DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900–AK69

Duty To Assist

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the Department of Veterans Affairs (VA) adjudication regulations to implement the provisions of the Veterans Claims Assistance Act of 2000 (the VCAA), which was effective on November 9, 2000. The intended effect of this regulation is to establish clear guidelines consistent with the intent of Congress regarding the timing and the scope of assistance VA will provide to a claimant who files a substantially complete application for VA benefits or who attempts to reopen a previously denied claim.

DATES: Effective Date: This rule is effective November 9, 2000, except for the amendment to 38 CFR 3.156(a), which is effective August 29, 2001.

Applicability Dates: Except for the amendment to 38 CFR 3.156(a), the second sentence of 38 CFR 3.159(c), and 38 CFR 3.159(c)(4)(iii), the provisions of this final rule apply to any claim for benefits received by VA on or after November 9, 2000, as well as to any claim filed before that date but not decided by VA as of that date. The amendment to 38 CFR 3.156(a), the second sentence of 38 CFR 3.159(c), and 38 CFR 3.159(c)(4)(iii) apply to any claim to reopen a finally decided claim received on or after August 29, 2001.

FOR FURTHER INFORMATION CONTACT: Janice Jacobs, Lead Consultant, Strategy Development Staff, Compensation and Pension Service, Veterans Benefits Administration, 810 Vermont Avenue, NW, Washington, DC 20420, telephone (202) 273–7223.

SUPPLEMENTARY INFORMATION: In the Veterans Claims Assistance Act of 2000, Pub. L. 106–475 (the VCAA), Congress amended sections 5102 and 5103 of Title 38, United States Code, and added new sections 5100 and 5103A, establishing new duties for VA in the claims development and adjudication process. Congress also amended section 5107 by deleting the concept of a ''well-grounded claim'' previously contained in that section, while retaining the claimant's responsibility to present and support a claim for benefits. In section 5103A(f) Congress stated that nothing in section 5103A was to be construed to require VA to reopen a claim that has been disallowed except when new and material evidence is presented or secured as described in section 5108.

In the **Federal Register** of April 4, 2001 (66 FR 17834), VA published a proposal to amend 38 CFR 3.159 to implement the VCAA. Interested persons were invited to submit comments on or before May 4, 2001. We received comments from various organizations and individuals, including the American Legion and the National Veterans Legal Services Program (jointly submitted); Paralyzed Veterans of America; Vietnam Veterans of America; Disabled American Veterans; National Organization of Veterans Advocates, Inc.; State of Florida Department of Veterans' Affairs; the National Veterans Organization of America, Inc.; and other interested persons.

Definitions

Competent Medical Evidence and Competent Lay Evidence. We proposed to define ''competent medical evidence'' in § 3.159(a)(1) to mean evidence provided by a person who, through education, training, or experience, is qualified to offer medical diagnoses, statements or opinions. We proposed that the term would include statements conveying sound medical principles found in medical treatises, medical and scientific articles, and research reports or analyses. We proposed to define ''competent lay evidence'' in § 3.159(a)(2) to mean evidence not requiring that the person offering it have specialized education, training, or experience. We proposed that lay evidence be competent if offered by someone who has knowledge of facts or circumstances and conveys matters that can be described by a lay person. Accordingly, while a lay person would not be competent or qualified to offer medical opinions or to diagnose a medical condition, a claimant or other lay person would be competent to describe symptoms of disability experienced or observed in him/herself or others. These definitions are consistent with those discussed in the legislative history of the VCAA, 146 Cong. Rec. H9915 (daily ed. Oct. 17, 2000) (explanatory statement on H.R. 4864, as amended), and reflect existing case law governing the VA claims adjudication process.

One commenter stated that we should delete these definitions as unnecessary. Other commenters objected to defining these terms by regulation, stating that to do so may lead VA adjudicators to reject evidence preliminarily at the development stage, or to become ''mired in technical assessments of the competency of the evidence.'' Consideration of the competency of the evidence is a necessary step inherent in the adjudication process and one with which VA adjudicators are already familiar. In our view, defining these terms fosters a consistent application of these concepts in the adjudication process, and ensures that a claimant is likewise aware of the types and nature of evidence that will help substantiate a claim. Therefore, we have retained these definitions in the regulatory language.

Two of these same commenters stated, alternatively, that because an assessment of the competency of the evidence should always be a part of VA's decision-making process, the inclusion of the word ''competent'' in the regulatory definition was therefore redundant. As previously stated, we believe there is value in including this definition in the regulatory language so that the claimant understands how this term, used by Congress in the VCAA and discussed in the legislative history of the Act, is applied to the evidence received by VA in support of a claim.

Another commenter suggested that we revise the definition to state that competent lay or medical evidence must also be ''credible.'' The VCAA refers to competent evidence in the context of determining when a VA medical examination or medical opinion is necessary. It does not require that the evidence also be credible. Moreover, credibility is what a VA decisionmaker determines in weighing the competent evidence of record. It is not a requirement to be met in order for evidence to be considered competent. Therefore, we have made no change to the proposed regulatory language based on this comment.

With particular respect to the proposed definition of ''competent medical evidence,'' one commenter thought the inclusion of medical treatises and other similar authoritative medical writings resulted in an overly broad definition that would lead VA decisionmakers to misuse these materials by relying on them to deny a claim. However, VA intentionally broadened this definition to encompass these materials for the benefit of the claimant who may want to submit such materials, which are commonly found on the Internet or from other sources, in support of a claim. VA adjudicators have always had access to authoritative medical writings, such as *Dorland's Medical Dictionary* and the *Merck Manual,* as aids in deciding claims. In fact, 38 CFR 4.130, the schedule of ratings for mental disorders, specifically incorporates the American Psychiatric Association's *Diagnostic and Statistical*

Manual of Mental Disorders, Fourth Edition, (DSM IV) and refers to its use as the basis for the schedule's nomenclature and diagnostic criteria. In our view, both VA and the claimant benefit from the claimant's awareness that ''competent medical evidence'' includes such materials and that he or she may rely upon them to support a claim. Therefore, no change to the regulatory language has been made based on this comment.

Regarding the proposed definition of competent lay evidence specifically, one commenter suggested that the regulation should provide that VA would accept any lay statement as credible unless rebutted by affirmative evidence. This suggestion reflects the manner in which VA treated lay evidence on the issue of service incurrence in determining whether a claim was well grounded. In pre-VCAA procedures, lay evidence was generally accepted as credible for the purpose of meeting the evidentiary threshold well-grounded-claim requirement of showing that there was some evidence of an event, injury, or disease in service. Nonetheless, when a well-grounded claim was considered on its merits, VA claim procedures required that the decisionmaker consider all the evidence of record, assigning appropriate weight to both the lay and medical evidence. We note, as well, that if VA were to accept any claimant's statement as true on its face to establish the existence of an in-service event, injury or disease, without considering the veteran's service records and other evidence, this practice would conflict with the intent of 38 U.S.C. 1154(b). Under section 1154(b), in the case of a combat veteran, VA must accept satisfactory lay evidence of service incurrence or aggravation of an injury or disease alleged to have been incurred or aggravated in combat service, if such lay evidence is consistent with the circumstances, conditions, or hardships of this combat service even if there is no official record of such incurrence or aggravation. To permit every claimant, whether or not he or she served in combat, and whether or not the claimed injury is combat-related, to be able to establish in-service incurrence or aggravation based on the claimant's lay statement alone would nullify the meaning of section 1154(b). For all of these reasons, we have made no change to the regulatory language based on these comments.

Another commenter wanted us to make clear that lay evidence includes statements from the claimant. Not every claimant is a lay person, however; claims for benefits are also filed by physicians and nurses and their statements might qualify as competent medical evidence. Therefore, we have not made the change to the proposed regulatory language suggested by this comment.

One commenter stated that the regulation should indicate that lay evidence may be considered as partially competent so that a VA decisionmaker will not disregard a lay statement in its entirety if it should also happen to contain a medical opinion which would not be considered competent medical evidence. We decline to make any change in the proposed regulatory language based on this comment because VA decisionmakers are already obligated to consider all the evidence of record, both lay and medical, when deciding a claim. This would require VA adjudicators to consider those portions of the lay evidence submitted that are competent. Amending the regulation as suggested by this comment would result in an unnecessary redundancy.

Substantially Complete Application. We proposed to define a ''substantially complete application'' for benefits in § 3.159(a)(3) as one that contains the claimant's name; his or her relationship to the veteran, if applicable; service information, if applicable; the benefit claimed and any medical conditions on which it is based; and the claimant's signature. If applicable, as in claims for nonservice-connected disability or death pension, and parents' dependency and indemnity compensation, we proposed that a substantially complete application must also include a statement of income. This information is generally sufficient for VA to identify the benefit claimed, and determine whether the claimant is potentially eligible for it. This is basic information VA needs in order to inform a claimant of the types of information and evidence that would be required to substantiate a claim.

