

## Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

## Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

## Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

## Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

## Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

## Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023-01, and Commandant Instruction M16475.ID, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321-4370f), and have concluded that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded under figure 2-1, paragraph (32)(e), of the Instruction.

Under figure 2-1, paragraph (32)(e), of the Instruction, an environmental analysis checklist and a categorical exclusion determination are not required for this rule.

## List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

## PART 117—DRAWBRIDGE OPERATION REGULATIONS

- 1. The authority citation for part 117 continues to read as follows:

**Authority:** 33 U.S.C. 499; 33 CFR 1.05-1; Department of Homeland Security Delegation No. 0170.1.

- 2. Add § 117.664 to read as follows:

### § 117.664 Rainy River, Rainy Lake and their tributaries.

The draw of the Canadian National Bridge, mile 85.0, at Rainer, shall open on signal; except that, from October 16 to April 30, the draw shall open on signal if at least 12-hours advance notice is provided. The commercial phone number to provide advance notice shall be posted on the bridge so that it is plainly visible to vessel operators approaching the up or downstream side of the bridge. The owners of the bridge shall maintain clearance gauges in accordance with 33 CFR 118.160 of this chapter.

Dated: March 21, 2011.

**M.N. Parks,**

*Rear Admiral, U.S. Coast Guard, Commander, Ninth Coast Guard District.*

[FR Doc. 2011-7466 Filed 3-29-11; 8:45 am]

**BILLING CODE 9110-04-P**

## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Parts 19 and 20

RIN 2900-AN34

### Board of Veterans' Appeals: Remand or Referral for Further Action; Notification of Evidence Secured by the Board and Opportunity for Response

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule.

**SUMMARY:** The Department of Veterans Affairs (VA) is amending the Appeals Regulations of the Board of Veterans' Appeals (Board) to articulate the Board's practice of referring unadjudicated claims to the Agency of Original Jurisdiction (AOJ) 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 (SOC). We are also amending the Board's Rules of Practice to outline the procedures the Board must follow when supplementing the record with a recognized medical treatise, and to remove the notice procedures the Board must currently follow when considering law not considered by the AOJ. The purpose of these amendments is to codify existing practices derived from caselaw, enhance efficiency, and provide guidance and clarification.

**DATES:** *Effective Date:* The final rule is effective April 29, 2011.

**FOR FURTHER INFORMATION CONTACT:** Laura H. Eskenazi, Principal Deputy Vice Chairman, Board of Veterans' Appeals (012), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461-8078. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** On December 18, 2009, VA published in the **Federal Register** (74 FR 67149) a Notice of Proposed Rulemaking (NPRM) that proposed to amend 38 CFR 19.9 to articulate the Board's practice of referring unadjudicated claims to the AOJ for appropriate action and to define when the Board can remand a claim to the AOJ for the limited purpose of issuing an SOC. The NPRM also proposed to amend 38 CFR 20.903 to codify the notice procedures the Board must follow when supplementing the record with a recognized medical treatise, and to eliminate the notice procedures the Board must currently follow when considering law not previously considered by the AOJ. Interested persons were invited to

submit written comments on or before February 16, 2010.

We received two comments on the proposed rule. One commenter was fully supportive of all aspects of the proposal. The second commenter expressed concerns with various parts of the NPRM, the specifics of which will be discussed in greater detail below. Based on the rationale set forth in this document and in the NPRM, VA adopts the proposed rule as final with one minor clarification.

#### A. Referral of Unadjudicated Claims

We proposed to amend 38 CFR 19.9(b) to articulate the Board's practice of referring to the AOJ for appropriate action unadjudicated claims that have been reasonably raised by the record, except for claims over which the Board has original jurisdiction. One commenter voiced support for the referral practice in general, but expressed concern that the Board will make "many unnecessary, unjustified and time-consuming referrals" unless Board attorneys and Veterans Law Judges are provided with written guidance and training on what constitutes a claim and when it is appropriate to refer a claim to the AOJ. The commenter specifically suggested that the Board should provide training on the difference between separate claims and separate theories of entitlement.

As explained in the NPRM, the purpose of this rulemaking is to provide guidance as to what action the Board must take when it discovers an unadjudicated claim in the record. Questions regarding the Board's training practices and when filings must be interpreted as raising a new claim are outside the scope of this rulemaking.

