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Federal Regulations**

Title 38, Parts 0, 1, 2, 12, 14-16,
18-20, 25-26, 38-45, 48-49, 74-75

General

Veterans Benefits Administration

Supplement No. 99

Covering period of *Federal Register* issues
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GENERAL INSTRUCTIONS

Custom Federal Regulations Service™

Supplemental Materials for *Book A*

Code of Federal Regulations

Title 38, Parts 0, 1, 2, 12, 14-16, 18-20, 25-26, 38-45, 48-49, 74-75

General

Veterans Benefits Administration

Supplement No. 99

5 May 2011

Covering the period of Federal Register issues
through May 5, 2011

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FILING INSTRUCTIONS

**Book A, Supplement No. 99
May 5, 2011**

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HIGHLIGHTS

Book A, Supplement No. 99 May 5, 2011

Supplement Highlights references: Where substantive changes are made in the text of regulations, the paragraphs of *Highlights* sections are cited at the end of the relevant section of text. Thus, if you are reading §3.263, you will see a note at the end of that section which reads: “Supplement *Highlights* references—6(2).” This means that paragraph 2 of the *Highlights* section in Supplement No. 6 contains information about the changes made in §3.263. By keeping and filing the *Highlights* sections, you will have a reference source explaining all substantive changes in the text of the regulations.

Supplement frequency: This Book A (*General*) was originally supplemented twice a year, in April and October. Beginning 1 August 1995, supplements will be issued *every month* during which a final rule addition or modification is made to the parts of Title 38 covered by this book. Supplements will be numbered consecutively as issued.

Modifications in this supplement include the following:

1. On 30 March 2011, the VA published a final rule, effective 29 April 2011, to articulate the Board's practice of referring unadjudicated claims to the Agency of Original Jurisdiction for appropriate action, and to describe when it is appropriate for the Board to remand a claim to the AOJ for the limited purpose of issuing a Statement of the Case. Changes:

- In §19.9, revised the section heading, revised paragraphs (a) through (c), and added paragraph (d).
- In §20.903, revised the section heading and revised paragraph (b); and
- In §20.1304, revised paragraph (b)(2).



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**Part 19 — Board of Veterans’ Appeals:
Appeals Regulations**

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

Source: 48 FR 6969, Feb. 17, 1983.
Revised 57 FR 4104, Feb. 3, 1992,
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§19.9 Remand or referral for further action.

(a) *Remand.* If further evidence, clarification of the evidence, correction of a procedural defect, or any other action is essential for a proper appellate decision, a Veterans Law Judge or panel of Veterans Law Judges shall remand the case to the agency of original jurisdiction, specifying the action to be undertaken.

(b) *Referral.* The Board shall refer to the agency of original jurisdiction for appropriate consideration and handling in the first instance all claims reasonably raised by the record that have not been initially adjudicated by the agency of original jurisdiction, except for claims over which the Board has original jurisdiction.

(c) *Remand for a Statement of the Case.* In cases before the Board in which a claimant has timely filed a Notice of Disagreement with a determination of the agency of original jurisdiction on a claim, but the record reflects that the agency of original jurisdiction has not subsequently granted the claim in full and has not furnished the claimant with a Statement of the Case, the Board shall remand the claim to the agency of original jurisdiction with instructions to prepare and issue a Statement of the Case in accordance with the provisions of subpart B of this part. A remand for a Statement of the Case is not required if the claimant, consistent with the withdrawal requirements of §20.204 of this chapter, withdraws the Notice of Disagreement.

(d) *Exceptions.* A remand or referral to the agency of original jurisdiction is not necessary for any of the following purposes:

(1) Clarifying a procedural matter before the Board, including the appellant's choice of representative before the Board, the issues on appeal, or requests for a hearing before the Board;

(2) Considering law not already considered by the agency of original jurisdiction, including, but not limited to, statutes, regulations, and court decisions;

(3) Reviewing additional evidence received by the Board, if, pursuant to § 20.1304(c) of this chapter, the appellant or the appellant's representative waives the right to initial consideration by the agency of original jurisdiction, or if the Board determines that the benefit or benefits to which the evidence relates may be fully allowed on appeal;

(4) Requesting an opinion under §20.901 of this chapter;

(5) Supplementing the record with a recognized medical treatise; or

(6) Considering a matter over which the Board has original jurisdiction.

