TABLE 5.—MORTALITY TABLE FOR SOCIAL SECURITY DISABLED MALE PARTICIPANTS—Continued

| Age x | $q_x$ |
|---|---|
| 45 | 0.043033 |
| 46 | 0.044007 |
| 47 | 0.044993 |
| 48 | 0.045989 |
| 49 | 0.046993 |
| 50 | 0.048004 |
| 51 | 0.049021 |
| 52 | 0.050042 |
| 53 | 0.051067 |
| 54 | 0.052093 |
| 55 | 0.053120 |
| 56 | 0.054144 |
| 57 | 0.055089 |
| 58 | 0.056068 |
| 59 | 0.057080 |
| 60 | 0.058118 |
| 61 | 0.059172 |
| 62 | 0.060232 |
| 63 | 0.061303 |
| 64 | 0.062429 |
| 65 | 0.063669 |
| 66 | 0.065082 |
| 67 | 0.066724 |
| 68 | 0.068642 |
| 69 | 0.070834 |
| 70 | 0.073284 |
| 71 | 0.075979 |
| 72 | 0.078903 |
| 73 | 0.082070 |
| 74 | 0.085606 |
| 75 | 0.088918 |
| 76 | 0.092208 |
| 77 | 0.095625 |
| 78 | 0.099216 |
| 79 | 0.103030 |
| 80 | 0.107113 |
| 81 | 0.111515 |
| 82 | 0.116283 |
| 83 | 0.121464 |
| 84 | 0.127108 |
| 85 | 0.133262 |
| 86 | 0.139974 |
| 87 | 0.147292 |
| 88 | 0.155265 |
| 89 | 0.163939 |
| 90 | 0.173363 |
| 91 | 0.183585 |
| 92 | 0.194653 |
| 93 | 0.206615 |
| 94 | 0.219519 |
| 95 | 0.234086 |
| 96 | 0.248436 |
| 97 | 0.263954 |
| 98 | 0.280803 |
| 99 | 0.299154 |
| 100 | 0.319185 |
| 101 | 0.341086 |
| 102 | 0.365052 |
| 103 | 0.393102 |
| 104 | 0.427255 |
| 105 | 0.469531 |
| 106 | 0.521945 |
| 107 | 0.586518 |
| 108 | 0.665268 |
| 109 | 0.760215 |
| 110 | 1.000000 |

TABLE 6.—MORTALITY TABLE FOR SOCIAL SECURITY DISABLED FEMALE PARTICIPANTS

| Age x | $q_x$ |
|---|---|
| 15 | 0.007777 |
| 16 | 0.008120 |
| 17 | 0.008476 |
| 18 | 0.008852 |
| 19 | 0.009243 |
| 20 | 0.009650 |
| 21 | 0.010076 |
| 22 | 0.010521 |
| 23 | 0.010984 |
| 24 | 0.011468 |
| 25 | 0.011974 |
| 26 | 0.012502 |
| 27 | 0.013057 |
| 28 | 0.013632 |
| 29 | 0.014229 |
| 30 | 0.014843 |
| 31 | 0.015473 |
| 32 | 0.016103 |
| 33 | 0.016604 |
| 34 | 0.017121 |
| 35 | 0.017654 |
| 36 | 0.018204 |
| 37 | 0.018770 |
| 38 | 0.019355 |
| 39 | 0.019957 |
| 40 | 0.020579 |
| 41 | 0.021219 |
| 42 | 0.021880 |
| 43 | 0.022561 |
| 44 | 0.023263 |
| 45 | 0.023988 |
| 46 | 0.024734 |
| 47 | 0.025504 |
| 48 | 0.026298 |
| 49 | 0.027117 |
| 50 | 0.027961 |
| 51 | 0.028832 |
| 52 | 0.029730 |
| 53 | 0.030655 |
| 54 | 0.031609 |
| 55 | 0.032594 |
| 56 | 0.033608 |
| 57 | 0.034655 |
| 58 | 0.035733 |
| 59 | 0.036846 |
| 60 | 0.037993 |
| 61 | 0.039176 |
| 62 | 0.040395 |
| 63 | 0.041653 |
| 64 | 0.042950 |
| 65 | 0.044287 |
| 66 | 0.045666 |
| 67 | 0.046828 |
| 68 | 0.048070 |
| 69 | 0.049584 |
| 70 | 0.051331 |
| 71 | 0.053268 |
| 72 | 0.055356 |
| 73 | 0.057573 |
| 74 | 0.059979 |
| 75 | 0.062574 |
| 76 | 0.065480 |
| 77 | 0.068690 |
| 78 | 0.072237 |
| 79 | 0.076156 |
| 80 | 0.080480 |
| 81 | 0.085243 |
| 82 | 0.090480 |
| 83 | 0.096224 |
| 84 | 0.102508 |

TABLE 6.—MORTALITY TABLE FOR SOCIAL SECURITY DISABLED FEMALE PARTICIPANTS—Continued

| Age x | $q_x$ |
|---|---|
| 85 | 0.109368 |
| 86 | 0.116837 |
| 87 | 0.124948 |
| 88 | 0.133736 |
| 89 | 0.143234 |
| 90 | 0.153477 |
| 91 | 0.164498 |
| 92 | 0.176332 |
| 93 | 0.189011 |
| 94 | 0.202571 |
| 95 | 0.217045 |
| 96 | 0.232467 |
| 97 | 0.248870 |
| 98 | 0.266289 |
| 99 | 0.284758 |
| 100 | 0.303433 |
| 101 | 0.327385 |
| 102 | 0.359020 |
| 103 | 0.395842 |
| 104 | 0.438360 |
| 105 | 0.487816 |
| 106 | 0.545886 |
| 107 | 0.614309 |
| 108 | 0.694884 |
| 109 | 0.789474 |
| 110 | 1.000000 |

Issued in Washington, DC, this 29 day of November, 2005.

**Elaine L. Chao,**

*Chairman, Board of Directors, Pension Benefit Guaranty Corporation.*

Issued on the date set forth above pursuant to a resolution of the Board of Directors authorizing its Chairman to issue this final rule.

**Judith R. Starr,**

*Secretary, Board of Directors, Pension Benefit Guaranty Corporation.*

[FR Doc. 05–23554 Filed 12–1–05; 8:45 am]

**BILLING CODE 7708–01–P**

## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Parts 3 and 20

**RIN 2900–AL86**

## Dependency and Indemnity Compensation: Surviving Spouse's Rate; Payments Based on Veteran's Entitlement to Compensation for Service-Connected Disability Rated Totally Disabling for Specified Periods Prior to Death

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule.

**SUMMARY:** The Department of Veterans Affairs (VA) is amending its adjudication regulations concerning payment of dependency and indemnity compensation (DIC) for certain non-

service-connected deaths and the rate of DIC payable to a surviving spouse for either service-connected or non-service-connected deaths. The purpose of this final rule is to clarify VA's interpretation of two similar statutes that provide for payments to the survivors of veterans who were, at the time of death, in receipt of or entitled to receive disability compensation for service-connected disability that was rated totally disabling for a specified period prior to death. This rule also reorganizes and revises the regulations governing surviving spouses' DIC rates and revises the Board of Veterans' Appeals rule concerning the effect of unfavorable decisions during a veteran's lifetime on claims for death benefits by the veteran's survivors.

**DATES:** *Effective Date:* This rule is effective December 2, 2005.

*Applicability Date:* VA will apply this rule to claims pending before VA on the effective date of this rule, as well as to claims filed after that date.

**FOR FURTHER INFORMATION CONTACT:** Maya Ferrandino, Consultant, Compensation and Pension Service, Policy and Regulations Staff, Veterans Benefits Administration, 810 Vermont Avenue, NW., Washington, DC 20420 (202) 273–7211.

**SUPPLEMENTARY INFORMATION:**

**Background**

In the **Federal Register** of October 25, 2004 (69 FR 62229), VA proposed to revise its DIC regulations to clarify and harmonize VA's interpretation of two statutory provisions. We further proposed to reorganize and restate existing regulations to make them easier to understand and apply.