One commenter suggested that we clarify the requirement of ''service information'' to state, instead, ''sufficient service information for the VA to verify the duration and character of the claimed service, if applicable.'' This commenter stated that such a change would reflect VA's duty to assist the claimant in verifying service lest the language of the regulation be interpreted to mean that the claimant has the sole responsibility of establishing qualifying service. This is a reasonable suggestion and reflects current VA procedure. Therefore, the proposed regulatory definition of a ''substantially complete application'' in § 3.159(a)(3) has been changed to require ''sufficient information for VA to verify the claimed service, if applicable.''

Another commenter objected to the proposed requirement that a substantially complete application identify the benefit sought, on the grounds that it should be VA's burden to determine all the benefits to which a claimant is entitled. Under section 5107(a), it is the claimant's responsibility to present and support a claim for benefits. Requiring a claimant to identify the benefit sought is a necessary prerequisite for VA to inform a claimant of the information and evidence necessary to substantiate the claim for that benefit. Therefore, no change to the proposed regulatory language has been made based on this comment.

Another commenter indicated that the current application form, VA Form 21–526, Veteran's Application for Compensation or Pension, is too long, and that instead of defining ''substantially complete application,'' VA should revise VA Form 21–526. This form is designed to elicit more information than is required to file a substantially complete application for benefits. However, if it was completed in its entirety by the claimant, the information on the form would enable VA to immediately begin development of the claim because it requests the identity of all relevant evidence including medical treatment records. VA would not then be required to send a letter to the claimant seeking to identify relevant records as it must do if the claimant submits only the minimal information necessary to file a substantially complete application. This same commenter noted that the requirement in the regulation for the signature of the claimant is at odds with the new Veterans On-Line Application Process (VONAPP), a recent initiative of VA, in which the agency accepts applications from claimants via the Internet. Currently, VA still requires a signature from the claimant in conjunction with such applications, although it is working cooperatively with other agencies on establishing secure on-line signature procedures. Therefore, we have not deleted this definition per this commenter's suggestion.

Event In Service. We proposed to define the term ''event'' in § 3.159(a)(4) to mean a ''potentially harmful occurrence,'' such as would be associated with a particular duty assignment or place of duty because there are circumstances in service other than an injury or disease that, under 38 U.S.C. 1110, could meet the criteria of an ''incurrence'' in service for

establishing entitlement to service-connected compensation benefits. Nonetheless, some commenters asserted that the definition could be used to winnow out claims when, in the opinion of the VA decisionmaker, the in-service event is not perceived as ''potentially harmful.'' One commenter stated that any occurrence in service could be seen as ''potentially harmful.''

We agree that many events in service could be seen as potentially harmful, and that the assessment of whether an event in service was harmful is necessarily a retrospective one. The definition of ''event'' was intended to be expansive and liberal, not limiting. As reflected in the Supplementary Information accompanying the proposed rule, we believed the term could encompass such ''events'' as exposure to environmental hazards as well as such activities as parachute jumping or being a forward observer, although these events did not result in a specific injury or disease or aggravation of a pre-existing condition while in service. In our view, it is helpful for a claimant to understand that actual treatment in service for a medical condition is not an absolute requirement to establish service connection, and we see utility in defining this term for the claimant. To ensure its expansive interpretation, we have revised the proposed regulatory language to state: ''For purposes of paragraph (c)(4)(i), 'event' means 'one or more incidents associated with places, types, and circumstances of service giving rise to disability.' '' This definition is derived from the language of section 1154(a) which provides that in claims for service-connected compensation, consideration will be given to the ''places, types, and circumstances of such veteran's service as shown by such veteran's service record, the official history of each organization in which such veteran served, such veteran's medical records, and all pertinent medical and lay evidence . . .'' This definition would permit a VA decisionmaker to consider any number of events, including exposures to environmental hazards as an event in service that could have led to the claimed disability for which the veteran seeks compensation.

Information. Some questions have been raised about the meaning of the term ''information,'' which appears in the VCAA with respect to the information necessary to complete an application and the information and evidence necessary to substantiate a claim. Although the VCAA itself does not define the term, its legislative history gives guidance as to what Congress intended the term to mean. The history suggests that Congress was referring to non-evidentiary facts that are necessary to complete an application or to substantiate claim. *See* 146 Cong. Rec. H9914, H9914 (daily ed. Oct. 17, 2000) (identifying Social Security number and addresses as types of ''information'' necessary to substantiate a claim). We have defined the term accordingly in § 3.159(a)(5).

VA's Duty To Notify Claimants of Necessary Information or Evidence To Substantiate a Claim

We proposed in § 3.159(b)(1) that, if VA receives an application for benefits that is substantially complete, VA would notify the claimant of the information and medical or lay evidence required to substantiate the claim. As explained in the Supplementary Information, it is clear from the legislative history of the VCAA that Congress intended the notice to inform the claimant of the type of medical evidence required, such as diagnoses or opinions as well as the type of lay evidence that could be used to substantiate the claim. We further proposed that the notice would also inform the claimant which information and evidence the claimant is to provide and which information and evidence VA will attempt to obtain on the claimant's behalf. This proposed regulatory language mirrored the provisions in section 5103A.

We received a comment stating that the regulation should require VA, at the point in time when any evidence has been received in a claim for compensation benefits, to determine whether that evidence satisfies a necessary element of the claim and so advise the claimant. We decline to revise the regulation to accommodate this suggestion; such a regulatory requirement would necessitate multiple reviews of a single claim and is administratively unworkable. It would, moreover, increase the time it takes to decide a single claim, contributing to the backlog of claims that await processing. The intent of Congress, as indicated in the plain language of the VCAA and in the legislative history, is that VA advise a claimant as to the evidence and information necessary to substantiate a claim once VA receives a substantially complete application. There is no indication that Congress intended that VA review each claim and advise the claimant every time any evidence relevant to it is received. When a decision is reached on a claim, the rating decision document will cite all relevant evidence obtained and considered, as well as any relevant evidence not obtained or considered. That rating decision document is shared with the claimant as part of our notification procedures.

Some commenters stated that the regulation should provide for multiple notices to claimants of the information and evidence required to be submitted by them. We have made no change based on this suggestion because multiple notices would also be administratively unworkable. Development of evidence is a shared responsibility, with the claimant having the responsibility to present and support a claim for benefits. 38 U.S.C. 5107(a). If VA provides a clear and understandable notice to the claimant of what information and evidence is necessary to substantiate the claim, and what portion of that information and evidence VA will try to obtain, and what portion the claimant is required to provide, we believe we have satisfied our statutory duty. The notice will also provide the claimant with a phone number to reach the VA employees actually handling the claim, and the claimant can easily contact VA if he or she has additional concerns or questions.

Other commenters stated that this regulatory provision should state in more specific detail what will be required to be contained in every notice to the claimant on what is needed to establish entitlement for an individual claim. It is neither reasonable nor administratively feasible to require by regulation the level of specificity advocated by these commenters. The statutory notice required by the VCAA occurs at an early point in the claims process when the claimant often has not yet identified the evidence and information relevant to the claim, and VA does not yet know what kinds of specific evidence to try to obtain on behalf of the claimant. Without knowing what this evidence is, VA cannot advise the claimant as to whose responsibility it will be to obtain it. VA attempts to be as specific as it can in these notices. However, the content of VA's notice to the claimant depends on the amount of information and evidence VA already has regarding an individual claim, and cannot precisely be defined by regulation. Therefore, we have made no change to the proposed regulatory language based on these comments.

Another commenter stated that the regulation should specifically state that the notice required under section 5103(a) will be sent to the claimant before a decision on the claim has been made. We agree and have changed the language of § 3.159(b)(1) to state that VA will send the required statutory notice ''When VA receives a complete or

substantially complete application for benefits,'' rather than ''If VA receives'' this application.

One commenter stated that the regulation should require VA to tell the claimant a date certain for the submission of requested information and evidence. It has always been VA's practice to advise the claimant that he or she has one year to submit requested information or evidence, although it was requesting that the claimant submit the information or evidence within a shorter period of time. This procedure enables VA to take action on the claim as quickly as possible. There are no plans to change this procedure; VA will continue to advise a claimant that he or she has one year to submit requested evidence, as indicated in § 3.159(b)(1) of the regulation. Additionally, we have not revised the proposed regulatory language to reflect the period of time in which VA will request that the claimant submit the requested information or evidence, because VA would like to retain the flexibility to vary the time frame it currently specifies if in the future it is appropriate to do so.

