

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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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). 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.

Further, this rule deals with appeals before the Board, rather than with claims at regional offices. The rule simply recognizes that it would be worthwhile to give the possibility of priority to appellants who statistically may not be with us much longer. Finally, the Secretary has approved this amendment. Any conflict between the proposed rule and the priorities of the Secretary has been resolved. No changes have been made based on this comment.

3. *The inequality of allowing one case to be advanced over another.* One commenter asserted that all veterans' claims should be processed quickly, and that no claim should be advanced on the docket over another. Another commenter argued that the proposed rule fails to take into consideration the negative effect of advancing one case over another. The commenter felt allowing one claim to advance over another was fundamentally unfair.

As noted above, 38 U.S.C. 7107 provides us with the statutory authority to advance a case on the Board's docket. Further, the number of exceptions to the general rule of "first come, first served" has been kept to a minimum. By defining "advanced age" as 75 or more years old, the narrow application of the advance on docket exception remains intact. We therefore make no change based on these comments.

A need for clarification of the proposed rule has become apparent. As proposed, the rule could be interpreted to require the Board to advance a case on the docket if the appellant has reached "advanced age," in the absence of a motion of a party to the case or the party's representative. VA does not intend such an interpretation. Rather, VA intends to permit the Board to advance such a case on the motion of the Chairman or Vice Chairman, but not require the Board to advance the case in the absence of a motion of a party to the case or the party's representative. Accordingly, we have added a sentence to § 20.900(c) to clarify that intent. The resulting paragraph (c) is so long that, for clarity and readability, we have divided it into three paragraphs separately addressing grounds for advancement on the docket, the requirements for a motion to advance, and disposition of such motions. If a party to the case moves for advancement and sufficient cause is shown, the Board will advance the case on the docket.

Based on the rationale set forth in the proposed rule and in this document, we are adopting the provisions of the proposed rule revised as described.

Administrative Procedure Act

This final rule is effective on the date of publication. The 30-day delayed effective date required under the Administrative Procedure Act (APA) is inapplicable pursuant to 5 U.S.C. 553(d)(1), which excepts from the delayed-effective-date requirement a substantive rule that "grants or recognizes an exemption or relieves a restriction." The amendment adopted in this final rule permits a case to be advanced on the Board's docket because of an appellant's advanced age, which grants an exception from the rule that normally requires the Board to consider and decide appeals in the order in which they were filed. Consequently, the amendment in this final rule meets the requirements for exception set forth in the APA.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 202) requires 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 final rule would have no such effect on State, local, or tribal governments, or the private sector.

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. 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.

Paperwork Reduction Act

The Secretary hereby certifies that this final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521).

List of Subjects in 38 CFR Part 20

Administrative practice and procedure; Claims; Veterans.

Dated: Approved: July 2, 2003.

Anthony J. Principi,

Secretary of Veterans Affairs.

■ For the reasons set out in the preamble 33 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.

Subpart J—Action by the Board

■ 2. Section 20.900(c) is revised to read as follows:

§ 20.900 Rule 900. Order of consideration of appeals.

* * * * *

(c) *Advancement on the docket.* (1) *Grounds for advancement.* A case may be advanced on the docket on the motion of the Chairman, the Vice Chairman, a party to the case before the Board, or such party's representative. Such a motion may be granted only if the case involves interpretation of law of general application affecting other claims, if the appellant is seriously ill or is under severe financial hardship, or if other sufficient cause is shown. "Other sufficient cause" shall include, but is not limited to, administrative error resulting in a significant delay in docketing the case or the advanced age of the appellant. For purposes of this Rule, "advanced age" is defined as 75 or more years of age. This paragraph does not require the Board to advance a case on the docket in the absence of a motion of a party to the case or the party's representative.

(2) *Requirements for motions.* Motions for advancement on the docket must be in writing and must identify the specific reason(s) why advancement on the docket is sought, the name of the veteran, the name of the appellant if other than the veteran (e.g., a veteran's survivor, a guardian, or a fiduciary appointed to receive VA benefits on an individual's behalf), and the applicable Department of Veterans Affairs file number. The motion must be filed with: Director, Administrative Service (014), Board of Veterans' Appeals, 810 Vermont Avenue, NW., Washington, DC 20420.

(3) *Disposition of motions.* If a motion is received prior to the assignment of the case to an individual member or panel of members, the ruling on the motion will be by the Vice Chairman, who may delegate such authority to a Deputy Vice Chairman. If a motion to advance a case on the docket is denied, the appellant and his or her representative will be immediately notified. If the motion to advance a case on the docket is granted, that fact will

be noted in the Board's decision when rendered.

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(Authority: 38 U.S.C. 7107, Pub. L. 103-446, Sec. 302)

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COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

41 CFR Parts 51-3 and 51-4

Miscellaneous Amendments to Committee Regulations

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Final rule.