DIC is a benefit paid to survivors of veterans in cases of death due to service-connected disability or certain cases of death due to non-service-connected disability. Section 1318(b) of title 38, United States Code, provides in effect that, if the veteran's death is not caused by a service-connected disability, DIC is payable only if the veteran was in receipt of or ''entitled to receive'' compensation at the time of death for a service-connected disability that was continuously rated totally disabling for a period of 10 or more years immediately preceding death, or for a period of not less than five years from the date of the veteran's discharge or release from active duty, or for a period of not less than one year immediately preceding death if the veteran was a former prisoner of war. VA has implemented this provision through regulations at 38 CFR 3.22, paragraph (b) of which explains that the phrase ''entitled to receive'' refers to circumstances in which the veteran, at the time of his or her death, had service-connected disability that was rated totally disabling by VA, but was not receiving compensation for one of seven specified reasons, including the fact that the veteran had applied for compensation during his or her lifetime but had not received total disability compensation due to a clear and unmistakable error (CUE) in a VA decision.

We proposed to revise § 3.22(b) in two respects. First, we proposed to revise ambiguous language in § 3.22(b) to clarify that the correction of CUE may establish that a veteran was ''entitled to receive'' benefits ''at the time of death'' irrespective of whether the CUE is corrected before or after the veteran's death. We explained that the statutory requirement that the veteran have been entitled to benefits ''at the time of death'' would be satisfied in such cases because 38 U.S.C. 5109A and 7111 mandate that decisions correcting CUE must be given full retroactive effect as a matter of law.

Second, we proposed to add an eighth circumstance in which a veteran may be found to have been ''entitled to receive'' compensation at the time of death for a disability that was continuously rated totally disabling for the specified period preceding death. We proposed to state that service department records that existed at the time of a prior final VA decision but were not previously considered by VA (hereinafter referenced as ''newly identified service department records'') may support a finding that the veteran was ''entitled to receive'' compensation at the time of death for a disability that was rated totally disabling for the specified period. We explained that the proposed rule would apply to such service department records received by VA before or after a veteran's death, if the records established a basis for assigning a total disability rating for the retroactive period specified in 38 U.S.C. 1318(b). We stated that, similar to awards based on correction of CUE, awards based on such newly identified service department records may be made retroactive as a matter of law, as provided in long-standing VA regulations at 38 CFR 3.156(c) and 3.400(q)(2).

Under section 1311(a)(2) of title 38, United States Code, if a veteran's survivor is entitled to DIC based on either service-connected or non-service-connected death, the basic monthly rate of DIC payable to the survivor may be increased by a specified amount if the veteran at the time of death was in receipt of or was ''entitled to receive'' compensation for a service-connected disability that was rated totally disabling for a continuous period of at least eight years immediately preceding death. VA previously implemented this provision through regulations in 38 CFR 3.5(e)(1). Unlike § 3.22, however, § 3.5(e)(1) did not define or elaborate upon the phrase ''entitled to receive.''

In view of the substantially similar language and common derivation of 38 U.S.C. 1311(a)(2) and 1318(b), VA has concluded that the statutes should be given a similar construction, and the United States Court of Appeals for the Federal Circuit (Federal Circuit) upheld that determination in *National Organization of Veterans' Advocates, Inc.* v. *Secretary of Veterans Affairs*, 314 F.3d 1373, 1378 (Fed. Cir. 2003) (''*NOVA*''). In its *NOVA* decision, however, the Federal Circuit criticized VA for not elaborating the meaning of the phrase ''entitled to receive'' in § 3.5(e)(1), as VA had done in § 3.22. NOVA at 1381. The court ordered VA to undertake further rulemaking to harmonize those regulations.

In our October 2004 proposed rule, we proposed to remove the provisions in 38 CFR 3.5(e) and to replace them with new 38 CFR 3.10. We proposed to reorganize and restate more clearly in new § 3.10 several provisions specifying the amounts of DIC payable to surviving spouses of veterans. We also proposed to include in new § 3.10(f)(3) a definition of the phrase ''entitled to receive'' that would parallel the definition set forth in § 3.22(b), as revised by this rule.

VA also proposed to revise 38 CFR 20.1106, which provides generally that claims for death benefits by a veteran's survivor will be decided without regard to decisions rendered during the veteran's lifetime. The rule historically has contained an express exception for claims under section 1318, but not for claims under section 1311. To ensure that those two statutes are applied consistently, we proposed to revise § 20.1106 to exempt claims under either section 1311 or 1318.

Finally, the Federal Circuit's order in *NOVA* directed VA to address, in this rule, whether a survivor may establish entitlement to DIC under 38 U.S.C. 1311(a)(2) and 1318 by submitting new and material evidence after a veteran's death in order to reopen a claim filed by the veteran during his or her lifetime. *NOVA* at 1380–1381. The Federal Circuit stated that VA's current regulation at 38 CFR 3.22 reasonably recognizes the correction of CUE as a basis for revisiting final decisions made during a veteran's lifetime and

satisfying the durational disability requirement in 38 U.S.C. 1318(b). *NOVA* at 1380–1381. However, the court stated that the correction of CUE is only one of the two statutory bases for revisiting final decisions, and that VA had failed to explain whether the durational disability requirements could be met under the other exception, which involves the submission of new and material evidence to reopen a previously denied claim. *NOVA* at 1380–1381.

Our notice of proposed rulemaking explained that the submission of new and material evidence (other than newly identified service department records) after a veteran's death could not establish that the veteran was ''entitled to receive'' benefits for any past period. We explained that there were fundamental differences between the two statutory exceptions to finality and that those distinctions were significant in the context of claims under 38 U.S.C. 1311(a)(2) and 1318(b), which depend upon whether a veteran was ''entitled to receive'' benefits for past periods. The correction of CUE is a remedy for error committed by VA in a prior final decision. By statute, a decision correcting CUE has full retroactive effect irrespective of when the CUE claim is brought. Accordingly, a CUE claim brought after a veteran's death may establish that the veteran was entitled as a matter of law to have received benefits during his or her lifetime.

In contrast, a reopening based on new and material evidence (other than newly identified service department records) is not a retroactive correction of a prior final decision, but is instead a means for establishing prospective entitlement to benefits despite a prior final denial. Pursuant to 38 U.S.C. 5110(a), the effective date of an award based on a reopened claim ''shall not be earlier than the date of receipt of application therefore.'' Accordingly, the Federal Circuit has held that VA regulations reasonably provide that reopening with new and material evidence of a previously denied claim generally may not operate retroactively. *See Sears* v. *Principi*, 349 F.3d 1326, 1330 (Fed. Cir. 2003), *cert. denied*, 124 S. Ct. 1723 (2004). The United States Court of Appeals for Veterans Claims (CAVC) has explained that a reopening ''is not a reactivation of the previous claim, based upon the original application for benefits'' and that ''even upon a reopening, the prior claim is still 'final' in a sense'' because any award based on the reopening can be effective no earlier than the date of the application to reopen. *Spencer* v. *Brown*, 4 Vet. App. 283, 293 (1993), *aff'd*, 17 F.3d 368 (Fed. Cir. 1994). Accordingly, even if new and material evidence could show as a factual matter that any veteran was totally disabled due to service-connected disability during prior periods, such evidence could not establish that the veteran was entitled to receive benefits from VA for such past periods.

We concluded that, because awards based on new and material evidence generally cannot establish retroactive entitlement to benefits, a survivor seeking DIC under section 1311(a)(2) or 1318(b) generally cannot rely upon new and material evidence for the purpose of showing that a veteran was ''entitled to receive'' VA compensation for past periods. As noted above, the only exception to this general principle relates to circumstances in which newly identified service department records are submitted after a claim was finally denied. Because long-standing VA regulations authorize retroactive benefit entitlement based on such service department records, the proposed rule explained that new service department records submitted after a veteran's death may show that the veteran was ''entitled to receive'' total disability compensation for periods prior to death.