One commenter stated that the regulation should provide that if VA receives evidence that is inadequate to substantiate the claim, VA should contact the claimant and give him or her the opportunity to correct the inadequacy or bolster the evidence. In our view, the regulatory language ensures that, with the claimant's cooperation, VA will have all the evidence relevant to the claim before it at the time a decision is made on the claim. Whether all of this relevant evidence is sufficient to substantiate the claim is a determination that is not made until the claim is adjudicated. If all relevant evidence was obtained and considered but it is insufficient to establish entitlement, VA issues a rating decision that informs the claimant of the reason(s) why entitlement was not established. The claimant has the opportunity to appeal the decision if it is unfavorable, which gives the claimant the opportunity to present additional evidence to support the appeal. This procedure is consistent with long-standing adjudication practice which was not altered by the VCAA. Therefore, no change to the regulatory language has been made based on this comment.

Mirroring the statutory language in section 5103(b), we proposed in § 3.159(b)(1) that, if VA does not receive the information and evidence requested from the claimant within one year of the date of the notice to the claimant, VA cannot pay or provide any benefits based on that application. We proposed that VA would give a claimant a reasonable period of time to respond to the request for information or evidence, and if the claimant fails to respond, VA may decide the claim based on all the information and evidence of record. Some decisions would be grants of benefits while some decisions would be denials of benefits. We stated at § 3.159(b) that if the claimant subsequently submitted the requested information or evidence within one year of the date of VA's request for it, VA would make another decision. We note that if such new information or evidence warrants a VA examination or further development, VA would take whatever action is necessary to reconsider the claim on this new information or evidence.

A number of commenters objected to this proposed provision for various reasons. Some commenters felt that VA's failure to wait one full year for a claimant to respond to a request for information or evidence would discourage claimants from submitting the requested evidence. This is speculation that VA's long-standing claims process does not corroborate. In our experience, claimants are generally cooperative with VA's efforts to help them substantiate their claims, and respond to VA requests for information as quickly as possible, and usually within the suggested time frame for doing so.

Other commenters interpreted section 5103(b) to provide that VA is prohibited from deciding a claim without waiting for one full year for information or evidence requested from the claimant. We believe such an interpretation is unreasonable and would clearly contravene the intent of the VCAA. Section 5103(b) is essentially an effective date provision governing the earliest date from which benefits may be paid if a claimant submits requested information and evidence. If interpreted as preventing VA from taking award action until the one year period expired, VA would be unable to grant a benefit when the claimant has not responded to a request for information or evidence, even though VA has obtained evidence establishing that the claimant is entitled to that benefit. Moreover, the procedure as proposed is identical to the manner in which VA had adjudicated claims for many years prior to the VCAA and *Morton* v. *West*, 12 Vet. App. 477 (1999), *remanded sub nom. Morton* v. *Gober*, 243 F.3d 557 (Fed. Cir. 2000), *opinion withdrawn and appeal dismissed*, 14 Vet. App. 174, the court decision that led to the passage of the VCAA. It is a procedure familiar to veterans' service organizations and other veterans' advocates. Moreover, it is a procedure that is responsive to the interests of Congress as well as veterans' advocates in improving the timeliness of VA claims processing. It is our experience that once evidence is not received in response to a request for it, extending the time period does not improve the chances of receiving it. Therefore, no change to the proposed regulatory language has been made based on these comments.

However, we have made one change from the proposed rule. Rather than allowing VA to proceed to decide a claim if the claimant has not responded ''within a reasonable period of time'' to a request for information or evidence or a request for any pertinent evidence in the claimant's possession, the final rule will allow VA to proceed to decide the claim if the claimant has not responded ''within 30 days'' of such requests. Specifying the period in which a claimant may respond before VA may decide the claim allows every claimant to know in advance the minimum time he or she will have to respond to VA's request. This rule will not require VA to decide a claim 30 days after its request if the claimant has not responded. It will merely allow VA to proceed on the claim. Furthermore, a claimant need not necessarily provide the evidence and information necessary to substantiate the claim within 30 days. A claimant would, however, be required to ''respond'' in some fashion to VA's request in order to have VA delay further action on the claim to give the claimant time to procure and submit the requested information and evidence. Such a response could merely request VA to wait beyond the 30-day period while the claimant attempts to gather evidence.

One commenter stated that VA should decide a claim without waiting for one year only if the claimant has fully responded to the request for information or evidence, or if VA is granting the claim. We agree that if VA can grant the claim based on the evidence of record it has obtained without the information or evidence requested from the claimant, it should do so as quickly as possible, and this regulation is consistent with such action. To clarify that this evidence may include VA medical examinations or opinions, we have revised the regulatory language at § 3.159(b)(1) to state that VA's decision on the claim would be based on all ''information and evidence contained in the file, including information and evidence it has obtained on behalf of the claimant and any VA medical examinations or medical opinions.''

However, nothing in the VCAA expressly requires that VA keep a claim

pending when the claimant has failed to respond to requests for information or evidence within 30 days. The duty to assist is not ''always a one-way street'; the claimant cannot passively wait for VA's assistance in circumstances where he or she may or should have information that is essential to obtaining supporting evidence. *Zarycki* v. *Brown*, 6 Vet. App. 91 (1993); *Wamhoff* v. *Brown*, 8 Vet. App. 517 (1996). Nonetheless, in cases where the claimant has failed to respond, VA's case management system encourages personal phone contacts with the claimant during which the veterans service center representative can obtain by phone the information requested of the claimant. The case management process also ensures that VA does not take any action on a claim without first informing the claimant of what it needs to decide the claim, and this assurance is reflected in the regulatory language at § 3.159(b)(1).

Even in cases where a claimant fails to respond to VA's request for information and evidence, and the claim is denied based on the other evidence of record, the claimant still has another one year after the notification of the denial to appeal the denial of the claim. At that time, he or she has another opportunity to submit the requested evidence or new evidence. In addition, the claimant has a right to two de novo reviews of the claim, one by a Decision Review Officer and another by the Board of Veterans' Appeals. In our view, the claimant suffers no prejudice from this long-standing practice of deciding a claim based on the evidence of record when the claimant has failed to timely respond to requests for information or evidence. Therefore, we have maintained the proposed language codifying this procedure. However, we have revised the proposed language to clarify that the one-year deadline applies to both the information and evidence necessary to substantiate the claim and that the claimant is to provide, as well as to the evidence in the claimant's possession that pertains to the claim.

A comment from one service organization stated that this regulation failed to recognize that under § 3.156(b) and § 20.1304(b), evidence submitted in connection with an appeal will be considered in connection with the claim on appeal even if it was not received within one year of the date VA requested it. We recognize that there is a potential conflict between §§ 3.156(b) and 20.1304(b) and section 5103(b)(1) and proposed § 3.159(b)(1). A possible technical amendment to section 5103(b)(1), which would eliminate the potential conflict, is being considered. If the amendment does not materialize, VA will have to address the implications section 5103(b)(1) has for §§ 3.156(b) and 20.1304(b).

One commenter stated that if VA decides a claim less than one year from the time it requests information or evidence from a claimant, the claimant may confuse the one-year time period in which to submit requested information or evidence with the one year time period allowed by statute for the claimant to file an appeal. *See* 38 U.S.C. 7105. The one-year time periods are mandated by statute, and VA cannot alter them by regulation. Therefore, no change to the regulatory language has been made based on this comment.

Several commenters argued for a ''good cause'' exception for extending the statutory one year time period for a claimant to submit requested information or evidence, to accommodate claimants who are ''seriously disabled,'' mentally incompetent or who have other hardships caused by poverty, lack of access to transportation, or remoteness of domicile. Two commenters cited the difficulty experienced by claimants who try to obtain service medical records to submit to VA as the basis for a good cause exception. We have made no change to the proposed regulatory language to accommodate such an exception. There is no statutory authority permitting VA to create such an exception. Section 5103(b)(1) states that if VA does not receive the information or evidence to be provided by a claimant ''within one year from the date of such notification, no benefit may be paid or furnished'' based on that application. The statutory scheme created by Congress places significant duties on VA to obtain the evidence relevant to a claim. However, the VCAA reiterated that it is the claimant's duty to present and support a claim for benefits, including the duty to submit information and evidence as designated by VA in its statutory notice to the claimant. Clearly, Congress envisioned one year to be an adequate amount of time for the claimant to cooperate with VA's efforts by submitting requested information or evidence. This information or evidence would include such things as a stressor statement in a claim for compensation for PTSD, or the name and address of treating physicians. We also note in response to the commenters who cited the difficulty of obtaining service medical records that in a compensation claim it is the responsibility of VA rather than the claimant to obtain those records if they are relevant to the claim and maintained or held by a governmental entity.