We agree with the commenter that the training of Board employees is extremely important. The Board has an established training office that organizes regular training sessions for its employees on a wide range of topics in the constantly-evolving field of veterans' benefits law. The Board fully intends to continue training its employees on all aspects of veterans' law, including matters addressed in this rulemaking. We also emphasize that the Board has referred unadjudicated claims for many years, and implementation of this final rule will not result in any deviation from current Board practice. The final rule we are adopting by this rulemaking merely codifies the Board's referral practice in regulation. We therefore make no changes to the proposed rule based on this comment.

#### B. Remand for Issuance of an SOC

Proposed 38 CFR 19.9(c) stated that in situations where a claimant timely filed a Notice of Disagreement (NOD) with a determination of the AOJ, but the record does not reflect that the AOJ subsequently granted the claim in full or furnished the claimant with an SOC, the Board shall remand the claim to the AOJ with instructions to prepare and issue an SOC. *See generally Manlincon v. West*, 12 Vet. App. 238 (1999). While agreeing with the substance of the proposed regulatory amendment, one commenter expressed concern that "the statement at 74 FR 67151 [of the Preamble] that the claimant must file *another* timely Substantive Appeal to perfect the appeal is contrary to law" (emphasis added). The commenter cited to *Hamilton v. Brown*, 39 F.3d 1574, 1585 (Fed. Cir. 1994), as support for the proposition that a claim that has been remanded to the AOJ will be "automatically returned to the Board for further processing if full relief is not awarded by the [AOJ] on remand." *See Hamilton*, 39 F.3d at 1584–85 (citing 38 CFR 19.182 (1988) (now codified in 38 CFR 19.9, 19.31, and 19.38)).

We respectfully disagree with the commenter as the Preamble does not state that a claimant must file *another* Substantive Appeal after issuance of an SOC. The portion of the Preamble referenced by the commenter states the following: "The appeal initiated by the filing of the NOD will be subsequently returned to the Board only if, after the AOJ issues the SOC, the appellant files a timely Substantive Appeal that perfects the appeal to the Board." NPRM, 74 FR at 67151. This sentence explains that the situation addressed in proposed § 19.9(c) is one where a claimant has not had an opportunity to file a Substantive Appeal on the issue being remanded because the AOJ has not yet issued an SOC. Therefore, the commenter's characterization of proposed § 19.9(c) as requiring the filing of a *second* Substantive Appeal is simply incorrect. Rather, the law is well settled that an appeal to the Board consists of a timely filed NOD in writing and, after an SOC has been furnished, the submission of a timely filed Substantive Appeal. 38 U.S.C. 7105(a); 38 CFR 20.200. Accordingly, a matter that is remanded pursuant to proposed § 19.9(c) for issuance of an SOC may be returned to the Board only if a timely Substantive Appeal is filed, following the issuance of the SOC, for purposes of perfecting the appeal of the matter to the Board.

The commenter's reliance on *Hamilton* is also misplaced. Unlike

proposed § 19.9(c), *Hamilton* did not address remand by the Board for the limited purpose of issuing an SOC. *Hamilton* instead addressed a remand for evidentiary development in an appeal that had already been perfected by the timely filing of a Substantive Appeal. *Hamilton*, 39 F.3d at 1577–78. In *Hamilton*, the United States Court of Appeals for the Federal Circuit (Federal Circuit) specifically discussed whether a statement filed in response to a Supplemental SOC (SSOC) could be considered an NOD. *Hamilton*, 39 F.3d at 1584–85. The Federal Circuit concluded that, since an SSOC was not an initial determination made by the AOJ, such a statement could not be considered an NOD, even if it raised new issues in connection with the claim. *Id.* at 1584. The Federal Circuit did not discuss whether a claimant needed to submit multiple Substantive Appeals; it addressed whether multiple NODs could be filed in one claim. Thus, the situation in *Hamilton* was markedly different from that addressed by proposed § 19.9(c), which concerns the Board's remand of a claim to the AOJ for issuance of an SOC so an appellant can have an opportunity to file a *single* Substantive Appeal necessary to complete the appeal to the Board. We accordingly make no change to the proposed rule based on this comment.