Although the Federal Circuit's NOVA decision refers to the possibility of a DIC claimant ''reopening'' a deceased veteran's claim based on either CUE or new and material evidence, we note that a survivor's DIC claim is not actually a ''reopening'' of the decedent's claim for disability compensation because a veteran's claim does not survive his or her death. *See Richard* v. *West*, 161 F.3d 719, 721–22 (Fed. Cir. 1998). Rather, the survivor's claim is a new and distinct claim that the survivor is entitled to DIC in his or her own right based on a showing that the veteran was ''entitled to receive'' certain benefits during the veteran's lifetime. Thus the fact that CUE and new and material evidence both provide grounds on which the veteran could have ''reopened'' or otherwise revisited a previously denied claim during his or her lifetime does not, in itself, provide any basis for applying those remedies to a survivor's DIC claim. Rather, the conclusion that a showing of CUE could establish a survivor's entitlement to DIC is based on factors unique to CUE. First, because CUE may be corrected retroactively, a showing of CUE may bear directly upon the issue of whether a veteran was truly ''entitled to receive'' benefits that were wrongly denied due to VA error during his or her lifetime. Second, the legislative history of 38 U.S.C. 1318 clearly expressed Congress' intent that ''the existence of clear and unmistakable VA administrative error would be a basis for entitlement to DIC benefits when such administrative error is the only bar to entitlement otherwise.'' S. Rep. No. 97–550, at 17 (1982), reprinted in 1982 U.S.C.C.A.N. 2877, 2880. Neither of those considerations applies to the submission of new and material evidence.

**Analysis of Public Comments**

We received comments from the Paralyzed Veterans of America (PVA) and the National Organization of Veterans' Advocates, Inc. (NOVA), both of which were parties to the above-referenced *NOVA* litigation. NOVA suggested a change to the terminology used in proposed 38 CFR 3.10(c)–(f) to describe the benefits authorized by 38 U.S.C. 1311(a)(2). The remaining comments from PVA and NOVA all relate to the issue of whether DIC claimants may rely on new and material evidence other than newly identified service department records to show that the veteran was ''entitled to receive'' total disability compensation for the specified statutory period. We address these comments below.

*I. Terminology in § 3.10(c)–(f)*

We proposed to state in 38 CFR 3.10(a) that the rate of DIC payable to a surviving spouse would consist of a basic monthly rate and any applicable increases specified in § 3.10(c) and (e). We proposed, in § 3.10(c), (d), (e), and (f), to describe the additional DIC amount payable under 38 U.S.C. 1311(a)(2) as the ''veteran's compensation increase'' because the survivor's eligibility for that increase was conditioned upon the veteran's entitlement to compensation during his or her lifetime. NOVA states that the term ''veteran's compensation increase'' is misleading because the increase is payable to the surviving spouse rather than the veteran and suggests that we change the term to ''surviving spouse's compensation increase.'' We note that the provisions of proposed § 3.10(a) and (c) make clear that the increase pertains solely to the rate of DIC payable to a surviving spouse and does not authorize any payment to a deceased veteran. Nevertheless, we are changing the proposed term ''veteran's compensation increase'' to the more specific term ''section 1311(a)(2) increase.'' We do not believe that the term suggested by NOVA (''surviving spouse's compensation increase'') is sufficiently specific, because § 3.10(e) refers to other increases that are also payable to surviving spouses as dependency and indemnity compensation.

*II. New and Material Evidence*

NOVA and PVA both assert that survivors seeking DIC under sections 1311(a)(2) and 1318(b) should be allowed to submit new and material evidence after a veteran's death for the purpose of establishing that the veteran was, at the time of death, ''entitled to receive'' disability compensation for a disability that was rated totally disabling for the specified statutory period immediately preceding the veteran's death. NOVA and PVA both argue that the proposed rules are arbitrary insofar as they allow claimants to rely upon newly identified service department records but not on other types of new evidence submitted after a veteran's death. The organizations present a number of specific arguments in support of this assertion, which we address below.

A. Interpretation of ''Entitled To Receive''

Although not expressly stated in the comments, it appears that each of the comments from PVA and NOVA rest upon a disagreement with VA concerning the meaning of the phrase ''entitled to receive'' as it is used in 38 U.S.C. 1311(a)(2) and 1318(b). Because we believe the interpretation of that statutory phrase is relevant to all of the comments, we address that issue as a preliminary matter, even though it is not expressly discussed in the comments.

The statutory requirement that the veteran have been ''entitled to receive'' certain benefits at the time of death is ambiguous, and two possible interpretations of that language have been suggested. It may be construed to mean that the veteran had a legal right to the specified benefits and that VA had authority to grant such benefits to the veteran under the statutes and regulations giving VA authority to award benefits for the period required by sections 1311(a)(2) and 1318(b). This has been VA's consistent interpretation of the statute. However, in a series of decisions finding ambiguity in prior VA regulations implementing section 1318(b), the CAVC suggested that the phrase ''entitled to receive'' may also be construed to mean that the veteran was ''hypothetically'' entitled to have received total disability compensation for the period required by sections 1311(a)(2) and 1318(b), irrespective of whether the claimant had satisfied the statutory requirements necessary to actually obtain such benefits, such as the requirements pertaining to the filing of applications and those specifying the effective dates of awards based on such applications. *See Wingo* v. *West,* 11 Vet. App. 307, 311 (1998). Under this interpretation, a survivor would be required to submit evidence showing that the veteran was totally disabled due to a service-connected disease for the period specified in section 1311(a)(2) or section 1318(b), but would not need to establish that the veteran had any legal right to compensation for the disability for that period or that VA had any legal authority to pay such benefits to the claimant under the statutes governing VA's authority to pay benefits. The two commenters have advocated the latter interpretation in the *NOVA* litigation and their comments on this rule appear to be predicated upon that interpretation.

The distinction between the two interpretations is significant because, with the exception of newly identified service department records, new and material evidence submitted after a veteran's death could not establish that the veteran had a legal right to receive total disability compensation for a retroactive period preceding the veteran's death or that VA had authority to pay such benefits to the veteran for that retroactive period. This is a function of the finality of VA decisions, the limited nature of reopenings based on new and material evidence, and the corresponding limitations on VA's authority to grant benefits in such reopened claims. As a general matter, once VA denies a claim, the decision is final and VA cannot thereafter consider the claim or award benefits except as otherwise provided by law. *See* 38 U.S.C. 7104(b), 7105(c). Congress has established two exceptions to this finality. One exception permits VA to correct CUE in a prior final decision and to award benefits retroactive to the date of the prior claim. *See* 38 U.S.C. 5109A, 7111. The other exception permits VA to reopen a previously denied claim when new and material evidence is received. *See* 38 U.S.C. 5108. However, Congress has provided that an award based on a reopened claim may be effective no earlier than the date VA received the claim for reopening. *See* 38 U.S.C. 5110(a). Accordingly, except with respect to newly identified service department records, new and material evidence submitted after a veteran's death could not show that a veteran had any legal right to benefits for periods prior to death. The commenters' assertion that DIC claimants may rely upon new and material evidence to establish that a veteran was ''entitled to receive'' benefits for past periods necessarily reflects the view that the phrase ''entitled to receive'' means hypothetical entitlement rather than entitlement under applicable statutory and regulatory provisions.

As stated in the notice of proposed rulemaking, as well as in several prior rulemaking documents published in the **Federal Register** (67 FR 16309 (2002); 66 FR 65861 (2001); 65 FR 3388 (2000)), the phrase ''entitled to receive'' is most reasonably construed to mean that the veteran had a legal right to total disability compensation for the specified period under the statutes governing entitlement to such benefits and that VA had authority to grant such benefits to the veteran under the statutes giving VA authority to award such benefits. There are several reasons why this interpretation best effectuates congressional intent.

