part. Such waiver is not required for matters that have already been waived by virtue of electing participation in the Initiative.

(b) *Evidence obtained or submitted after the Statement of the Case.*

(1) *Evidence obtained by VA.* If new evidence is obtained by VA following issuance of a Statement of the Case under §§ 19.29 and 19.30 of this chapter, and the claim(s) is not otherwise granted in full based on this new evidence, VA will provide a copy of such evidence to the participant and representative, and request a waiver of review by the agency of original jurisdiction of such evidence and issuance of a Supplemental Statement of the Case pursuant to the provisions set forth in § 20.1304(c) of this part. A response to a written waiver request from VA must be filed within the 30-day period prescribed in § 20.1504(a)(3) of this part.

(2) *Evidence submitted by participant or representative.* If new evidence is submitted by the participant or representative following issuance of a Statement of the Case under §§ 19.29 and 19.30 of this chapter, the participant, by virtue of executing a valid Agreement and Waiver of Rights, is deemed to have knowingly and voluntarily waived agency of original jurisdiction review of such evidence and issuance of a Supplemental Statement of the Case, which permits the Board to review such evidence in the first instance.

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

**§ 20.1509 Rule 1509. Compliance and revocation of participation.**

(a) Unless the participant revokes his or her participation in the Initiative as provided in paragraphs (b), (c) or (d) of

this section, all covered claims will continue to be processed by VA or the Board in accordance with the provisions of this subpart until a final decision of the agency of original jurisdiction or the Board has been issued.

(b) *Express revocation.* A participant may revoke participation in the Initiative at any time by submitting a revocation request in writing. The revocation request must be filed with the participating VA regional office unless the case has been certified and transferred to the Board, in which case the revocation request should be filed with the Board. As of the date of receipt of the revocation, any covered claims will be processed in the same manner as if the participant had not elected to participate in the Initiative.

(c) *Implied revocation.* The failure of a participant to meet the terms of these rules, as outlined in the executed Agreement and Waiver of Rights, will have the same result as if the participant had expressly revoked his or her participation in the Initiative. As of the date of the action constituting such implied revocation, any covered claims will be processed in the same manner as if the participant had not elected to participate in the Initiative. Grounds for implied revocation of participation include, but are not limited to:

(1) The failure of the participant or representative, as appropriate, to comply with any of the time limits set forth in § 20.1504(a) of this part;

(2) The failure to waive initial consideration by the agency of original jurisdiction of any evidence obtained by VA that was not considered in the Statement of the Case;

(3) A request by a participant or representative for an extension of any of the time limits set forth in § 20.1504(a) of this part, unless a motion for good cause is granted, as described by paragraph (e) of this section; and

(4) Any other failure on the part of the participant to comply with the terms of the Agreement and Waiver of Rights, as determined by VA.

(d) *Death of participant.* If a participant dies while his or her claim is being processed, participation in the Initiative will be deemed revoked.

(e) *Extensions.* Extensions of any of the time limits described in this subpart may only be granted when the participant demonstrates on motion that there is good cause for the extension request. At no time may time periods be extended beyond those provided by law to all claimants and appellants. Examples of good cause include, but are not limited to, illness of the participant or the representative of such severity that precludes action during the period;



death of an individual representative; illness or incapacity of an individual representative that renders it impractical for a participant to continue with him or her as representative; or withdrawal of an individual representative. Motions for extensions must be filed prior to the expiration of the time period for which a motion is being requested. Motions must be in writing, and filed with the participating VA regional office that has jurisdiction over the claim, unless the case has been certified and transferred to the Board, in which case the motion must be filed with the Board. Motions must include the name of the participant, the applicable Department of Veterans Affairs file number; and an explanation as to why the extension request is being made.

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

#### **§ 20.1510 Rule 1510. Termination of the Initiative.**

VA may terminate the Initiative at any time. In the event of such termination, VA will notify participants and their representatives in writing and inform them that any covered claims will be processed from the date of termination in the same manner as if the participant had not elected to participate in the Initiative.