We are, however, making one minor revision to proposed § 19.9(c). In the NPRM, we proposed the following rule language: "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 does not reflect that the agency of original jurisdiction subsequently granted the claim in full or 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 \* \* \* ." 74 FR at 67154. Upon further consideration of this language, we have determined that the use of the disjunctive "or" between the phrase "but the record does not reflect that the [AOJ] subsequently granted the claim in full" and the phrase "furnished the claimant with a[n SOC]" could cause confusion as to the possible situations under which the Board must remand a case pursuant to § 19.9(c). Taken literally, the use of the disjunctive "or" could lead to the misinterpretation that the Board is required to remand a case in situations where the AOJ has *not* granted the claim in full following the filing of an NOD, but where an SOC *has already been*

issued. This outcome was not our intent in issuing proposed § 19.9(c). For obvious reasons, if an SOC has already been issued on a claim subsequent to the NOD, the Board would not be required to remand for issuance of another SOC. To avoid this incorrect construction, we have slightly reworded § 19.9(c) and replaced the disjunctive “or” with the conjunctive “and” to clarify that the Board will only be required to remand a claim to the AOJ for issuance of an SOC following the timely filing of an NOD when: (1) the AOJ has not subsequently granted the claim in full, and (2) the AOJ has not furnished the claimant with an SOC. We believe this minor revision more clearly describes when the Board will remand for issuance of an SOC pursuant to § 19.9(c).

### C. Thurber Procedures

We proposed to amend 38 CFR 20.903(b) to clarify the notice procedures the Board must follow when it supplements the record with a recognized medical treatise. One commenter objected to the proposed language which stated that, as part of the notice procedures, the Board will inform appellants that it “will consider such recognized medical treatise in the adjudication of the appeal.” The commenter believed that this language does not provide a claimant and his or her representative with the requisite notice regarding the reliance proposed to be placed on the treatise, and thus, does not comply with the notice requirements outlined in *Thurber v. Brown*, 5 Vet. App. 119 (1993).

We respectfully disagree with this comment. As explained in the NPRM, we chose not to use the term “reliance” in § 20.903(b) because such language could be misconstrued to suggest that the Board has already reached a preliminary decision on a claim. NPRM, 74 FR at 67152. We do not interpret *Thurber* as requiring the Board to pre-adjudicate a claim before following the requisite notice procedures. *Id.* This interpretation is in accordance with other areas of VA adjudicatory procedure that do not require the Secretary to rule on the probative value of evidence prior to reaching a decision on the merits. For example, the United States Court of Appeals for Veterans Claims (Veterans Court) has interpreted VA notice requirements under 38 U.S.C. 5103(a) as not imposing upon the Secretary a “legal obligation to rule on the probative value of information and evidence presented in connection with a claim prior to rendering a decision on the merits of the claim itself.” *Locklear v. Nicholson*, 20 Vet. App. 410, 415–16

(2006) (noting that the VA adjudication process is “longitudinal and sequential” and that the gathering of information and evidence is meant to precede VA analysis and adjudication). In addition, the Federal Circuit has held that the notice letter provided under section 5103(a) does not need to “describe the VA’s evaluation of the veteran’s particular claim.” *Wilson v. Mansfield*, 506 F.3d 1055, 1062 (Fed. Cir. 2007).

Moreover, § 20.903(a) requires the Board to provide an appellant with a copy of a medical opinion obtained pursuant to § 20.901 and an opportunity to respond to the opinion. This provision is substantially similar to proposed § 20.903(b) in that it provides a claimant with notice and an opportunity to respond, but does not require the Board to pre-adjudicate an appellant’s claim when providing this notice. In *Wilson*, the Federal Circuit noted that when § 20.903(a) was promulgated the Secretary rejected a proposal to provide the claimant with “a form of predecisional adjudication.” *Wilson*, 506 F.3d at 1061 n.3 (citing 67 FR 3099, 3100 (Jan. 23, 2002)). The Federal Circuit explained that notice under § 20.903(a) is not meant to inform an appellant of how the Board intends to weigh the evidence or analyze the claim. *Id.* The same logic applies to proposed § 20.903(b), as it is also not meant to provide an appellant with a pre-adjudication of the merits of a claim. The purpose of the notice procedures outlined in *Thurber* is to elicit additional evidence and argument that will more fully inform the Board’s eventual decision. We believe the language of proposed § 20.903(b) serves this purpose, while at the same time avoiding any implication that the Board has reached a preliminary decision on the appeal. Therefore, we make no changes to the proposed rule based on this comment.

### D. Board Consideration of Law Not Already Considered by the AOJ

The NPRM proposed to completely remove the provisions of current 38 CFR 20.903(b) from the Board’s Rules of Practice. Current § 20.903(b) requires that if the Board intends to consider law not already considered by the AOJ, and such consideration could result in denial of the appeal, the Board must notify the appellant and his or her representative of its intent to do so, provide a copy or summary of the law to be considered, and allow 60 days for a response. One commenter stated a belief that it is “ill conceived” to remove this provision. While the commenter acknowledged that the Board as an appellate body can consider law not

previously considered by the AOJ, the commenter believed that the same due process considerations underlying the *Thurber* notice requirements apply.