Duty To Inform a Claimant When An Application Is Incomplete

We proposed in § 3.159(b)(2) that, if VA receives an incomplete application in which the claimant has failed to provide the minimal information required to permit VA to begin development of the claim, we would defer assistance until the claimant substantially completed the application. This provision is plainly consistent with section 5103A(a)(3). Nevertheless, several commenters objected to this proposed language, reflecting a misunderstanding that VA would deny claims contained in an incomplete application. As the regulatory language clearly reflects, VA will defer assistance on incomplete applications, not deny them. Therefore, no change to the regulatory language based on these comments has been made.

General Rule; VA's Duty To Assist a Claimant in Obtaining Evidence

We proposed in § 3.159(c)(1) that VA will make reasonable efforts to help a claimant obtain relevant records from non-Federal-agency sources including records from private medical care providers, current or former employers, and other non-Federal government sources. We also proposed to retain the prior language of § 3.159 providing that VA will not pay any fees charged by a custodian of the records.

One commenter stated that VA should request congressional authorization to pay for costs associated with obtaining private medical records, a suggestion that is beyond the scope of this rulemaking. Other commenters stated that VA should budget funds to pay for private medical records, also an issue that is beyond the scope herein. Two commenters stated that VA should make an exception and pay for private records for claimants who are destitute or mentally incompetent. Because VA has no statutory authority to expend funds in this manner, we cannot create the exceptions suggested by these comments.

Consistent with the language of section 5103A(b)(1), we proposed in paragraphs (1)(i) and (2)(i) of § 3.159(c) that the claimant must adequately identify any Federal and non-Federal records, providing enough information to enable VA to request them. We proposed that the claimant should identify the custodian of the records, the approximate time frame covered by them, and in the case of medical treatment records, the condition for which treatment was provided. One

commenter stated that to require a claimant to identify the custodian of the records would be ''unduly burdensome.'' One commenter cited the difficulty this may present for claimants with memory problems. This commenter stated that the claimant should be required to give VA only enough information to allow VA to pursue retrieval of the records. We agree that VA needs only enough information to try to retrieve the record, but believe that the identity of the custodian of the record is critical and reasonable information to request of the claimant. It would be very impractical and inefficient for VA to try to obtain records without knowing who has them. Therefore, no change to the proposed regulatory language requiring the claimant to identify who has custody of the records has been made based on this comment.

One commenter objected to the language of the regulation at § 3.159(c)(1)(i), (c)(2)(i), and (c)(3) that provides that a claimant's failure to adequately identify existing records ''may result in a denial of the benefit sought.'' In this commenter's view, this language would encourage adjudicators ''to think in terms of denial of the claim'' particularly because of the regulatory authority in § 3.159(b)(1) providing that VA may decide a claim on the evidence of record if a claimant fails to timely respond to a request for information or evidence. Although this proposed regulatory language reflects a procedure that has been in place for many years, long before the well-grounded claim process, we have deleted those sentences in § 3.159(c)(1)(i) and (ii), (c)(2)(i) and (ii), (c)(3), and (e)(2) because they are unnecessary and state the obvious.

We also proposed that VA will assist claimants by requesting relevant records in the custody of a Federal agency or department. One commenter stressed that VA should limit such requests to only relevant records. The proposed language already contained such a limitation, and we decline to make any changes to the regulatory language that would result in a redundancy. The same commenter suggested that VA should limit the number of requests it makes for Federal records. However, such a suggestion directly contravenes the express language of section 5103A(b)(3), requiring VA to continue to attempt to obtain these records unless it is reasonably certain that they do not exist or until further efforts to obtain them would be futile. Therefore, we have made no change to the proposed rule to limit these efforts to a specific number of attempts. One commenter suggested that VA should define the word ''futile'' by regulation. However, the proposed regulatory language at § 3.159(c)(2) gave examples of circumstances in which VA may conclude that further efforts would be futile and in our view there is no need to further define such circumstances.

One commenter stated that the regulation should contain a ''good faith extension'' of the one-year time period to secure Federal records; however, there is no such one year time period in the VCAA and the inclusion of a good faith exception is unnecessary because VA is obligated to make repeated efforts to secure Federal records, which is tantamount to ''good faith efforts.''

VA's Duty To Notify a Claimant of Its Inability to Obtain Records

When VA is unable to obtain relevant records after making reasonable efforts to do so, section 5103A(b)(2) requires VA to (1) notify the claimant that it is unable to obtain relevant records, (2) identify the records it cannot obtain, (3) briefly explain the efforts it made to obtain them, and (4) describe any further action VA will take with respect to the claim. In the case of requests for non-Federal agency or department records, we proposed in § 3.159(e)(1) that VA would provide the claimant with written or oral notice of its inability to obtain them at the time it makes its final request for them. In the case of requests for non-Federal agency or department records, VA proposed that it would provide oral or written notice after VA is reasonably certain that the records do not exist or that further efforts to try to obtain them would be futile.

We received several comments objecting to the proposal to provide oral notice to claimants when VA is unable to obtain records as proposed in § 3.159(e). Some commenters stated that a message conveyed orally is more subject to misunderstanding by a claimant than a message conveyed by letter, and suggested that claimants prefer contact by letter. However, in VA's 2000 Survey of Veterans' Satisfaction with the VA Compensation and Pension Claims Process, 43.0 percent of respondents who were contacted by phone about their claim indicated they were ''very satisfied '' with the claims process. Only 28.3 percent of the respondents who were not contacted by phone stated that they were ''very satisfied'' with the process. In response to another survey question, 31.8 percent of the respondents stated that they preferred phone contact with VA during the claims process whereas only 15.9 percent stated they preferred mail contact. We believe these data support VA's decision to increase use of the phone to expedite the claims process; not only is it practical, but claimants prefer it. In our experience, phone contacts facilitate cooperation between VA and the claimant and afford claimants the opportunity to ask questions about their claims, including the status of VA's efforts to obtain relevant records. While not all claimants are available by phone during normal business hours, VA has found that when phone communications are successful, claim processing is expedited, benefiting both VA and the claimant. Ultimately, however, the decision on whether to communicate with a claimant by phone, letter, or other means such as e-mail or facsimile is based on the availability of the claimant and the resources of the VA regional office handling the claim. This regulatory language is intended to ensure the flexibility needed for efficient, modern claims processing.

Moreover, nothing in the VCAA precludes oral notice. In fact, the legislative history of the VCAA shows that Congress sought to accommodate VA's plans to expand its options for communicating with claimants beyond the written letter format. The legislative history of the VCAA shows that Congress intentionally removed the words ''in person or in writing'' from former 38 U.S.C. 5102 with respect to the notice VA must give a claimant when the claimant has not submitted a substantially complete application. 146 Cong. Rec. H9913, H9914 (daily ed. Oct 17, 2000) (explanatory statement on H.R. 4864, as amended). The removal of this language was intended to ''permit veterans and VA to use current and future modes of communication.'' Thus, VA's proposal to use oral communication is consistent with congressional intent.

Other commenters objected to the proposal to provide oral notice because they perceived there would be no written documentation of this notice. However, VA does make a record of such oral contacts. VA's case management system uses a Claims Automated Processing System (CAPS), a sophisticated electronic development and notice tracking system. Any written or oral contact with a claimant is documented by date and subject matter of the communication. Alternatively, when appropriate, VA standard procedure requires that oral conversations with a claimant be memorialized in writing, a procedure from which VA has no intention to deviate. *See* Veterans Benefits Administration's Adjudication

Procedures Manual M21–1, Part III, ¶11.17. Therefore we have added a provision to § 3.159(e) to require VA to make a record of any oral notice conveyed to the claimant.

One commenter stated that the regulation should provide that if VA learns that a requested medical record no longer exists, after making reasonable efforts to obtain it, the claimant's lay evidence should be accepted as credible evidence in its place. Because a claimant, if a lay person, is not competent to provide medical evidence, we decline to make the change suggested by this comment.

Medical Examinations and Medical Opinions at VA Expense

Under section 5103A(d)(1), VA must provide a medical examination or obtain a medical opinion in compensation claims ''when such an examination or opinion is necessary to make a decision on the claim.'' Section 5103A(d)(2) provides that an examination or opinion is ''necessary'' if the evidence of record, considering all the information and lay or medical evidence, including statements of the claimant: (1) Contains competent evidence that the claimant has a current disability or persistent or recurrent symptoms of disability; and (2) indicates that the disability or symptoms may be associated with the claimant's military service; but (3) does not contain sufficient medical evidence to decide the claim.