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

[FR Doc. E8-8099 Filed 4-15-08; 8:45 am]

BILLING CODE 8320-01-P

## **DEPARTMENT OF VETERANS AFFAIRS**

### **38 CFR Part 17**

#### **RIN 2900-AM81**

#### **Elimination of Co-Payment for Weight Management Counseling**

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would amend the Department of Veterans Affairs (VA) medical regulations concerning co-payments for inpatient hospital care and outpatient medical care. More specifically, it would designate weight management counseling (individual and group sessions) as a service that is not subject to co-payment requirements. The intended effect of this proposed rule is to increase participation in weight management counseling by removing the co-payment barrier. This proposed rule would also amend the medical regulations by making nonsubstantive

changes to correct references to statutory provisions.

VA is also using direct final rulemaking for this action because we expect that there will be no significant adverse comments on the rule. (See RIN 2900-AM59). If no significant adverse comments are received, VA will confirm the effective date of the direct final rule and withdraw this proposed rule. If significant adverse comments are received, VA will withdraw the direct final rule and proceed with rulemaking on this proposed rule. A subsequent **Federal Register** document will be published to announce VA's action.

**DATES:** Written comments must be received on or before May 16, 2008.

**ADDRESSES:** Written comments may be submitted through [www.Regulations.gov](http://www.Regulations.gov); by mail or hand-delivery to the Director, Regulations Management (00REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to "RIN 2900-AM81—Elimination of Co-payment for Weight Management Counseling." Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m. Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment (this is not a toll-free number). In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at [www.Regulations.gov](http://www.Regulations.gov).

**FOR FURTHER INFORMATION CONTACT:** Tony Guagliardo, Director, Business Policy, Chief Business Office (16), Veterans Health Administration, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 254-0384 (this is not a toll-free number).

**SUPPLEMENTARY INFORMATION:** This document proposes to amend VA's "Medical" regulations, which are set forth at 38 CFR part 17 (referred to below as the regulations), to eliminate co-payments for weight management counseling (individual and group sessions).

A large number of veterans using VA medical facilities are overweight (body mass index of 25–29.9) or obese (body mass index of 30 or higher). Among male veterans using VA medical facilities in 2000, 40 percent were classified as overweight and 33 percent were classified as obese. Among female veterans using VA medical facilities in 2000, 31 percent were classified as

overweight and 37 percent were classified as obese.

Poor diet and physical inactivity are rapidly overtaking smoking as the leading preventable cause of morbidity and mortality in the United States. Further, most of the morbidity and mortality related to poor diet and physical inactivity can be attributed to excess weight. However, even modest weight loss and increased physical activity can result in improved health outcomes, especially for individuals with diabetes or likely to get diabetes, a highly prevalent condition among veterans seeking healthcare at VA facilities. Being overweight or obese are also conditions clearly associated with coronary heart disease (CHD), CHD risks (hypertension, hyperlipidemia), certain cancers, gallbladder disease, obstructive sleep apnea, osteoarthritis, and all-cause mortality. Consequently, the health care costs for obesity-associated conditions throughout the United States are substantial with estimates of the total annual expenditures in the United States consisting of as much as \$107.2 billion in 2006 dollars.

To combat the effects of being overweight or obese, VA has established "Managing Overweight/Obesity for Veterans Everywhere!" (MOVE!). This is a comprehensive, evidence-based weight management program that consists of both individual and group counseling.

Currently, VA regulations require many veterans to agree to make co-payments as a condition for participation in the MOVE! program. However, field providers report that co-payments are a significant barrier to participation in the counseling program. The co-payment requirement is estimated to generate approximately \$1,001,294 annually. However, we believe that not imposing co-payments would be clearly cost effective based on the conclusion that the costs of healthcare for overweight and obese individuals become significantly lower as they lose weight. Accordingly, we propose to eliminate co-payments for weight management counseling.

The MOVE! program is based primarily upon the National Institutes of Health/National Heart, Lung, and Blood Institute's *Clinical Guidelines for the Identification, Evaluation, and Treatment of Overweight and Obesity* and is consistent with the weight management recommendations of the U.S. Preventive Services Task Force, supported by the Agency for Healthcare Research and Quality in the Department of Health and Human Services. An Executive Council consisting of federal weight management experts and