First, VA's interpretation comports logically with the language of sections 1311(a)(2) and 1318(b) viewed in their entirety. Although the statutory language alone evinces no clear meaning, it may provide evidence of congressional intent for consideration in connection with other interpretive tools. Section 1311(a)(2) requires that the veteran, ''at the time of death,'' have been ''entitled to receive'' compensation for a service-connected disability ''that was rated totally disabling for a continuous period of at least eight years immediately preceding death.'' Section 1318(b) similarly requires that the veteran, ''at the time of death,'' have been ''entitled to receive'' compensation for a service-connected disability that ''was continuously rated totally disabling'' for a specified period immediately preceding death. The requirement that the disability have been ''rated totally disabling'' for a specified period is consistent with an intent to require that the veteran have held a total disability rating assigned by VA under the statutes and regulations governing disability ratings for the specified period. By statute, a veteran is entitled to receive total disability compensation only during periods in which the disability is rated totally disabling by VA. *See* 38 U.S.C. 1114(j). If Congress intended to authorize benefits without regard to whether the veteran had obtained, or taken the steps necessary to obtain, a total disability rating from VA, it would have been more logical to require only that the veteran ''was totally disabled'' for the specified period, rather than requiring that the veteran was ''rated totally disabled'' for such period.

Second, VA's interpretation comports with the purposes indicated by the legislative history of sections 1311(a)(2) and 1318(b). In providing for payment of DIC based on the veteran's entitlement to total disability

compensation during his or her lifetime, Congress explained that its purpose was to replace the source of income the veteran's family would otherwise lose when the veteran died and his or her compensation payments ceased. The Senate Committee on Veterans' Affairs explained this purpose by stating:

> The appropriate Federal obligation to these survivors should, in the Committee's view, be the replacement of the support lost when the veteran dies. For example, assume that a veteran who is totally blind from service-connected causes dies at the age of 55 from a heart attack, having been so disabled from the age of 22—a period of 33 years. During that period, his wife and he depended upon his disability compensation for income support, but, because his death is not service connected, she would not receive DIC.

S. Rep. No. 95–1054 at 28 (1978), *reprinted in,* 1978 U.S.C.C.A.N. 3465, 3486. Permitting survivors to rely on new and material evidence or on CUE to establish a veteran's entitlement to benefits that were not actually awarded during the veteran's lifetime would be contrary to the stated purpose to replace income that veterans and their families had come to depend on by virtue of having received total disability payments for a prolonged period prior to death. While Congress subsequently explicitly amended the 1978 legislation in 1982 to allow for recovery of DIC benefits in cases of CUE, as indicated below, significantly, it made no similar express provision for recovery in cases where new and material evidence is presented to establish a veteran's entitlement to benefits that were not actually awarded during the veteran's lifetime and could not have been awarded to the veteran retroactively if he or she had survived.

In 1982, Congress expanded the criteria for DIC eligibility under what is now 38 U.S.C. 1318, by authorizing DIC in cases where the veteran would have received total disability compensation for the specified period prior to death but for CUE committed by VA in a decision on a claim submitted during the veteran's lifetime. The stated purpose of that change was ''to provide that the existence of a clear and unmistakable error should not defeat entitlement to the survivors' benefits.'' S. Rep. No. 97–550, at 35 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2877, 2898. The legislative history further explained that, ''[u]nder the amendment, a veteran would not need actually to have been 'in receipt' of total disability benefits for the requisite period of time in order to provide eligibility to the survivors if a clear and unmistakable error had been made that resulted in a shorter period of receipt than should have been provided.'' *Id.*

Permitting survivors to rely on new and material evidence to establish a veteran's entitlement to benefits that were not actually awarded during the veteran's lifetime would go well beyond the stated purpose to provide DIC in cases where CUE resulted in a shorter period of entitlement than should have been provided. As noted above, new and material evidence generally does not have retroactive effect and could not establish a longer period of compensation entitlement for any veteran, as correction of CUE may do. The legislative history of the 1982 statute reasonably reflects the principle that veterans and their families should not be penalized in cases where the veteran did everything necessary to establish entitlement to a total disability rating for the required period, but VA's error prevented the timely assignment of such rating. The purpose of that amendment was clearly remedial, in the same way that the general authority to correct CUE retroactively is remedial. In contrast, the authority to reopen and grant claims upon receipt of new and material evidence (other than service department records that were previously in the government's possession) is not remedial, in that it does not correct any past error, but merely permits a new adjudication informed by new evidence.

In view of the stated congressional purpose, we believe it is appropriate to recognize the distinction between statutory procedures that may result in the retroactive assignment of a total disability rating for periods prior to death (i.e., correction of CUE; readjudication based on newly identified service department records) and those that may not (i.e., reopening based on new and material evidence other than service department records). It is, further, appropriate to recognize a distinction between procedures designed to remedy governmental error (i.e., correction of CUE; readjudication based on newly identified service department records) and those that are not (i.e., reopening based on new and material evidence). Newly identified service department records are considered ''lost or mislaid,'' 38 CFR 3.400(q)(2), presumably by the government, and therefore belong conceptually with CUE, rather than with new and material evidence. In view of Congress's stated purpose to allow DIC where VA's error was the only obstacle to the veteran's receipt of benefits, we find no basis for extending DIC to circumstances where there was no VA error and, moreover, where VA would have no statutory authority to award retroactive entitlement to the veteran if the veteran were still alive.

A third basis for our interpretation of the statutory language is our conclusion that, when Congress conditioned a survivor's DIC eligibility on the extent and duration of a veteran's entitlement to benefits, it intended that VA would apply the existing statutory provisions governing the extent and duration of the veteran's entitlement, including those prohibiting VA from according retroactive effect to decisions based on new and material evidence. As a general rule, new statutes enacted as part of an established statutory scheme must be construed to fit logically within the statutory scheme. *See United States* v. *Jefferson Electric Mfg. Co.,* 291 U.S. 386, 396 (1934) (''As a general rule, where the legislation dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, new enactments of a fragmentary nature on that subject are to be taken as intended to fit into the existing system and to be carried into effect conformably to it, excepting as a different purpose is plainly shown.'') When Congress enacted statutes authorizing DIC in cases where a veteran was ''entitled to receive'' a specific type of benefit at a specific level for a specific time period, it is reasonable to assume that Congress intended VA to apply the established statutory and regulatory scheme then in place governing entitlement to benefits, including those statutes and regulations that delimit the duration and level of entitlement. As discussed above and in the notice of proposed rulemaking, those provisions permit retroactive determinations of entitlement only in limited circumstances, involving CUE or newly identified service department records.

Finally, we note that an alternate interpretation—i.e., requiring VA to ignore the statutory and regulatory provisions governing a veteran's entitlement to benefits and the level and duration of such entitlement—would result in a process fraught with uncertainty. Under the effective date provisions of 38 U.S.C. 5110 and corresponding VA regulations, the duration of any veteran's entitlement to benefits may be determined with relative ease and certainty, most often by reference to the date of the claim that resulted in the award of benefits. Although the effective date of entitlement may not correspond to the date the veteran actually became disabled or attained a particular level of disability, the statutory procedure promotes certainty and administrative efficiency. However, if determinations regarding a veteran's entitlement to

benefits are to be made without regard to the statutes expressly governing the effective dates of entitlement, there would be no clear basis for determining when a veteran's entitlement to a total disability rating began. Even assuming that the veteran's ''hypothetical'' entitlement would begin on the date he or she became totally disabled due to a service-connected disability, such a determination ordinarily would be exceedingly difficult, highly speculative, and would lend itself to prolonged evidentiary disputes, potentially involving medical opinions or lay testimony rendered many years after the events in question. The difficulty of such determinations would be compounded by the need to evaluate the decedent's condition over a prolonged continuous period of many years prior to death. In view of Congress' practice of imposing clear and definite effective-date rules for VA benefit awards and limiting retroactive awards and the complex issues they involve, we believe it is reasonable to conclude that Congress did not intend to impose a much more complex and uncertain process for determining a veteran's entitlement to benefits for purposes of sections 1311(a)(2) and 1318. This conclusion is underscored by the stated purposes of those statutes to authorize benefits in cases where the veteran's entitlement can be simply and readily established—i.e., where the veteran was actually receiving total disability compensation at the time of death or would have received such benefits but for a VA error that is clearly and unmistakably shown by the record created during the veteran's lifetime.