We proposed to implement section 5103A(d)(2) by providing in § 3.159(c)(4)(i) that, in claims for disability compensation, VA would provide an examination or obtain a medical opinion if, after completing its duty to assist a claimant in obtaining records from Federal agency and non-Federal agency sources, the evidence of record does not contain sufficient competent medical evidence to decide the claim, but: (1) Contains competent lay or medical evidence of a current diagnosed disability or of persistent or recurrent symptoms of disability; (2) establishes that the veteran suffered an event, injury or disease in service; and (3) indicates that the claimed disability or symptoms may be associated with the established event, injury or disease in service or another service-connected disability.

Several commenters objected to the similarity between the proposed regulatory criteria for determining when a VA examination or opinion is necessary and the former well-grounded-claim requirements. Although the VCAA eliminated the need to establish a well-grounded claim to be entitled to VA assistance, section 5103A(d)(2) specifies when an examination or medical opinion will be considered necessary. Our regulatory criteria are derived from the corresponding statutory criteria at section 5103A(d)(2). Any similarity between our regulatory criteria and the former well-grounded-claim requirements is due to the similarity between the statutory criteria and the former well-grounded-claim requirements. Therefore, no change was made to the proposed regulatory language based on these comments.

One commenter stated that this regulatory language should expressly state that lay testimony may be considered when determining if a medical examination or medical opinion is necessary to decide the claim. Because the term ''evidence'' in the proposed regulatory language at § 3.159(c)(4) encompasses lay testimony, we decline to make the change suggested by this comment. Another commenter stated that the ''information'' of record should also be considered in determining whether a medical examination or medical opinion was necessary. Accordingly, we have added the term ''information'' to the proposed regulatory language in § 3.159(c)(4)(i) to state, ''A medical examination or medical opinion is necessary if the information or evidence of record does not contain sufficient competent medical evidence to decide the claim.''

Another commenter suggested a change in the proposed regulatory language at § 3.159(c)(4) to state that VA must provide an examination or obtain a medical opinion where the ''evidence is inconclusive to establish service connection.'' However, the language of section 5103A(d)(2)(C) specifies that an examination or medical opinion is necessary when the record does not contain sufficient *medical* evidence. If the evidence lacking to establish service incurrence cannot be supplied by a VA examination or medical opinion, then providing an examination or obtaining an opinion would not benefit the claim. Therefore, no change to the proposed regulatory language was made based on this comment.

Several commenters objected to the proposed language requiring that the evidence of record establish that there was an event, injury or disease in service—the incurrence or aggravation element for service connection. In summary, these commenters felt that this criterion was too burdensome, and that this determination should be postponed until after a VA examination has been provided or a medical opinion obtained. Whether there was an injury or disease in service, or an event leading to injury or disease, is a finding of fact made by the VA decisionmaker. In our view, it is unreasonable to require a claimant to report for an unnecessary VA examination or to ask a medical expert to review the record when the evidence that would result (the examination report or medical opinion) would not be competent evidence of the incurrence or aggravation of a disease or injury in service. In such cases, there is no reasonable possibility that the examination would aid in substantiating the claim because it cannot provide the missing evidence. In the case of medical opinion evidence, for instance, a doctor cannot link a current condition to an injury or disease in service unless that injury or disease is shown to have existed. The evidence on this issue is independent of the VA examination or medical opinion. Therefore, no change has been made to the regulatory language to delete the criterion that the evidence establish an injury or disease in service or an event leading to injury or disease.

One commenter stated that even where there is no evidence of an event, injury or disease in service, a VA examination could establish the incurrence of an injury in some claims. The commenter offered as an example the case of a claim for compensation for a bone or muscle injury, for which a doctor could offer the opinion that a currently diagnosed arthritis is consistent with the veteran's statements describing a fall in service. However, this doctor's opinion would address the nexus, or relationship, between the current disability of arthritis and the claimed injury in service; it would not establish the underlying predicate issue, that is, whether the veteran, in fact, had a fall in service. This same commenter further stated that for disabilities that are presumed under law to have been incurred or aggravated in service based on their manifestation during a specified period after service, a physician's opinion could link the disability to reported symptoms occurring during the presumptive period, thus establishing the existence of the condition within the presumptive period. VA agrees that, under those circumstances, a medical opinion could link the claimed presumptive disability to symptoms shown by other evidence to have occurred during a presumptive period. However, a medical opinion given after the presumptive period could not itself establish the presence of symptoms in the presumptive period. Section 3.307(c) ''Prohibition of certain presumptions'' prevents VA from

accepting a physician's opinion that a presumptive condition was present and manifest to a compensable degree during an applicable presumptive period based merely on the advanced stage of the current disability without other evidence of the condition during service or the presumptive period. Therefore, there would be no use in providing an examination or obtaining an opinion in the absence of any evidence of symptoms during the presumptive period.

Another commenter stated that the Supplementary Information accompanying the proposed rule assumed that only contemporaneous records such as service medical records could establish an in-service incurrence of a disability, in disregard of the evidentiary value of lay testimony. We have revised the proposed regulatory language to clarify that lay evidence can also be considered in establishing that an event, injury or disease occurred in service. Under § 3.159(c)(4), VA will review the ''information and lay and medical evidence of record'' to determine if an examination or medical opinion is necessary to decide the claim.

One commenter stated that in claims for secondary service connection, (for a disability caused or aggravated by a service-connected condition), where the primary condition is a presumptive one, there will be no evidence of an ''event, injury or disease'' in service that will meet the regulatory requirement. Since the proposed regulatory language specifically provided for examinations or medical opinions for secondary service connection conditions in § 3.159(c)(4)(i)(C), we have made no change based on this comment.

We received several comments on the requirement that the evidence of record ''indicate[ ]'' that the claimed disability or symptoms ''may be associated'' with service. Notably, neither Congress nor VA in its proposed rule, required either competent evidence or medical evidence of such an association as a prerequisite to a VA examination or medical opinion. VA proposed to require only an indication by the evidence of record. Nonetheless, some commenters misconstrued the proposed language to require more. Other commenters expressed the opinion that this regulatory language would require that the veteran ''establish'' that an in-service event caused his or her current disability. However, neither the proposed regulatory language nor the Supplementary Information stated that the claimant must provide such evidence. In our view, the VCAA's term, ''indicates,'' is a clear signal of Congress' intent that the evidentiary record need not definitively establish such an association or ''nexus'' between current disability and service; rather, the mere indication of such a possible association based on all the information and evidence of record would dictate the necessity of a VA medical examination or opinion to clarify this evidentiary point. Because the regulatory language proposed is consistent with this interpretation, we made no change to the regulation based on these comments.

In § 3.159(c)(4)(ii), we stated circumstances in which such an association with service may be shown, including continuity of symptoms after discharge from service, post-service treatment for a condition, or other possible association with service. Two commenters stated that the examples should not include ''evidence showing continuity of symptoms of a disability since the veteran's release from active duty'' because it is unnecessary in light of the continuity provisions of § 3.303(b). We agree, and have deleted this language from the final rule.

Another commenter stated that symptoms of a presumptive condition occurring during a presumptive period should satisfy the statutory criteria that the evidence show that the current condition ''may be associated'' with service. We agree that evidence of symptoms of a presumptive condition manifested to a compensable degree during a presumptive period would be evidence that a claimed presumptive condition may be associated with service. In such cases, a VA examination may be necessary to determine the degree of disability caused by the presumptive condition. When the record shows evidence of symptoms of a condition that may or may not be a presumptive one during an applicable presumptive period, a VA medical examination or medical opinion would be necessary because the medical evidence is insufficient to determine if the symptoms are consistent with the currently diagnosed condition.

We have revised the regulatory language at § 3.159(c)(4)(i)(B) to state that VA will consider a medical examination or opinion necessary when the evidence of record does not contain sufficient competent medical evidence to decide the claim, but contains competent lay or medical evidence of a current diagnosed disability or persistent or recurrent symptoms of disability, and establishes that the veteran suffered an event, injury or disease in service, or has a disease or symptoms of a disease manifested during an applicable presumptive period.

Finally, one commenter stated that the regulation should expressly state that a medical examination is not necessary when sufficient medical evidence has been submitted to decide the claim. We have made no change to the regulation based on this comment. The regulation states circumstances in which VA will be required to provide a VA medical examination or obtain a medical opinion. VA may certainly schedule examinations in circumstances other than those set forth in this regulation; section 5103(g) states that VA may provide more assistance than required by statute. This regulation sets the floor, not the ceiling for VA assistance in providing medical examinations or obtaining medical opinions.