We reject this comment for the following reasons. The situation set out in *Thurber* is fundamentally different than when VA relies on a provision of law not previously considered by the AOJ. *Thurber* specifically addresses whether an appellant is entitled to receive notice and an opportunity to respond before the Board considers a medical treatise in making a decision. *Thurber*, 5 Vet. App. at 120. The appellant would not be aware of the content of a medical treatise relied upon unless the Board provided the appellant with notice of its provisions. In contrast, statutes, regulations, and case law are all matters of public record. The United States Supreme Court has held that everyone dealing with the Government is charged with knowledge of federal statutes and lawfully promulgated agency regulations. *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384–85 (1947); see *Morris v. Derwinski*, 1 Vet. App. 260, 265 (1991) (applying *Fed. Crop Ins. Corp.* in the context of VA regulations); *Velez v. West*, 11 Vet. App. 148, 156 (1998) (same); see also *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1111–12 (DC Cir. 1988) (noting that “parties dealing with the government are expected to know the law” and that “there is no grave injustice in holding parties to a reasonable knowledge of the law” (internal quotation marks omitted)). Information about governing law, including relevant case law, is available to the public without the Board providing the notice required by current § 20.903(b).

As explained in the NPRM, in *Disabled American Veterans v. Secretary of Veterans Affairs*, 327 F.3d 1339 (Fed. Cir. 2003), the Federal Circuit considered a challenge to the validity of § 19.9(b)(2), which permits the Board to consider law not considered by the AOJ in the first instance. *Id.* at 1349. The Federal Circuit deferred to VA’s interpretation that the “Board’s status as an appellate body does not bar it from considering law not considered by the AOJ,” and held that in considering “whether the proper law was applied by the AOJ in a particular claim, the Board inherently provides legal questions ‘one review on appeal to the Secretary’ as required by [38 U.S.C.] 7104(a).” *Id.* The Federal Circuit’s holding was not predicated on the Board’s adherence to the notice provisions outlined in current § 20.903(b). *Id.*

Several statutory provisions also contemplate the Board’s consideration

of all applicable law, whether or not such law has been considered by the AOJ and regardless of whether the notice provisions of current § 20.903(b) have been satisfied. Section 7104(a) requires that “[d]ecisions of the Board shall be based \* \* \* upon consideration of all \* \* \* applicable provisions of law and regulation.” Section 7104(c) provides that the “Board shall be bound in its decisions by the regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department.” Moreover, 38 U.S.C. 7104(d)(1) requires that each Board decision include “a written statement of the Board’s findings and conclusions, and the reasons or bases for those findings and conclusions, on *all material issues of fact and law* presented on the record” (emphasis added). None of these provisions is conditioned on the Board’s following notice procedures similar to those currently outlined in 38 CFR 20.903(b).

Removing current § 20.903(b) is consistent with the jurisprudence of both the Veterans Court and the Federal Circuit, and more accurately depicts the Board’s statutory obligation to consider all applicable provisions of law and regulation. 38 U.S.C. 7104. We therefore make no changes to the proposed rule based on the commenter’s suggestion.

#### **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. 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.

#### **Executive Order 12866—Regulatory Planning and Review**

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The

Order classifies a rule as a significant regulatory action requiring review by the Office of Management and Budget if it meets any one of a number of specified conditions, including: having an annual effect on the economy of \$100 million or more, creating a serious inconsistency or interfering with an action of another agency, materially altering the budgetary impact of entitlements or the rights of entitlement recipients, or raising novel legal or policy issues. VA has examined the economic, legal, and policy implications of this final rule and has concluded that it is not a significant regulatory action under Executive Order 12866 because it primarily codifies longstanding VA practice and already existing law, does not raise any novel legal or policy issues, and will have little to no effect on the economy.

#### **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 issuing any rule that may result in an expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of \$100 million or more (adjusted annually for inflation) in any given year. This rule would have no such effect on State, local, and tribal governments, or on the private sector.