NOVA presents three comments regarding the foregoing analysis. First, it asserts that the congressional purpose to replace income lost when a totally-disabled veteran dies would apply equally in circumstances in which the veteran held a total-disability rating for less than the specified statutory period. We do not dispute nor diminish the hardship that any family may face following the death of a veteran family member and the resulting termination of VA benefit payments. However, Congress has specified by statute the period of a veteran's entitlement to total disability compensation that is necessary to vest survivors with DIC entitlement under section 1311(a)(2) and 1318(b). The difficult task of drawing lines governing benefit entitlement is a policy matter entrusted to Congress and VA is not at liberty to alter the statutory standards Congress has adopted. *See Mathews* v. *Diaz,* 426 U.S. 67, 83–84 (1976). Accordingly, we make no change based on this comment.

Second, NOVA asserts that allowing survivors to rely upon any type of new and material evidence submitted after a veteran's death would serve a ''remedial purpose'' similar to the correction of CUE and would be consistent with the congressional intent to authorize DIC where VA error prevented the veteran from receiving benefits during his or her lifetime. We do not agree. The statutory and regulatory provisions relating to CUE and newly obtained service department records are unique not merely because they can fairly be described as having a ''remedial'' purpose, but also because they effectuate that purpose by expressly authorizing retroactive awards of entitlement to benefits. There is no similar authority for retroactive awards based on new and material evidence, and the mere assertion that the reopening of claims serves a remedial function cannot provide such authority in view of the effective-date rules in 38 U.S.C. 5110(a). Moreover, it is not accurate to say that a reopening based on new and material evidence provides a remedy for VA error. As the Federal Circuit stated in *Sears* v. *Principi,* VA's effective-date regulations reasonably differentiate between reopening based on previously unobtained service department records, which provides a remedy for ''government errors or inattention,'' and reopening based on other evidence, which encompasses ''situations outside the control of the government,'' such as where the new evidence was not provided earlier ''either due to inattention by the veteran or his representatives or subsequent advances in medicine and science.'' *Sears,* 349 F.3d at 1331. Accordingly, we make no change based on this comment.

Third, NOVA asserts that interpreting sections 1311 and 1318 to permit reopening based on new and material evidence would have no significant practical effects on VA claim processing. NOVA asserts that DIC claimants alone would be responsible for developing evidence relevant to their claim and that VA would have no need to conduct any evidentiary development unless it were for the improper purpose of trying to refute the survivor's DIC claim. VA does not agree with this comment. If new and material evidence submitted after a veteran's death could potentially establish a survivor's entitlement to DIC under section 1311(a)(2) and 1318(b), VA would be required by statute and regulation, to assist the claimant in obtaining evidence necessary to substantiate the claim. 38 U.S.C. 5103A; 38 CFR 3.159(c). Such assistance would be necessary if the claimant needed help obtaining allegedly new and material evidence or if evidence submitted by the claimant was insufficient to permit fair adjudication of the claim. The assertion that VA's assistance could serve no purpose other than to refute the claim is factually incorrect and is contrary to law and to longstanding VA policy.

Further, the practical concerns we discussed were not based merely on the fact that VA would need to assist claimants in developing evidence, as VA routinely does. Rather, the burdens unique to NOVA's suggested interpretation of sections 1311(a)(2) and 1318(b) would involve the difficulty of resolving medical issues regarding the duration and degree of a veteran's disability many years after the events in question and the difficulty of ascertaining a specific period of the veteran's ''entitlement'' to total disability benefits in the absence of an applicable statutory standard defining the period of entitlement. As noted above, 38 U.S.C. 5110(a) provides a definite and specific mechanism for measuring the beginning date of any individual's entitlement to benefits. If, as NOVA suggests, that provision is inapplicable in determining the period of a veteran's entitlement to total disability benefits for purposes of section 1311(a)(2) and 1318(b), there would be no clear basis for defining the period of a veteran's entitlement. Assuming the matter involved a purely factual determination as to when the veteran's total disability began, resolution of that question would often be a matter of significant uncertainty and speculation, compounded by the remoteness of the events and the unavailability of the veteran. There potentially would be equal difficulty in determining whether the veteran was totally disabled throughout the specified statutory period, as sections 1311(a)(2) and 1318(b) require, in the absence of clear and contemporaneous disability evaluations throughout that period. *See* 38 CFR 4.1, 4.2 (discussing the need for thorough medical reports to support disability evaluations).

We do not suggest that these problems are entirely insurmountable. Rather, as stated in the notice of proposed rulemaking, the extent of the burdens and uncertainty that would be associated with this interpretation of sections 1311(a)(2) and 1318(b) lends support to our conclusion that Congress did not intend that interpretation. The legislative history reflects that Congress intended to authorize these DIC benefits in at least two circumstances in which

the extent and duration of the veteran's entitlement to benefits can be readily established by the record of proceedings during the veteran's lifetime, *i.e.*, where the veteran actually received total disability benefits for the specified period or would have received such benefits but for a VA error that is clear and unmistakable on the existing record. Viewed against these definite and efficient standards, it is unlikely that Congress intended to impose the much more complex, uncertain, and hypothetical adjudicative actions that would be necessary in determinations based on new and material evidence. For the foregoing reasons, we make no change based upon this comment.

B. Comments Based on 38 U.S.C. 5110(a)

As explained above, VA concluded that the submission of new and material evidence following a veteran's death could generally not retroactively establish that the veteran was ''entitled to receive'' compensation for periods prior to the veteran's death, because 38 U.S.C. 5110(a) prohibits retroactive awards based on new and material evidence. NOVA asserts that this statutory limit on retroactivity is irrelevant because section 1311(a)(2) or 1318(b) would not require VA to pay any retroactive benefits to a veteran. Rather, NOVA asserts, VA would be required only to pay prospective DIC benefits to survivors in a manner consistent with section 5110(a).

VA does not agree with this comment. NOVA is correct that VA would not be required to pay retroactive benefits to a deceased veteran or to the DIC claimant. However, a survivor's claim for benefits under section 1311(a)(2) or section 1318(b) is predicated on the veteran's entitlement to benefits insofar as the statutes authorize benefits only if the veteran was ''entitled to receive'' total disability compensation for a specified period prior to death. In order to determine whether a veteran was ''entitled to receive'' benefits for past periods, VA necessarily must consider section 5110(a), which imposes limits on a veteran's entitlement to receive, and VA's authority to award, benefits for specific periods. If a veteran whose claim was denied ten years ago were to submit new evidence establishing that he was totally disabled due to service-connected disability, section 5110(a) would permit VA to award compensation only from the date the claim was reopened, even if the total disability may have arisen at an earlier date. The veteran's reopened claim could not establish a right to receive benefits for any prior periods. New and material evidence submitted after a veteran's death could no more establish the veteran's retroactive entitlement to benefits than could evidence submitted by the veteran himself during his lifetime. Although an adjudication under section 1311(a)(2) or section 1318(b) based on new and material evidence would not require VA to actually release payment to a deceased veteran, such a claim could prevail only if VA were to find that the veteran was entitled to receive payment from VA for periods prior to the date VA received the new and material evidence establishing such entitlement. Such a finding would be contrary to the requirements of section 5110(a). Accordingly, we make no change based on this comment.