Circumstances Where VA Will Refrain From or Discontinue Providing Assistance

Section 5103A(a)(2) states that VA has no duty to assist a claimant if or when there is no reasonable possibility that VA assistance would help substantiate the claim. We proposed to implement that statutory provision in § 3.159(d) by stating that VA will refrain from or discontinue providing assistance when there is no reasonable possibility that its assistance would substantiate a claim. We proposed three examples of circumstances in which VA will refrain from providing assistance: (1) When a claimant applies for a benefit for which he or she is not legally eligible; (2) when a claimant asserts a claim that is inherently incredible or clearly lacks merit; and (3) when a claimant claims a benefit to which the claimant is not entitled as a matter of law. In some cases, VA's determination that there is no reasonable possibility of VA assistance substantiating the claim may be made on the face of a substantially complete application. In other cases, the futility of further assistance may not become apparent until some assistance has been given. Therefore, we proposed that VA will ''discontinue'' assistance when the evidence obtained indicates that there is no reasonable possibility that further assistance would substantiate the claim.

One commenter stated that there is no reason to define the statutory phrase, ''no reasonable possibility.'' We disagree. The term is subject to varying interpretations, and it benefits both the claimant and VA if VA defines the term and sets a standard.

One commenter objected to the first circumstance described, stating that it should be VA's duty to help the

claimant establish legal eligibility for a benefit if eligibility is not clear on the face of the application. As noted previously, we have amended the definition of a ''substantially complete application'' to indicate that it contains enough information for VA to verify service and character of discharge, which VA would need to determine eligibility. However, no amount of VA assistance can provide eligibility for a benefit to a claimant who is in fact ineligible. Therefore, we retain our proposed rule that VA will refrain from assisting to obtain evidence if the information on a substantially complete application indicates no reasonable possibility that VA assistance will substantiate the claim because the claimant is not legally eligible for the benefit.

We also received comments to the proposed second circumstance, that is, when a claim is inherently incredible or clearly lacks merit. Some commenters felt that VA would use this provision as a pretext to refuse assistance for potentially meritorious claims. VA will not do that. Some commenters stated that certain mentally disabled claimants might assert claims that would seem ''inherently incredible'' when in actuality these assertions may be manifestations of their mental illness. The VCAA requires VA to notify a claimant of the information and evidence necessary to substantiate a claim in all claims for which a substantially complete application has been submitted, regardless of whether VA is going to assist in obtaining evidence. If a VA decisionmaker determines that a claim is inherently incredible, the decisionmaker can request that the claimant submit information or evidence as provided by section 5103(a) and § 3.159(b)(1) that would lead VA to conclude that it should provide assistance to substantiate the claim. Moreover, the proposed rule would not preclude a claimant from submitting information and evidence that might lead VA to change its determination that there is no reasonable possibility that VA assistance will help substantiate the claim.

Other commenters felt that ''clearly lacks merit'' was too vague a term to be of useful guidance for either VA or a claimant. Others stated objections to the term ''inherently incredible.'' We have retained both terms in the final rule because they are not mutually exclusive and cover different circumstances. It may not be clear that a claim clearly lacks merit until VA has requested and received records relevant to the claim, whereas it may be appropriate to conclude that a claim is inherently incredible on its face based merely on the facts asserted in the claim or after certain development. On this same issue, one service organization commented that we should consider a standard by which VA would provide assistance, ''unless it can affirmatively determine that a medical expert could not find any association under current medical or scientific knowledge.'' As a substitute for ''inherently incredible'' claims, we find merit in this suggestion, but believe that the standard, as phrased, may be construed to permit the VA adjudicator to apply his or her own unsubstantiated medical opinion. Because this is contrary to long-standing veterans' law principles, we have not revised the final regulatory language based on this comment.

One commenter stated that the third circumstance, ''no entitlement under the law'' should be deleted, asserting that VA may develop such claims and come up with evidence supporting entitlement under a new legal theory. We decline to make the change in the proposed regulatory language as suggested because this circumstance encompasses claims for which there is no legal entitlement under any theory, such as claims for compensation for a congenital or developmental condition.

Reopened Claims and New and Material Evidence

The VCAA states that nothing in section 5103A ''shall be construed to require the Secretary to reopen a claim that has been disallowed except when new and material evidence is presented or secured.'' On the other hand, section 5103(g) provides that nothing in section 5103A precludes VA from providing such other assistance as the Secretary considers appropriate. Accordingly, we proposed to provide limited assistance to claimants trying to reopen finally decided claims.

VA proposed that it would request any existing records from Federal agencies or non-Federal agency sources, if reasonably identified by the claimant, in order to assist the claimant to reopen his or her claim. In our view, such assistance is appropriate because it could be accomplished with minimal effort and expense, although it would be a change from pre-VCAA procedures. These procedures arose from case law that required a claimant to first submit new and material evidence sufficient to reopen a claim before VA could assist in developing additional evidence to substantiate it.

Given section 5103A(f)'s express preservation of the finality of VA decisions, we proposed, however, to provide less assistance in attempts to reopen final previously disallowed claims than for original claims for compensation. We proposed that VA would not provide an examination or obtain a medical opinion to create new evidence that may or may not be material, given the substantial time, effort and expense involved in the VA examination and medical opinion process. Some commenters objected to this proposal on the grounds that it would disadvantage persons whose previous claims were denied not on the merits but on the basis that they were not well grounded, because many of these claimants may not have had their claims fully developed. However, claimants whose prior claims were denied as not well grounded would not be disadvantaged, since a claim that was previously denied as not well grounded should be easy to reopen compared to a claim denied on the merits. If a claim was denied as not well grounded, it was denied because of a lack of evidence relating to a fact necessary to establish a claim. For example, a claim may have been denied as not well grounded because there was no competent evidence that a veteran has a current disability. If there were any competent evidence that the veteran did have a current disability, that evidence would constitute new and material evidence, which would reopen the claim.

Some commenters stated that VA should also provide a VA examination or medical opinion to develop evidence to reopen a claim. This regulation presumes that a claim that was finally decided on the merits had been fully developed by VA, including a VA examination or medical opinion where necessary, because under the provisions of prior section 5107(a), VA had a duty to assist a claimant who filed a well-grounded claim. In our view, it is more than fair that VA impose some limit on the expenditure of its finite resources in subsequent efforts to assist a claimant substantiate a claim after it has once made reasonable efforts to assist and the evidence failed to substantiate the claim. Nevertheless, we have revised the proposed language of § 3.159(c)(4)(iii) to clarify that VA will consider providing an examination or obtaining a medical opinion only if new and material evidence is already presented or secured.

We also proposed to change the definition of ''new and material evidence'' in conjunction with VA's proposal in § 3.159 to define what actions it will take to assist a claimant in submitting evidence to reopen a finally denied claim. Several commenters objected to the proposed

change in definition on the grounds that the VCAA did not address this issue. However, in our view, it is helpful for the claimant to understand the nature of the evidence that will reopen a claim, in light of the fact that it will now be easier for a claimant to reopen a claim because, unlike before, the claimant now will have VA assistance in obtaining evidence that is potentially new and material. Therefore, we have not withdrawn the proposed revision to § 3.156 based on these comments.

We proposed to redefine ''material'' evidence to mean ''existing evidence that relates specifically to the reason why the claim was last denied.'' Many commenters felt this language was too restrictive. We agree, and therefore have revised the final regulatory language at § 3.156(a) in a manner that more accurately conveys the meaning intended, to state that ''Material evidence means existing evidence that . . . relates to an unestablished fact necessary to substantiate the claim.''

One commenter objected to the proposed definition because it did not provide that VA would review any evidence submitted as new and material ''in connection with evidence previously assembled.'' This commenter stated that this omission may negatively impact claims where all the evidence of record may lead to a different conclusion on the issue of whether new and material evidence had been submitted, than does one piece of evidence in isolation. We agree and have changed the regulatory language to state that ''Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim.''

We also proposed that new and material evidence ''must raise a reasonable possibility of substantiating the claim,'' a requirement to which several commenters objected. With respect to other claims for benefits, the VCAA provides that VA assistance is required unless there is no reasonable possibility that this assistance would aid in substantiating the claim. We believe it is fair and reasonable to apply the same standard—that there be a reasonable possibility that VA assistance would help substantiate the claim—in determining whether a claim has been reopened, triggering VA's full duty to assist by providing a VA examination or obtaining a medical opinion. Therefore, we have made no change to the proposed regulatory language based on these comments.

One commenter stated that the regulation should be revised to state specifically that new and material evidence could also be evidence that supports a different legal theory for entitlement. However, VA adjudicators are required to ''grant[] every benefit that can be supported in law,'' under § 3.103(a) which includes considering all possible legal theories of entitlement in deciding a claim. The same standard would apply in considering all legal theories applicable to reopening a claim. Therefore, we have made no change to the regulatory language based on this comment.