#### **Catalog of Federal Domestic Assistance Numbers and Titles**

The Catalog of Federal Domestic Assistance program numbers and titles for this proposal are 64.100, Automobiles and Adaptive Equipment for Certain Disabled Veterans and Members of the Armed Forces; 64.101, Burial Expenses Allowance for Veterans; 64.102, Compensation for Service-Connected Deaths for Veterans’ Dependents; 64.103, Life Insurance for Veterans; 64.104, Pension for Non-Service-Connected Disability for Veterans; 64.105, Pension to Veterans Surviving Spouses, and Children; 64.106, Specially Adapted Housing for Disabled Veterans; 64.109, Veterans Compensation for Service-Connected Disability; 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death; 64.114, Veterans Housing-Guaranteed and Insured Loans; 64.115, Veterans Information and Assistance; 64.116, Vocational Rehabilitation for Disabled Veterans; 64.117, Survivors and Dependents Educational Assistance; 64.118, Veterans Housing-Direct Loans for Certain Disabled Veterans; 64.119, Veterans Housing-Manufactured Home Loans; 64.120, Post-Vietnam Era

Veterans’ Educational Assistance; 64.124, All-Volunteer Force Educational Assistance; 64.125, Vocational and Educational Counseling for Servicemembers and Veterans; 64.126, Native American Veteran Direct Loan Program; 64.127, Monthly Allowance for Children of Vietnam Veterans Born with Spina Bifida; and 64.128, Vocational Training and Rehabilitation for Vietnam Veterans’ Children with Spina Bifida or Other Covered Birth Defects.

#### **Signing Authority**

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, approved this document on March 18, 2011 for publication.

#### **List of Subjects in 38 CFR Parts 19 and 20**

Administrative practice and procedure, Claims, Veterans.

Dated: March 24, 2011.

**Robert C. McFetridge,**  
*Director, Regulations Policy and Management, Department of Veterans Affairs.*

For the reasons set forth in the Preamble to this final rule, VA amends 38 CFR parts 19 and 20 as follows:

#### **PART 19—BOARD OF VETERANS’ APPEALS: APPEALS REGULATIONS**

■ 1. The authority citation for part 19 continues to read as follows:

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

#### **Subpart A—Operation of the Board of Veterans’ Appeals**

- 2. Amend § 19.9 by:
  - a. Revising the section heading and paragraph (a) heading.
  - b. Revising paragraphs (b) and (c).
  - c. Adding paragraph (d).
  - d. Revising the authority citation at the end of the section.

The revisions and addition read as follows:

#### **§ 19.9 Remand or referral for further action.**

(a) *Remand*. \* \* \*

(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).

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

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

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

### Subpart J—Action by the Board

■ 4. Amend § 20.903 by:

- a. Revising the section heading.
- b. Revising paragraph (b).

The revisions read as follows:

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

\* \* \* \* \*

(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.

■ 5. In § 20.1304, revise paragraph (b)(2) to read as follows:

#### § 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.

\* \* \* \* \*

(b) \* \* \*

(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.

\* \* \* \* \*

[FR Doc. 2011-7395 Filed 3-29-11; 8:45 am]

BILLING CODE 8320-01-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Parts 51 and 52

[EPA-HQ-OAR-2004-0014: FRL-9280-8]

RIN 2060-AQ73

### Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Reconsideration of Inclusion of Fugitive Emissions; Interim Rule; Stay and Revisions

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Interim rule; stay and revisions.

**SUMMARY:** EPA is taking an interim action to effectuate and extend a stay of the final rule entitled "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Reconsideration of Inclusion of Fugitive Emissions" ("Fugitive Emissions Rule") published in the **Federal Register** on December 19, 2008. The Fugitive Emissions Rule under the Federal NSR program required that fugitive emissions be included in determining whether a physical or operational change results in a major modification only for sources in designated industries. EPA issued a stay of the Fugitive Emissions Rule on March 31, 2010, that was effective for 18 months through October 3, 2011. This action supersedes the stay and thereby corrects potential confusion caused by that stay. To effectuate a stay of the Fugitive Emissions Rule, this action clarifies the stay and the revisions of specific paragraphs in the NSR regulations that were affected by the Fugitive Emissions Rule. This action also extends the stay until EPA completes its reconsideration of the Fugitive Emissions Rule.

**DATES:** *Effective date:* This interim rule is effective March 30, 2011.

The administrative stay of provisions in 40 CFR 51.165, 51.166, Appendix S to part 51, and 40 CFR 52.21 published on March 31, 2010 (75 FR 16012) is lifted; and

The following Code of Federal Regulations sections are stayed indefinitely: 40 CFR 51.165(a)(1)(v)(G) and (a)(1)(vi)(C)(3); 51.166(b)(2)(v) and (b)(3)(iii)(d); Appendix S to Part 51, Paragraph II.A.5(vii); and 52.21(b)(2)(v) and (b)(3)(iii)(c). The EPA will publish a document in the **Federal Register** lifting this stay.

*Comment date:* Comments must be received on or before April 29, 2011.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-