NOVA also states that, although section 5110(a) limits the effective date of awards based on claims reopened after a final adjudication, the statute refers separately to the effective date of claims for DIC and provides that the effective date of such awards ''shall be fixed in accordance with the facts found.'' NOVA asserts that it is improper for VA to rely on the statute's reference to reopened claims because effective-date issues in claims under section 1311(a)(2) and 1318(b) are governed by section 5110(a)'s reference to DIC claims.

VA does not agree with this comment. Section 5110(a) states a single effective-date rule applicable to ''an original claim, a claim reopened after final adjudication, or a claim for increase, of compensation, [or] dependency and indemnity compensation'' and provides that the effective date of any such award ''shall be in accordance with the facts found but shall not be earlier than the date of receipt of application therefor.'' In the context of a claim for DIC benefits under section 1311(a)(2) or 1318(b), there are potentially two effective-date issues to which section 5110(a) may apply. First, as explained above, section 5110(a) would govern the effective date of any compensation award to the veteran and thus would determine the date, if any, on which a veteran became ''entitled to receive'' total disability compensation. The duration of the veteran's total disability compensation, if any, would determine whether the survivor was entitled to DIC under section 1311(a)(2) or 1318(b). Second, if the survivor is entitled to DIC, section 5110(a) would again operate to determine the effective date of the survivor's entitlement. The issue of the effective date of a survivor's DIC award, if one is made, is both logically and sequentially distinct from the issue of the effective date of any benefits the veteran was entitled to receive during his or her lifetime. Accordingly, the fact that section 5110(a) would govern the effective date of a survivor's DIC award does not conflict with our conclusion that section 5110(a) also applies in determining whether and to what extent the veteran was ''entitled to receive'' benefits from VA. We therefore make no change based on this comment.

C. Comments Based on 38 U.S.C. 5108

PVA asserts that the proposed rules are inconsistent with 38 U.S.C. 5108 insofar as they provide that newly identified service department records may provide a basis for establishing that a veteran was ''entitled to receive'' benefits for past periods but that other types of new evidence submitted after a veteran's death may not establish that fact. Section 5108 provides that, ''[i]f new and material evidence is presented or secured with respect to a claim which has been disallowed, the Secretary shall reopen the claim and review the former disposition of the claim.'' PVA asserts that this statute unambiguously requires VA to reopen a previously denied claim when new and material evidence is received. PVA further asserts that, because this statute does not limit the form of acceptable new and material evidence, there is no basis for VA's conclusion that newly identified service department records, but not other types of records, submitted after a veteran's death, may establish that a veteran was ''entitled to receive'' benefits for periods prior to death. NOVA similarly asserts that there is no rational basis for distinguishing between newly identified service department records and other types of new evidence.

VA does not agree with these comments. Section 5108 allows claimants to reopen their benefit claims after a final denial. It is well established, however, that a veteran's claim for disability compensation does not survive the veteran's death. *See Richard* v. *West*, 161 F.3d 719, 721–22 (Fed. Cir. 1998). Section 5108 thus provides no general authority for survivors to ''reopen'' a deceased veteran's claim with new and material evidence. A survivor's claim for DIC under section 1311(a)(2) or section 1318(b) is not a ''reopening'' of the deceased veteran's compensation claim within the meaning of 38 U.S.C. 5108, but instead is a distinct claim for DIC benefits by the survivor.

Insofar as the proposed rule allows survivors to submit newly identified service department records after a veteran's death, the rule is not based upon 38 U.S.C. 5108, but upon the provisions of 38 U.S.C. 1311(a)(2) and

1318(b), viewed in the context of the overall statutory scheme in title 38, United States Code. Although a veteran's claim does not survive his or her death, sections 1311(a)(2) and 1318(b) are most reasonably construed to permit examination of decisions on a veteran's claim to the extent necessary to determine the survivor's entitlement to DIC. Because a survivor's entitlement to DIC under section 1311(a)(2) and 1318(b) may depend upon whether the veteran was ''entitled to receive'' total disability benefits for a specified number of years prior to death, it is reasonable to conclude that Congress intended to permit VA to examine prior claims or decisions under limited circumstances to determine whether the veteran was ''entitled to receive'' total disability benefits for the specified statutory period. This congressional intent is made clear by the legislative history stating an intent to allow DIC under sections 1311(a)(2) and 1318(b) if it is shown that the veteran would have received the specified compensation benefits but for CUE in a decision on a claim during the veteran's lifetime. As explained above, a veteran's retroactive entitlement to benefits may be established by a showing that prior decisions contained CUE or by newly identified service department records that establish entitlement to benefits. However, new and material evidence, if submitted after a veteran's death, could not establish such retroactive entitlement. Accordingly, the distinction in the proposed rule between newly identified service department records and new evidence submitted after death merely reflects the distinction between circumstances that may satisfy the eligibility requirements of section 1311(a)(2) and 1318(b) and circumstances that could not as a matter of law satisfy those eligibility requirements.

PVA and NOVA are correct that 38 U.S.C. 5108 does not distinguish between newly obtained service department records and other types of new evidence. However, the other statutory and regulatory provisions upon which the proposed rule was based do reflect a material distinction between the retroactive effect of awards based on newly obtained service department records and awards based on other types of new evidence. As explained above, 38 U.S.C. 5110(a) makes clear that entitlement to benefits based on a claim reopened with new and material evidence generally may be effective no earlier than the date VA received the reopened claim, and thus cannot establish retroactive entitlement for periods prior to the reopening. *See also* 38 CFR 3.400(q)(1). VA regulations recognize an exception to this general rule in cases where a previously denied claim is reopened with newly obtained service department records. In such cases, VA's regulations state that the effective date of entitlement to benefits will ''agree with evaluation (since it is considered that these records were lost or mislaid) or date of receipt of claim on which prior evaluation was made, whichever is later.'' 38 CFR 3.400(q)(2); *see also* 38 CFR 3.156(c).

The Federal Circuit has acknowledged and upheld the distinction between the retroactivity of awards based on newly obtained service department records and awards based on other types of new evidence. In *Sears*, the court stated:

> [A] claim that is reopened for new and material evidence in the form of missing service medical records dates back to the filing of the veteran's original claim for benefits. 38 CFR 3.400(q)(2) (2003).
>
> Section 3.400(q)(1)(ii) applies to other instances of new and material evidence, situations in which the new evidence was not presented earlier, either due to inattention by the veteran or his representative or subsequent advances in medicine and science. We conclude that section 3.400, which differentiates between government errors or inattention, and situations outside the control of the government, is not unreasonable.

349 F.3d at 1331. As the Court noted, the rules permitting retroactive awards based on newly identified service department records reflect the judgment that the failure to establish benefit entitlement at an earlier date would, in such cases, be a result of ''government errors or inattention.'' In this respect, the rules governing awards based on such service department records serve a remedial function similar to the rules governing the correction of CUE in prior decisions. In contrast, as the Federal Circuit noted, awards based on other types of new evidence do not remedy past government error, but merely permit consideration of new evidence that was not previously submitted for reasons outside the government's control. This distinction is also supported by the CAVC's decision in *Spencer*, 4 Vet. App. at 293, which stated that, generally, ''even upon a reopening, the prior claim is still 'final' in a sense,'' because ''[a]ny award of benefits made upon a claim reopened under section 5108 on other than service department reports will have an effective date no earlier than the date of the filing of the claim to reopen.'' The CAVC noted that VA's regulations according retroactive effect to awards based on service department records were rooted in VA regulations dating back to the 1930s and were consistent with prior statutory provisions.

For the reasons stated above, the distinction in the proposed rules between awards based on newly identified service department records and awards based on other types of new evidence is reasonable and is not inconsistent with 38 U.S.C. 5108. Accordingly, we make no change based upon the referenced comments.