Additional Comments and Administrative Procedure Act

One commenter stated that VA should consider extending the comment period for another 30 days. We decline to do so. We are unaware of any comments other than those submitted and reviewed in this document. These comments were extensive and detailed. We have attempted to analyze these comments as quickly as possible to expedite the development of this final rule. As noted in the Supplementary Information accompanying the proposed rule, the United States Court of Appeals for Veterans Claims has concluded that the Secretary's authority to implement the VCAA could be usurped by the court's issuance of decisions as to the applicability of the VCAA, and as a consequence, judicial review of Board of Veterans' Appeals decisions on claims affected by the VCAA is nearing a standstill. Clearly, it is necessary to issue the final rule rather than extend the comment period another 30 days. Further, for these reasons, we have found good cause for not applying the delayed effective date provisions of 5 U.S.C. 553.

Another commenter suggested that we expressly incorporate the ''benefit of the doubt'' rule in § 3.159. However, since § 3.102 already addresses this issue, and is not in conflict with § 3.159, we decline to change the regulation as suggested.

Scope and Applicability

As indicated by the proposal that these regulations be contained in 38 CFR part 3, this final rule applies only to claims for benefits that are governed by part 3. These benefits include compensation, pension, dependency and indemnity compensation, burial benefits, monetary benefits ancillary to those benefits, and special benefits.

These amendments are effective November 9, 2000, except for the amendment to 38 CFR 3.156(b), which is effective August 29, 2001. Except for the amendment to 38 CFR 3.156(a), the second sentence of 38 CFR 3.159(c), and 38 CFR 3.159(c)(4)(iii), the provisions of this rule merely implement the VCAA and do not provide any rights other than those provided by the VCAA. Therefore, we will apply those provisions to any claim for benefits received by VA on or after November 9, 2000, the VCAA's enactment date, as well as to any claim filed before that date but not decided by VA as of that date.

The second sentence of § 3.159(c) and § 3.159(c)(4)(iii), which relate to the assistance VA will provide to a claimant trying to reopen a finally decided claim, provide rights in addition to those provided by the VCAA. Authority to provide such additional assistance is provided by 38 U.S.C. 5103A(g), which provides that nothing in section 5103A shall be construed to preclude VA from providing such other assistance to a claimant in substantiating a claim as VA considers appropriate. Because we have no authority to make these provisions retroactively effective, they are applicable on the date of this final rule's publication. Accordingly, we will apply the second sentence of § 3.159(c), § 3.159(c)(4)(iii), and the amendment to 38 CFR 3.156(a), to any claim for benefits received by VA on or after August 29, 2001. We note that any future exercises by the Secretary of the discretionary authority granted by 38 U.S.C. 5103A(g) will be accomplished through rules published in accordance with Administrative Procedure Act rulemaking procedures.

Unfunded Mandates

The Unfunded Mandates Reform Act requires (in section 202) that agencies prepare an assessment of anticipated costs and benefits before developing any rule that may result in 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 amendment will have no consequential effect on State, local, or tribal governments.

Executive Order 12866

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

Paperwork Reduction Act

All collections of information under the Paperwork Reduction Act (44 U.S.C. 3501–3520) referenced in this final rule have existing OMB approval as forms. No changes are made in this final rule to those collections of information.

Regulatory Flexibility Act

The Secretary hereby certifies that the adoption of these amendments 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. This action would not directly affect any small entities. Only individuals could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), these amendments are exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

The Catalog of Federal Domestic Assistance program numbers are 64.100, 64.101, 64.104, 64.105, 64.106, 64.109, and 64.110.

List of Subjects in 38 CFR Part 3

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

Approved: July 30, 2001.

Anthony J. Principi,

Secretary of Veterans Affairs.

For the reasons set forth in the preamble, 38 CFR part 3 is amended 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.

§ 3.102 [Amended]

2. In § 3.102, the fifth sentence is amended by removing ''evidence; the claimant is required to submit evidence sufficient to justify a belief in a fair and impartial mind that the claim is well grounded.'' and adding, in its place, ''evidence.''.

3. Section 3.156(a) and its authority citation are revised to read as follows:

§ 3.156 New and material evidence.

(a) A claimant may reopen a finally adjudicated claim by submitting new and material evidence. New evidence means existing evidence not previously submitted to agency decisionmakers. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim.

(Authority: 38 U.S.C. 501, 5103A(f), 5108)

* * * * *

4. Section 3.159 is revised to read as follows:

§ 3.159 Department of Veterans Affairs assistance in developing claims.

(a) *Definitions.* For purposes of this section, the following definitions apply:

(1) *Competent medical evidence* means evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions. Competent medical evidence may also mean statements conveying sound medical principles found in medical treatises. It would also include statements contained in authoritative writings such as medical and scientific articles and research reports or analyses.

(2) *Competent lay evidence* means any evidence not requiring that the proponent have specialized education, training, or experience. Lay evidence is competent if it is provided by a person who has knowledge of facts or circumstances and conveys matters that can be observed and described by a lay person.

(3) *Substantially complete application* means an application containing the claimant's name; his or her relationship to the veteran, if applicable; sufficient service information for VA to verify the claimed service, if applicable; the benefit claimed and any medical condition(s) on which it is based; the claimant's signature; and in claims for nonservice-connected disability or death pension and parents' dependency and indemnity compensation, a statement of income.

(4) For purposes of paragraph (c)(4)(i) of this section, *event* means one or more incidents associated with places, types, and circumstances of service giving rise to disability.

(5) *Information* means non-evidentiary facts, such as the claimant's Social Security number or address; the name and military unit of a person who served with the veteran; or the name and address of a medical care provider who may have evidence pertinent to the claim.

(b) *VA's duty to notify claimants of necessary information or evidence.* (1) When VA receives a complete or substantially complete application for benefits, it will notify the claimant of any information and medical or lay evidence that is necessary to substantiate the claim. VA will inform the claimant which information and evidence, if any, that the claimant is to provide to VA and which information and evidence, if any, that VA will attempt to obtain on behalf of the claimant. VA will also request that the claimant provide any evidence in the claimant's possession that pertains to the claim. If VA does not receive the necessary information and evidence requested from the claimant within one year of the date of the notice, VA cannot pay or provide any benefits based on that application. If the claimant has not responded to the request within 30 days, VA may decide the claim prior to the expiration of the one-year period based on all the information and evidence contained in the file, including information and evidence it has obtained on behalf of the claimant and any VA medical examinations or medical opinions. If VA does so, however, and the claimant subsequently provides the information and evidence within one year of the date of the request, VA must readjudicate the claim.

(Authority: 38 U.S.C. 5103)

(2) If VA receives an incomplete application for benefits, it will notify the claimant of the information necessary to complete the application and will defer assistance until the claimant submits this information.

(Authority: 38 U.S.C. 5102(b), 5103A(3))

(c) *VA's duty to assist claimants in obtaining evidence.* Upon receipt of a substantially complete application for benefits, VA will make reasonable efforts to help a claimant obtain evidence necessary to substantiate the claim. In addition, VA will give the assistance described in paragraphs (c)(1), (c)(2), and (c)(3) to an individual attempting to reopen a finally decided claim. VA will not pay any fees charged by a custodian to provide records requested.

(1) *Obtaining records not in the custody of a Federal department or agency.* VA will make reasonable efforts to obtain relevant records not in the custody of a Federal department or agency, to include records from State or local governments, private medical care providers, current or former employers, and other non-Federal governmental sources. Such reasonable efforts will generally consist of an initial request for the records and, if the records are not received, at least one follow-up request. A follow-up request is not required if a response to the initial request indicates that the records sought do not exist or that a follow-up request for the records would be futile. If VA receives information showing that subsequent requests to this or another custodian could result in obtaining the records sought, then reasonable efforts will include an initial request and, if the records are not received, at least one follow-up request to the new source or

an additional request to the original source.

(i) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from non-Federal agency or department custodians. The claimant must provide enough information to identify and locate the existing records, including the person, company, agency, or other custodian holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided.

(ii) If necessary, the claimant must authorize the release of existing records in a form acceptable to the person, company, agency, or other custodian holding the records.

(Authority: 38 U.S.C. 5103A(b))

(2) *Obtaining records in the custody of a Federal department or agency.* VA will make as many requests as are necessary to obtain relevant records from a Federal department or agency. These records include but are not limited to military records, including service medical records; medical and other records from VA medical facilities; records from non-VA facilities providing examination or treatment at VA expense; and records from other Federal agencies, such as the Social Security Administration. VA will end its efforts to obtain records from a Federal department or agency only if VA concludes that the records sought do not exist or that further efforts to obtain those records would be futile. Cases in which VA may conclude that no further efforts are required include those in which the Federal department or agency advises VA that the requested records do not exist or the custodian does not have them.