SUMMARY: The Committee is changing the dates by which the annual certifications by participating nonprofit agencies are due to the central nonprofit agencies and the Committee.

EFFECTIVE DATE: October 14, 2003.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202-3259.

FOR FURTHER INFORMATION CONTACT: G. John Heyer (703) 603-0665. Copies of this notice will be made available on request in computer diskette format.

SUPPLEMENTARY INFORMATION: The Committee is revising 41 CFR §§ 51-3.2(m) and 51-4.3(a) to change the dates on which the Annual Certifications (Committee Form 403 or 404) submitted at the end of each Federal fiscal year by nonprofit agencies participating in the Committee's program are due to the central nonprofit agencies and the Committee. The purpose of this change is to ensure that the data is received in a more timely manner than is currently the case. The Committee is proposing to change the date the certification forms are due to the central nonprofit agencies from November 15 of each year to November 1, and the date the forms are due to the Committee from December 15 to December 1.

Notice of proposed rulemaking was published on August 1, 2003 (68 FR 45195). In addition, the central nonprofit agency which represents the great majority of nonprofit agencies participating in the Committee's program circulated the proposed regulatory changes to its participating nonprofit agencies.

Twenty-one public comments were received, all from nonprofit agencies

participating in the Committee's program. Sixteen comments objected to the change as placing an undue burden on the nonprofit agencies' ability to report fiscal year-end numbers when required. Two nonprofit agencies expressed only minor inconvenience in meeting the new deadline of November 1, and three others indicated that they would be able to meet the new deadline. The nonprofit agencies objecting to the deadline changes represent less than three percent of the over 600 nonprofit agencies participating in the Committee's program. The Committee does not believe that possible inconvenience to a small percentage of its participating nonprofit agencies justifies frustrating the needed improvements in its data reporting system.

Neither central nonprofit agency objected to the change in its reporting deadline from December 15 to December 1. The Committee does not believe the change, which shortens the reporting deadlines by only 15 days, will unduly impact nonprofit agencies participating in the Committee's program. These nonprofit agencies already submit quarterly data reports to their central nonprofit agencies 30 days after the close of each quarter, so their fiscal year-end report merely requires them to combine and update the totals they have already reported, and to provide the annual report at the same time they provide the fourth quarter data to the central nonprofit agencies. As this data is now generally compiled and reported on an electronic basis, the 45-day period which the regulations previously allowed between the close of a fiscal year and the submission of the annual report by nonprofit agencies can no longer be justified. The Committee does not believe that the requirement to have the report signed by the nonprofit agency's chief executive officer and an officer of the board of directors should cause nonprofit agencies to miss the new filing deadline, particularly as most of the participating nonprofit agencies are small community organizations whose executives and board officers are readily available.

The Committee believes it has a compelling need to accelerate the data reporting contained in the annual reports, in order to identify and take corrective action on nonprofit agencies which are falling short of meeting statutory requirements to remain in the Committee's program. The regulatory changes the Committee is making are a part of an initiative which will allow the Committee to conduct this corrective process earlier than is currently the case, and to restore more participating

nonprofit agencies to good standing in its program, thus furthering the Committee's statutory mission of increasing employment of people with severe disabilities.

These reporting deadline changes will also allow the Committee to meet its own statutory and regulatory oversight responsibilities in a more timely manner.

However, to help those nonprofit agencies which may experience difficulty adjusting to the new deadline, the Committee is willing to allow those nonprofit agencies which cannot meet the new filing deadline for their Fiscal Year 2003 reports to file them no later than the previous deadline of November 15, 2003. These nonprofit agencies will be required to meet the new deadline when filing their Fiscal Year 2004 annual reports, if they are to maintain their good standing within the Javits-Wagner-O'Day Program.

Regulatory Flexibility Act

I certify that this revision of the Committee regulations will not have a significant economic impact on a substantial number of small entities because the revision clarifies program policies and does not essentially change the impact of the regulations on small entities.

Paperwork Reduction Act

The Paperwork Reduction Act does not apply to this final rule because it contains no new information collection or recordkeeping requirements as defined in that Act and its regulations.

Executive Order No. 12866

The Committee has been exempted from the regulatory review requirements of the Executive Order by the Office of Information and Regulatory Affairs. Additionally, the rule is not a significant regulatory action as defined in the Executive Order.

List of Subjects

41 CFR Part 51-3

Government procurement, Handicapped.

41 CFR Part 51-4

Reporting and recordkeeping requirements.

■ For the reasons set out in the preamble, Parts 51-3 and 51-4 of Title 41, Chapter 51 of the Code of Federal Regulations are amended as follows:

■ 1. The authority citations for Parts 51-3 and 51-4 continue to read as follows:

Authority: 41 U.S.C. 46-48c.