D. Other Comments

NOVA asserts that VA should not distinguish between claims involving newly obtained service department records and claims involving other new evidence submitted after a veteran's death, because the function of either type of evidence would be the same, i.e., to provide a factual basis for determining that the veteran met the criteria for a total disability rating for the specified period prior to death. This comment is based on the assumption that a survivor is entitled to DIC under section 1311(a)(2) and 1318(b) whenever current evidence shows that the veteran was totally disabled due to service-connected disability for the specified period, irrespective of whether the veteran was entitled to receive any payments from VA for that period under the statutes and regulations governing awards of VA benefits. That assumption is incorrect, for the reasons set forth above. Because new evidence other than newly identified service department records cannot retroactively establish that a veteran was ''entitled to receive'' benefits for past periods, we make no change based on this comment.

NOVA also asserts that the regulation is arbitrary insofar as it permits new evidence only in the form of newly identified service department records because, in NOVA's view, service department records could not provide any information supporting the claim. VA does not agree. Service department records may be highly relevant in some circumstances, such as where the fact of the veteran's total disability was established, but VA had previously denied service connection for the disability due to the absence of evidence that the disability arose in service. Moreover, the reference in the proposed rules to service department records is not arbitrary, but properly reflects the existing statutory and regulatory scheme, which makes clear that service department records are the only form of new evidence that potentially may establish that a veteran was ''entitled to receive'' total disability compensation for past periods.

*III. Section 20.1106*

We proposed to revise 38 CFR 20.1106 in two respects. First, we proposed to add a reference in that rule to 38 U.S.C. 1311(a)(2), to clarify that claims under that statute are exempt from the general rule that issues in a survivor's claim for death benefits will be decided without regard to any disposition of the same issues during the veteran's lifetime. Second, we proposed to revise the regulation to state that VA would disregard only ''unfavorable'' dispositions during the veteran's lifetime. We explained that the second change would reflect VA's traditional practice of disregarding only unfavorable decisions and would resolve an ambiguity existing by virtue of differing language in the caption of § 20.1106, which refers to ''unfavorable'' decisions during a veteran's lifetime, and the text of § 20.1106, which more broadly states that VA will decide a survivor's claims without regard to ''any prior disposition.''

We received no comments on the proposed revisions to § 20.1106. Upon further consideration, however, we have concluded that the second change discussed above would be misleading and potentially inconsistent with statutory requirements in some instances. In a precedential opinion designated as VAOPGCPREC 11–96, VA's General Counsel noted that VA's traditional practice under § 20.1106 had been to disregard only unfavorable dispositions on a veteran's claim and, correspondingly, to accept favorable findings of service connection made during a veteran's lifetime. The General Counsel concluded that this practice was inconsistent with the requirements of a statute limiting VA's authority to grant service connection for a veteran's death for purposes of a survivor's DIC claim, even if VA had correctly granted service connection to the veteran during his or her lifetime for the condition that eventually caused the veteran's death. The General Counsel noted that Congress had enacted a statute that prospectively prohibited VA from granting service connection for disability or death due to an injury or disease caused by the veteran's abuse of alcohol or drugs. 38 U.S.C. 105. The General Counsel concluded that, even if VA had properly granted service connection to a veteran prior to the enactment of this statute, the statute precluded VA from granting service connection for the veteran's death if the death was caused by an injury or disease resulting from the veteran's abuse of alcohol or drugs. The General Counsel concluded that VA's traditional practice under § 20.1106 must yield in the face of statutory provisions requiring a different result.

A similar concern exists with respect to 38 U.S.C. 1103(a), which prohibits VA from establishing service connection for disability or death on the basis that it resulted from injury or disease attributable to the veteran's use of tobacco products during the veteran's service. In *Kane* v. *Principi*, 17 Vet. App. 97 (2003), the CAVC held that section 1103(a) prohibits VA from establishing service connection for a veteran's death due to an injury or disease related to the veteran's tobacco use even if VA had properly granted service connection for that injury or disease during the veteran's lifetime based on then-existing law.

Although there may be relatively few instances in which the Board would be required by statute to disregard a favorable decision during a veteran's lifetime, the proposed unqualified reference to disregarding only ''unfavorable'' decisions would be misleading and inaccurate with respect to such cases. Accordingly, we are not adopting that proposed change to § 20.1106. We recognize that § 20.1106 currently is ambiguous as to whether it requires the Board to disregard only unfavorable decisions. However, the revision we proposed would not be legally accurate or sufficiently informative with respect to all potential applications of that rule. A clarification of the applicable law and VA policy with respect to this matter would require consideration of matters beyond the scope of the proposed rule and, therefore, would more properly be the subject of a separate rule making.

We are, however, adopting as final the proposal to revise § 20.1106 to specify that claims under 38 U.S.C. 1311(a)(2) are among the types of claims exempt from the general rule that issues in a decision on a survivor's claim for death benefits will be decided without regard to any prior disposition of those issues during the veteran's lifetime. That proposed change is consistent with our determination that claims under sections 1311(a)(2) and 1318(b) should be addressed in the same manner. As noted above, we received no comments on that proposed change, which we now adopt as final.

For the reasons stated above and in the notice of proposed rulemaking, VA will adopt the proposed rules as final, with the changes discussed above.

**Unfunded Mandates**

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before developing any rule that may result in an expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any given year. This proposed amendment would have no such effect on State, local, or tribal governments, or the private sector.

**Executive Order 12866**

The Office of Management and Budget has reviewed this document under Executive Order 12866.

**Paperwork Reduction Act**

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

**Regulatory Flexibility Act**

The Secretary hereby certifies that this regulatory amendment 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. The reason for this certification is that these amendments would not directly affect any small entities. Only VA beneficiaries and their survivors 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.

**Catalog of Federal Domestic Assistance**

The Catalog of Federal Domestic Assistance program numbers and titles are 64.109, Veterans Compensation for Service-Connected Disability; and 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death.

**List of Subjects**

*38 CFR Part 3*

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

*38 CFR Part 20*

Administrative practice and procedure, Claims, Veterans.

Approved: August 1, 2005.

**R. James Nicholson,**

*Secretary of Veterans Affairs.*

■ For the reasons set forth in the preamble, 38 CFR parts 3 and 20 are 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.

**§ 3.5 [Amended]**

■ 2. Section 3.5 is amended by removing paragraph (e).

■ 3. Section 3.10 is added to read as follows:

**§ 3.10 Dependency and indemnity compensation rate for a surviving spouse.**

(a) *General determination of rate.* When VA grants a surviving spouse entitlement to DIC, VA will determine the rate of the benefit it will award. The rate of the benefit will be the total of the basic monthly rate specified in paragraph (b) or (d) of this section and any applicable increases specified in paragraph (c) or (e) of this section.

(b) *Basic monthly rate.* Except as provided in paragraph (d) of this section, the basic monthly rate of DIC for a surviving spouse will be the amount set forth in 38 U.S.C. 1311(a)(1).

(c) *Section 1311(a)(2) increase.* The basic monthly rate under paragraph (b) of this section shall be increased by the amount specified in 38 U.S.C. 1311(a)(2) if the veteran, at the time of death, was receiving, or was entitled to receive, compensation for service-connected disability that was rated by VA as totally disabling for a continuous period of at least eight years immediately preceding death. Determinations of entitlement to this increase shall be made in accordance with paragraph (f) of this section.

(d) *Alternative basic monthly rate for death occurring prior to January 1, 1993.* The basic monthly rate of DIC for a surviving spouse when the death of the veteran occurred prior to January 1, 1993, will be the amount specified in 38 U.S.C. 1311(a)(3) corresponding to the veteran's pay grade in service, but only if such rate is greater than the total of the basic monthly rate and the section 1311(a)(2) increase (if applicable) the surviving spouse is entitled to receive under paragraphs (b) and (c) of this section. The Secretary of the concerned service department will certify the veteran's pay grade and the certification will be binding on VA. DIC paid pursuant to this paragraph may not be increased by the section 1311(a)(2) increase under paragraph (c) of this section.

(e) *Additional increases.* One or more of the following increases may be paid in addition to the basic monthly rate and the section 1311(a)(2) increase.