(i) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from Federal agency or department custodians. If requested by VA, the claimant must provide enough information to identify and locate the existing records, including the custodian or agency holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided. In the case of records requested to corroborate a claimed stressful event in service, the claimant must provide information sufficient for the records custodian to conduct a search of the corroborative records.

(ii) If necessary, the claimant must authorize the release of existing records in a form acceptable to the custodian or agency holding the records.

(Authority: 38 U.S.C. 5103A(b))

(3) *Obtaining records in compensation claims.* In a claim for disability compensation, VA will make efforts to obtain the claimant's service medical records, if relevant to the claim; other relevant records pertaining to the claimant's active military, naval or air service that are held or maintained by a governmental entity; VA medical records or records of examination or treatment at non-VA facilities authorized by VA; and any other relevant records held by any Federal department or agency. The claimant must provide enough information to identify and locate the existing records including the custodian or agency holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided.

(Authority: 38 U.S.C. 5103A(c))

(4) *Providing medical examinations or obtaining medical opinions.* (i) In a claim for disability compensation, VA will provide a medical examination or obtain a medical opinion based upon a review of the evidence of record if VA determines it is necessary to decide the claim. A medical examination or medical opinion is necessary if the information and evidence of record does not contain sufficient competent medical evidence to decide the claim, but:

(A) Contains competent lay or medical evidence of a current diagnosed disability or persistent or recurrent symptoms of disability;

(B) Establishes that the veteran suffered an event, injury or disease in service, or has a disease or symptoms of a disease listed in § 3.309, § 3.313, § 3.316, and § 3.317 manifesting during an applicable presumptive period provided the claimant has the required service or triggering event to qualify for that presumption; and

(C) Indicates that the claimed disability or symptoms may be associated with the established event, injury, or disease in service or with another service-connected disability.

(ii) Paragraph (4)(i)(C) could be satisfied by competent evidence showing post-service treatment for a condition, or other possible association with military service.

(iii) Paragraph (c)(4) applies to a claim to reopen a finally adjudicated claim only if new and material evidence is presented or secured.

(Authority: 38 U.S.C. 5103A(d))

(d) *Circumstances where VA will refrain from or discontinue providing assistance.* VA will refrain from providing assistance in obtaining evidence for a claim if the substantially complete application for benefits indicates that there is no reasonable possibility that any assistance VA would provide to the claimant would substantiate the claim. VA will discontinue providing assistance in obtaining evidence for a claim if the evidence obtained indicates that there is no reasonable possibility that further assistance would substantiate the claim. Circumstances in which VA will refrain from or discontinue providing assistance in obtaining evidence include, but are not limited to:

(1) The claimant's ineligibility for the benefit sought because of lack of qualifying service, lack of veteran status, or other lack of legal eligibility;

(2) Claims that are inherently incredible or clearly lack merit; and

(3) An application requesting a benefit to which the claimant is not entitled as a matter of law.

(Authority: 38 U.S.C. 5103A(a)(2))

(e) *Duty to notify claimant of inability to obtain records.* (1) If VA makes reasonable efforts to obtain relevant non-Federal records but is unable to obtain them, or after continued efforts to obtain Federal records concludes that it is reasonably certain they do not exist or further efforts to obtain them would be futile, VA will provide the claimant with oral or written notice of that fact. VA will make a record of any oral notice conveyed to the claimant. For non-Federal records requests, VA may provide the notice at the same time it makes its final attempt to obtain the relevant records. In either case, the notice must contain the following information:

(i) The identity of the records VA was unable to obtain;

(ii) An explanation of the efforts VA made to obtain the records;

(iii) A description of any further action VA will take regarding the claim, including, but not limited to, notice that VA will decide the claim based on the evidence of record unless the claimant submits the records VA was unable to obtain; and

(iv) A notice that the claimant is ultimately responsible for providing the evidence.

(2) If VA becomes aware of the existence of relevant records before deciding the claim, VA will notify the claimant of the records and request that the claimant provide a release for the records. If the claimant does not provide any necessary release of the relevant records that VA is unable to obtain, VA

will request that the claimant obtain the records and provide them to VA.

(Authority: 38 U.S.C. 5103A(b)(2))

(f) For the purpose of the notice requirements in paragraphs (b) and (e) of this section, notice to the claimant means notice to the claimant or his or her fiduciary, if any, as well as to his or her representative, if any.

(Authority: 38 U.S.C. 5102(b), 5103(a))

§ 3.326 [Amended]

5. In § 3.326(a), the first sentence is amended by removing ''well-grounded''.

[FR Doc. 01–21802 Filed 8–28–01; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[TN–232–200118(a); FRL–7044–4]

Approval and Promulgation of Implementation Plans:State of Tennessee

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The EPA is approving a revision to the State of Tennessee's rules submitted on February 14, 2000. The State of Tennessee is amending Chapter 1200–3–22—Lead Emissions Standards—to require EPA approval of changes to Reasonably Available Control Technology (RACT) emission limitations in permits for specific lead sources.

DATES: This direct final rule is effective October 29, 2001 without further notice, unless EPA receives adverse comment by September 28, 2001. If adverse comment is received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: All comments should be addressed to: Kimberly Bingham at the EPA, Region 4 Air Planning Branch, 61 Forsyth Street, SW., Atlanta, Georgia 30303.

Copies of documents concerning this action are available at the following addresses for inspection during normal business hours:

Environmental Protection Agency, Region 4, Air Planning Branch, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960.

Tennessee Department of Environment and Conservation, Division of Air Pollution Control, 9th Floor L&C Annex, 401 Church Street, Nashville, Tennessee 37243–1531.

FOR FURTHER INFORMATION CONTACT: Kimberly Bingham, Regulatory Planning Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, Region 4, Environmental Protection Agency, Atlanta Federal Center, 61 Forsyth Street, SW., Atlanta, Georgia 30303. The telephone number is (404) 562–9038. Ms. Bingham can also be reached via electronic mail at bingham.kimberly@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Analysis of State Submittal

Background

Section 107(d)(5) of the Clean Air Act (CAA) provides for areas to be designated as attainment, nonattainment, or unclassifiable with respect to the lead national ambient air quality standard (NAAQS). States are required to submit recommended designations for areas within their states. When an area is designated nonattainment, the state must prepare and submit a state implementation plan (SIP) pursuant to sections 110(a)(2) and 172(c) of the CAA showing how the area will be brought into attainment. The requirements for all SIPs are contained in section 110(a)(2) of the CAA. Section 172(c) of the CAA specifies the provisions applicable to areas designated as nonattainment for any of the NAAQS. EPA has also issued a General Preamble describing how EPA will review SIPs and SIP revisions submitted under Title I of the Act, including those State submittals containing lead nonattainment area SIP requirements (see generally 57 FR 13498 (April 16, 1992) and 57 FR 18070 (April 28, 1992)).

One of the specific requirements of section 172(c) is that states include in their lead nonattainment SIPs reasonably available control technology (RACT) emission limitations for existing sources. The EPA defines RACT as the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility. When a state submits a lead nonattainment SIP that includes specific RACT emission limits for specific sources in the lead nonattainment area and these requirements are federally approved by EPA into Tennessee's SIP, any changes to those source-specific RACT emission limits require Tennessee to submit a revision to the SIP to EPA for approval.

Chapter 1200–3–22—Lead Emission Standards

The State of Tennessee had language included in this chapter of their SIP that granted the Tennessee Air Director the ability to change the RACT emission limits for sources specified in the SIP at any given time without prior approval from EPA. Region 4 requested that the State of Tennessee revise their SIP to provide that any changes to the source-specific RACT emissions limits would require EPA approval. In response to this request, the State of Tennessee submitted the following rule revision:

Paragraph (1) of rule 1200–3–22–.03 Specific Emission Standards for Existing Sources of Lead was amended by adding the following language: ''The RACT emission level specified as permit conditions on the operating permit(s) must be submitted, reviewed and approved by the Administrator of the Environmental Protection Agency or his designee.''

II. Final Action

EPA is approving the aforementioned rule revision submitted by the State of Tennessee, because it meets all CAA requirements. The EPA is publishing this rule without a prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. However, in the proposed rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective October 29, 2001 without further notice unless the Agency receives adverse comments by September 28, 2001.

If the EPA receives such comments, then EPA will publish a document withdrawing the final rule and informing the public that the rule will not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period. Parties interested in commenting should do so at this time. If no such comments are received, the public is advised that this rule will be effective on October 29, 2001 and no further action will be taken on the proposed rule.

III. Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That