

**§ 1280.62 When are the exhibition halls open?**

(a) The exhibition halls are open to the public during the following hours:

(1) The day after Labor Day through March 31, hours are 10 a.m. to 5:30 p.m.

(2) April 1 through the Friday before Memorial Day, hours are 10 a.m. to 7 p.m.

(3) Memorial Day weekend through Labor Day, hours are 10 a.m. to 9 p.m.

(b) The Archivist of the United States reserves the authority to close the exhibition halls to the public at any time for special events or other purposes. The building is closed on December 25.

Dated: September 4, 2003.

**John W. Carlin,**

*Archivist of the United States.*

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BILLING CODE 7515-01-P

## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 20

RIN 2900-AJ85

#### **Board of Veterans' Appeals: Rules of Practice—Motions for Revision of Decisions on Grounds of Clear and Unmistakable Error: Advancement on the Docket**

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Interim final rule with request for comments.

**SUMMARY:** This document amends the Rules of Practice of the Board of Veterans' Appeals (Board) relating to challenges to Board decisions on the grounds of "clear and unmistakable error" (CUE). The amendment provides for advancing CUE motions on the docket.

**DATES:** *Effective date:* September 12, 2003.

*Comments:* Comments must be submitted by October 14, 2003.

**ADDRESSES:** Mail or hand-deliver written comments to: Director, Regulations Management (00REG1), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1064, Washington, DC 20420; or fax comments to (202) 273-9026; or e-mail comments to [OGCRegulations@mail.va.gov](mailto:OGCRegulations@mail.va.gov). Comments should indicate that they are submitted in response to "RIN 2900-AJ85." All written comments will be available for public inspection at the above address 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) 273-9515 for an appointment.

**FOR FURTHER INFORMATION CONTACT:** Steven L. Keller, Senior Deputy Vice Chairman, Board of Veterans' Appeals (01C), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 565-5978.

**SUPPLEMENTARY INFORMATION:** The Board is an administrative body that decides appeals from denials of claims for veterans' benefits. There are currently 54 Board members (Veterans Law Judges), who collectively decide on average approximately 35,000 such appeals per year.

#### **Advancement on the Docket**

On January 13, 1999, the Department of Veterans Affairs (VA) published a final rule in the **Federal Register**, 64 FR 2134, implementing the provisions of section 1(b) of Pub. L. No. 105-111 (Nov. 21, 1997), which permits challenges to decisions of the Board on the grounds of CUE.

As published, the rules relating to CUE motions require that such motions be decided in accordance with their place on the Board's docket. 38 CFR 20.1405(a) (Rule 1405(a)). While appeals are subject to the same requirement, 38 U.S.C. 7107(a)(1), both section 7107(a)(2) and its implementing regulation provide for the earlier consideration of appeals in some circumstances, *id.* 7107(a)(2); 38 CFR 20.900(c) (Rule 900(c)). Generally, Rule 900(c) provides that a case may be advanced on the docket if it involves an interpretation of law of general application affecting other claims or for other good cause. Examples of such good cause in Rule 900(c) include serious illness, extreme financial hardship which might be relieved in whole or in part if the benefits sought on appeal were granted, and administrative error which results in significant delay in docketing the appeal. That rule also provides specific filing requirements.

However, because CUE motions are not appeals, and thus not subject to the various rules relating to appeals, 38 CFR 20.1402 (Rule 1402), we realized that there was no regulatory provision for advancing CUE motions on the docket.

Because we believe that circumstances may warrant advancing a motion on the docket, we have amended Rule 1405(a), relating to the disposition of CUE motions, by redesignating paragraph (2) as paragraph (3), and adding a new paragraph (2), which provides that a CUE motion may be advanced on the docket subject to the

substantive and procedural requirements of Rule 900(c).

VA will consider public comment submitted to the address above, but it has not published a notice of proposed rulemaking on the amendment to this regulation, as allowed by 5 U.S.C. 553(b)(A) and (B). The affected regulation is a rule of agency procedure and practice. In addition, the agency for good cause finds that notice and public procedure thereon would be unnecessary. The substantive rules (subpart O of 38 CFR) were effective February 12, 1999. To avoid delay in the application of this liberalizing benefit, this amendment is effective immediately.

#### **Regulatory Flexibility Act**

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

#### **Executive Order 12866**

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

#### **Paperwork Reduction Act**

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

#### **Unfunded Mandates**

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

#### **List of Subjects in 38 CFR Part 20**

Administrative practice and procedure, Claims, Lawyers, Legal services, Veterans, Authority delegations (government agencies).

Approved: August 4, 2003.

**Anthony J. Principi,**

*Secretary of Veterans Affairs.*

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

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

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

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

■ 2. In § 20.1405, paragraph (a) is amended by redesignating paragraph (a)(2) as paragraph (a)(3), and adding a new paragraph (a)(2) to read as follows:

### § 20.1405 Rule 1405. Disposition.

(a) \* \* \*

(2) *Advancement on the docket.* A motion may be advanced on the docket subject to the same substantive and procedural requirements as those applicable to an appeal under Rule 900(c) (§ 20.900(c) of this part).