(1) *Increase for children.* If the surviving spouse has one or more children under the age of 18 of the deceased veteran (including a child not in the surviving spouse's actual or constructive custody, or a child who is in active military service), the monthly DIC rate will be increased by the amount set forth in 38 U.S.C. 1311(b) for each child.

(2) *Increase for regular aid and attendance.* If the surviving spouse is determined to be in need of regular aid and attendance under the criteria in § 3.352 or is a patient in a nursing home, the monthly DIC rate will be increased by the amount set forth in 38 U.S.C. 1311(c).

(3) *Increase for housebound status.* If the surviving spouse does not qualify for the regular aid and attendance allowance but is housebound under the criteria in § 3.351(f), the monthly DIC rate will be increased by the amount set forth in 38 U.S.C. 1311(d).

(f) *Criteria governing section 1311(a)(2) increase.* In determining whether a surviving spouse qualifies for the section 1311(a)(2) increase under paragraph (c) of this section, the following standards shall apply.

(1) *Marriage requirement.* The surviving spouse must have been married to the veteran for the entire eight-year period referenced in paragraph (c) of this section in order to qualify for the section 1311(a)(2) increase.

(2) *Determination of total disability.* As used in paragraph (c) of this section, the phrase ''rated by VA as totally disabling'' includes total disability ratings based on unemployability (§ 4.16 of this chapter).

(3) *Definition of ''entitled to receive''.* As used in paragraph (c) of this section, the phrase ''entitled to receive'' means that the veteran filed a claim for disability compensation during his or her lifetime and one of the following circumstances is satisfied:

(i) The veteran would have received total disability compensation for the period specified in paragraph (c) of this section but for clear and unmistakable error committed by VA in a decision on a claim filed during the veteran's lifetime; or

(ii) Additional evidence submitted to VA before or after the veteran's death, consisting solely of service department records that existed at the time of a prior VA decision but were not previously considered by VA, provides a basis for reopening a claim finally decided during the veteran's lifetime and for awarding a total service-connected disability rating retroactively in accordance with §§ 3.156(c) and 3.400(q)(2) of this part for the period specified in paragraph (c) of this section; or

(iii) At the time of death, the veteran had a service-connected disability that was continuously rated totally disabling by VA for the period specified in paragraph (c) of this section, but was not receiving compensation because:

(A) VA was paying the compensation to the veteran's dependents;

(B) VA was withholding the compensation under the authority of 38 U.S.C. 5314 to offset an indebtedness of the veteran;

(C) The veteran had not waived retired or retirement pay in order to receive compensation;

(D) VA was withholding payments under the provisions of 10 U.S.C. 1174(h)(2);

(E) VA was withholding payments because the veteran's whereabouts were unknown, but the veteran was otherwise entitled to continued payments based on a total service-connected disability rating; or

(F) VA was withholding payments under 38 U.S.C. 5308 but determines that benefits were payable under 38 U.S.C. 5309.

(Authority: 38 U.S.C. 501(a), 1311, 1314, and 1321).

■ 4. Section 3.22 is amended by revising paragraph (b) to read as follows:

**§ 3.22 DIC benefits for survivors of certain veterans rated totally disabled at time of death.**

* * * * *

(b) For purposes of this section, ''entitled to receive'' means that the veteran filed a claim for disability compensation during his or her lifetime and one of the following circumstances is satisfied:

(1) The veteran would have received total disability compensation at the time of death for a service-connected disability rated totally disabling for the period specified in paragraph (a)(2) of this section but for clear and unmistakable error committed by VA in a decision on a claim filed during the veteran's lifetime; or

(2) Additional evidence submitted to VA before or after the veteran's death, consisting solely of service department records that existed at the time of a prior VA decision but were not previously considered by VA, provides a basis for reopening a claim finally decided during the veteran's lifetime and for awarding a total service-connected

disability rating retroactively in accordance with §§ 3.156(c) and 3.400(q)(2) of this part for the relevant period specified in paragraph (a)(2) of this section; or

(3) At the time of death, the veteran had a service-connected disability that was continuously rated totally disabling by VA for the period specified in paragraph (a)(2), but was not receiving compensation because:

(i) VA was paying the compensation to the veteran's dependents;

(ii) VA was withholding the compensation under authority of 38 U.S.C. 5314 to offset an indebtedness of the veteran;

(iii) The veteran had not waived retired or retirement pay in order to receive compensation;

(iv) VA was withholding payments under the provisions of 10 U.S.C. 1174(h)(2);

(v) VA was withholding payments because the veteran's whereabouts were unknown, but the veteran was otherwise entitled to continued payments based on a total service-connected disability rating; or

(vi) VA was withholding payments under 38 U.S.C. 5308 but determines that benefits were payable under 38 U.S.C. 5309.

* * * * *

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

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

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

### Subpart L—Finality

■ 6. Section 20.1106 is revised to read as follows:

**§ 20.1106 Rule 1106. Claim for death benefits by survivor—prior unfavorable decisions during veteran's lifetime.**

Except with respect to benefits under the provisions of 38 U.S.C. 1311(a)(2), 1318, and certain cases involving individuals whose Department of Veterans Affairs benefits have been forfeited for treason or for subversive activities under the provisions of 38 U.S.C. 6104 and 6105, issues involved in a survivor's claim for death benefits will be decided without regard to any prior disposition of those issues during the veteran's lifetime.

* * * * *

(Authority: 38 U.S.C. 7104(b)).

[FR Doc. 05–23541 Filed 12–1–05; 8:45 am]

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## POSTAL SERVICE

### 39 CFR Part 111

### Domestic Mail: New Postal Rates and Fees

**AGENCY:** Postal Service.

**ACTION:** Notice of implementation of new domestic rates and fees.

**SUMMARY:** The Governors of the U.S. Postal Service accepted the Postal Rate Commission's recommendation to increase most postal rates and fees by approximately 5.4 percent. The Board of Governors set 12:01 a.m. Sunday, January 8, 2006, as the effective date for the new prices.

**EFFECTIVE DATE:** 12:01 a.m., Sunday, January 8, 2006.

**FOR FURTHER INFORMATION CONTACT:** Sherry Suggs, 202–268–7261.

**SUPPLEMENTARY INFORMATION:** On April 8, 2005, the Postal Service filed with the Postal Rate Commission a Request for a Recommended Decision on Changes in Rates of Postage and Fees. The Commission designated the filing as Docket No. R2005–1. On November 1, 2005, the Commission issued its Opinion and Recommended Decision. The Governors approved all of the Commission's recommendations on November 14, 2005. Based on the decision of the Governors and Resolution No. 05–9 of the Board of Governors, the Postal Service adopts the new rates and fees and sets an effective date of 12:01 a.m., January 8, 2006.

This price increase is the first since 2002. It is needed to fulfill a Federal law passed in 2003 that requires the Postal Service to place $3.1 billion in escrow by September 30, 2006.

Customers can find resources and additional information about the price change at *usps.com/ratecase*. A special issue of the *Postal Bulletin* with detailed information, new rate and fee tables, and revised ''EZ'' (simplified) postage statements will be available online December 1, 2005. The Postage Rate Calculators at *pe.usps.com* will reflect new rates and fees beginning January 8, 2006.

The Postal Service adopts the following new rates and fees. Conforming changes will be made throughout *Mailing Standards of the United States Postal Service*, Domestic Mail Manual (DMM), incorporated by reference in the Code of Federal Regulations. *See* 39 CFR 111.1.

**List of Subjects in 39 CFR Part 111**

Administrative practice and procedure, Postal Service.

## PART 111—[AMENDED]

■ 1. The authority citation for 39 CFR part 111 continues to read as follows:

**Authority:** 5 U.S.C. 552(a); 39 U.S.C. 101, 401, 403, 404, 414, 3001–3011, 3201–3219, 3403–3406, 3621, 3626, 5001.

■ 2. *Revise Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM), to adopt the following new rates and fees.

**Stanley F. Mires,**

*Chief Counsel, Legislative.*

BILLING CODE 7710–12–P