(Authority: 38 U.S.C. 7102, 7103(c), 7104(a), 7105).

[48 FR 6969, Feb. 17, 1983, as amended at 57 FR 4104, Feb. 3, 1992; 61 FR 20449, May 7, 1996; 62 FR 52503, Oct. 8, 1997; 67 FR 3104, Jan. 23, 2002; 69 FR 53808, Sept. 3, 2004; 76 FR 17547, Mar. 30, 2011]

Supplement *Highlights* references: 14(3), 24(2), 47(1), 64(1), 99(1).

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§20.903 Rule 903. Notification of evidence to be considered by the Board and opportunity for response.

(a) *If the Board obtains a legal or medical opinion.* If the Board requests an opinion pursuant to Rule 901 (§20.901 of this part), the Board will notify the appellant and his or her representative, if any. When the Board receives the opinion, it will furnish a copy of the opinion to the appellant, subject to the limitations provided in 38 U.S.C. 5701(b)(1), and to the appellant's representative, if any. A period of 60 days from the date the Board furnishes a copy of the opinion will be allowed for response, which may include the submission of relevant evidence or argument. The date the Board furnishes a copy will be presumed to be the same as the date of the letter or memorandum that accompanies the copy of the opinion for purposes of determining whether a response was timely filed.

(b) *If the Board supplements the record with a recognized medical treatise*

(1) *General.* If, pursuant to §19.9(d)(5) of this chapter, the Board supplements the record with a recognized medical treatise, the Board will notify the appellant and his or her representative, if any, that the Board will consider such recognized medical treatise in the adjudication of the appeal. The notice from the Board will contain a copy of the relevant portions of the recognized medical treatise. The appellant will be given 60 days after the date of the notice described in this section to file a response, which may include the submission of relevant evidence or argument. The date the Board gives the notice will be presumed to be the same as the date of the notice letter for purposes of determining whether a response was timely filed.

(2) *Exception.* The notice described in paragraph (b)(1) of this section is not required if the Board uses a recognized medical treatise or medical dictionary for the limited purpose of defining a medical term and that definition is not material to the Board's disposition of the appeal.

[57 FR 4109, Feb. 3, 1992, as amended at 67 FR 3105, Jan. 23, 2002; 69 FR 53808, Sept. 3, 2004; 76 FR 17548, Mar. 30, 2011]

Supplement *Highlights* references: 47(1), 64(1), 99(1).

§20.1304 Rule 1304. Request for change in representation, request for personal hearing, or submission of additional evidence following certification of an appeal to the Board of Veterans' Appeals.

(a) *Request for a change in representation, request for a personal hearing, or submission of additional evidence within 90 days following notification of certification and transfer of records.* An appellant and his or her representative, if any, will be granted a period of 90 days following the mailing of notice to them that an appeal has been certified to the Board for appellate review and that the appellate record has been transferred to the Board, or until the date the appellate decision is promulgated by the Board of Veterans' Appeals, whichever comes first, during which they may submit a request for a personal hearing, additional evidence, or a request for a change in representation. Any such request or additional evidence must be submitted directly to the Board and not to the agency of original jurisdiction. The date of mailing of the letter of notification will be presumed to be the same as the date of that letter for purposes of determining whether the request was timely made or the evidence was timely submitted. Any evidence which is submitted at a hearing on appeal which was requested during such period will be considered to have been received during such period, even though the hearing may be held following the expiration of the period. Any pertinent evidence submitted by the appellant or representative is subject to the requirements of paragraph (d) of this section if a simultaneously contested claim is involved.

(b) *Subsequent request for a change in representation, request for a personal hearing, or submission of additional evidence.*

(1) *General rule.* Subject to the exception in paragraph (b)(2) of this section, following the expiration of the period described in paragraph (a) of this section, the Board of Veterans' Appeals will not accept a request for a change in representation, a request for a personal hearing, or additional evidence except when the appellant demonstrates on motion that there was good cause for the delay. Examples of good cause include, but are not limited to, illness of the appellant or the representative which precluded action during the period; death of an individual representative; illness or incapacity of an individual representative which renders it impractical for an appellant to continue with him or her as representative; withdrawal of an individual representative; the discovery of evidence that was not available prior to the expiration of the period; and delay in transfer of the appellate record to the Board which precluded timely action with respect to these matters. Such motions must be in writing and must include the name of the veteran; the name of the claimant or appellant if other than the veteran (e.g., a veteran's survivor, a guardian, or a fiduciary appointed to receive VA benefits on an individual's behalf); the applicable Department of Veterans Affairs file number; and an explanation of why the request for a change in representation, the request for a personal hearing, or the submission of additional evidence could not be accomplished in a timely manner. Such motions must be filed at the following address: Director, Management and Administration (01E), Board of Veterans' Appeals, 810 Vermont Avenue, NW., Washington, DC 20420. Depending upon the ruling on the motion, action will be taken as follows:

(i) *Good cause not shown.* If good cause is not shown, the request for a change in representation, the request for a personal hearing, or the additional evidence submitted

will be referred to the agency of original jurisdiction upon completion of the Board's action on the pending appeal without action by the Board concerning the request or additional evidence. Any personal hearing granted as a result of a request so referred or any additional evidence so referred may be treated by that agency as the basis for a reopened claim, if appropriate. If the Board denied a benefit sought in the pending appeal and any evidence so referred which was received prior to the date of the Board's decision, or testimony presented at a hearing resulting from a request for a hearing so referred, together with the evidence already of record, is subsequently found to be the basis of an allowance of that benefit, the effective date of the award will be the same as if the benefit had been granted by the Board as a result of the appeal which was pending at the time that the hearing request or additional evidence was received.

(ii) *Good cause shown.* If good cause is shown, the request for a change in representation or for a personal hearing will be honored. Any pertinent evidence submitted by the appellant or representative will be accepted, subject to the requirements of paragraph (d) of this section if a simultaneously contested claim is involved.

(2) *Exception.* The motion described in paragraph (b)(1) of this section is not required to submit evidence in response to a notice described in §20.903 of this chapter.

(c) *Consideration of additional evidence by the Board or by the agency of original jurisdiction.* Any pertinent evidence submitted by the appellant or representative which is accepted by the Board under the provisions of this section, or is submitted by the appellant or representative in response to a §20.903 of this part, notification, as well as any such evidence referred to the Board by the agency of original jurisdiction under §19.37(b) of this chapter, must be referred to the agency of original jurisdiction for review, unless this procedural right is waived by the appellant or representative, or unless the Board determines that the benefit or benefits to which the evidence relates may be fully allowed on appeal without such referral. Such a waiver must be in writing or, if a hearing on appeal is conducted, the waiver must be formally and clearly entered on the record orally at the time of the hearing. Evidence is not pertinent if it does not relate to or have a bearing on the appellate issue or issues.

(d) *Simultaneously contested claims.* In simultaneously contested claims, if pertinent evidence which directly affects payment, or potential payment, of the benefit sought is submitted by any claimant and is accepted by the Board under the provisions of this section, the substance of such evidence will be mailed to each of the other claimants who will then have 60 days from the date of mailing of notice of the new evidence within which to comment upon it and/or submit additional evidence in rebuttal. For matters over which the Board does not have original jurisdiction, a waiver of initial agency of original jurisdiction consideration of pertinent additional evidence received by the Board must be obtained from each claimant in accordance with paragraph (c) of this section. The date of mailing of the letter of notification of the new evidence will be presumed to be the same as the date of that letter for purposes of determining whether such comment or evidence in rebuttal was timely submitted. No further period will be provided for response to such comment or rebuttal evidence.

(e) *Relationship to proceedings before the General Counsel to cancel accreditation or to review the reasonableness of fees and expenses.* The provisions of paragraphs (a), (b), and (d) of this section allowing appellants to submit additional evidence do not apply in proceedings before

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the General Counsel conducted under part 14 of this chapter to cancel accreditation or to review fee agreements and expenses for reasonableness. (Authority: 38 U.S.C. 7104, 7105, 7105A; 38 U.S.C. 5902, 5903, 5904)

[57 FR 4109, Feb. 3, 1992, as amended at 60 FR 25851, May 15, 1995; 61 FR 20453, May 7, 1996; 67 FR 3105, Jan. 23, 2002; 67 FR 16023, Apr. 4, 2002; 69 FR 53808, Sept. 3, 2004; 73 FR 29880, May 22, 2008; 76 FR 17548, Mar. 30, 2011]

Supplement *Highlights* references: 7(1), 14(3), 47(1), 64(1), 83(3), 99(1).

Next Section is §20.1400

Reserved