\* \* \* \* \*

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BILLING CODE 8320-01-P

## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 20

RIN 2900-AL08

### Board of Veterans' Appeals: Speeding Appellate Review for Aging Veterans

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule.

**SUMMARY:** This document amends a Board of Veterans' Appeals (Board) Rule of Practice to provide that a case may be advanced on the Board's docket because of the appellant's advanced age. The change is necessary to speed the appellate process for the large group of aging veterans.

**DATES:** Effective Date: September 12, 2003.

#### 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).

**SUPPLEMENTARY INFORMATION:** The Board of Veterans' Appeals (Board) is an administrative body that decides appeals from denials of claims for veterans' benefits. An agency of original jurisdiction (AOJ), typically one of the Department of Veterans Affairs (VA)'s 57 regional offices, makes the initial decision on the claim. A claimant who is dissatisfied with an AOJ's decision may appeal to the Board. The Board's 55 Members decide about 35,000 to 40,000 cases per year.

Generally, the law requires that the Board consider and decide appeals in

the order in which they were filed. 38 U.S.C. 7107(a). However, the law also permits the Board, on motion, to advance cases for earlier consideration and determination under certain circumstances such as serious illness, severe financial hardship, and other sufficient cause shown. 38 U.S.C. 7107(a)(2). VA's implementing regulation, 38 CFR 20.900(c), currently specifies that "other sufficient cause" includes "administrative error resulting in a significant delay in docketing the case."

On June 12, 2002, VA published a proposed rule with request for comments, which would amend the Board of Veterans' Appeals Rule of Practice 900(c) (38 CFR 20.900(c)) to provide that a case may be advanced on the Board's docket because of the appellant's advanced age, defined as 75 or more years old. 67 FR 40255. The purpose of the proposed rule is to speed the appellate process for the cohort of aging veterans.

We received comments from seven individuals. The commenters urged VA to either amend or rescind the rule. Their concerns fell into three categories: (1) The ineffectiveness of defining "advanced age" as 75 or more years of age in advancing the claims of older veterans; (2) a conflict with the instructions set forth by the Secretary of Veterans Affairs on expediting, at VA's regional offices, the claims of older veterans; and (3) the inequality of allowing one case to be advanced over another.

We will address these concerns in turn.

1. *The ineffectiveness of defining "advanced age" as 75 years or older in advancing the claims of older veterans.* One commenter argued that an individual who met the requirements of the proposed rule for advanced age, 75 or more years of age, would "likely have died by the time the case runs its course." The commenter asserted that a claim remanded by the Board to the AOJ often remained active for another three to five years, and that a case appealed to the United States Court of Appeals for Veterans Claims takes 12 to 18 months to adjudicate. The commenter suggested lowering the threshold for "advanced age" from 75 to 70 years.

In the proposed rule, we explained our reasons for defining "advanced age" as 75 or more years of age. We seek to strike a balance between the statutory command that the Board consider appeals in docket order and the need to move some cases to the front of the line. We observed that approximately 18 percent of the total veteran population is age 75 or older whereas 27 percent of

the veteran population is age 70 or over, and that 75 is also an age at which a veteran is very near to his or her life expectancy. 67 FR at 40255-56.

In sum, 75 or more years of age represents a segment of the veteran population large enough to provide meaningful relief, but not so large as to dilute the general rule of "first come, first served." We have made no changes based on this comment.

2. *A conflict with the instructions set forth by the Secretary of Veterans Affairs on expediting, at VA's regional offices, the claims of older veterans.* One commenter asserted that defining "advanced age" as 75 or more years of age is in conflict with the Secretary's plan to expedite the processing of claims filed by older veterans. The commenter contended that the proposed rule does not show the same level of concern and stated that there should be uniformity in the way VA handles the cases of older veterans.

There are, however, significant differences between the factors facing the regional offices and the factors facing the Board.

In November 2001, the Secretary formed a "Tiger Team" at the Cleveland Regional Office for the purpose of processing the oldest claims in the Veterans Benefits Administration (VBA) and to focus on claims from veterans age 70 and older that had been pending over one year. Under Secretary for Benefits Daniel L. Cooper, Statement before the House Committee on Veterans' Affairs Subcommittee on Benefits (June 6, 2002) (transcript available at [http://www.va.gov/OCA/testimony/06je0220\\_usa.htm](http://www.va.gov/OCA/testimony/06je0220_usa.htm)). The emphasis was to process the claims of World War II and Korean War veterans whose claims were "mired in the system." *Id.*

The problem experienced by VBA is an increasing inventory of cases "original, reopened, and remanded—waiting for a decision and the lengthening time it takes to render a decision. The number of regional office cases awaiting decision in 2001 was nearly double that awaiting decision in 1996. 2003 Budget of the President, Department of Veterans Affairs at 281, available at <http://www.whitehouse.gov/omb/budget/fy2003/pdf/bud23.pdf>. By the end of 2001, claims awaiting decision exceeded 640,000. *Id.* VA projected that in 2002 it would take VBA in excess of 200 days to process a disability compensation claim. *Id.* at 282. In contrast, the Board has experienced neither an increased inventory nor any significant increase in the number of days it takes to adjudicate an appeal.