DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 5

RIN 2900–AL87

General Provisions

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to reorganize and rewrite in plain language general provisions applicable to its compensation and pension regulations, including definitions. These revisions are proposed as part of VA's rewrite and reorganization of all of its compensation and pension rules in a logical, claimant-focused, and user-friendly format. The intended effect of the proposed revisions is to assist claimants, beneficiaries and VA personnel in locating and understanding these general provisions.

DATES: Comments must be received by VA on or before May 30, 2006.

ADDRESSES: Written comments may be submitted by: mail or hand-delivery to Director, Regulations Management (00REG1), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; fax to (202) 273–9026; or e-mail through *http://www.Regulations.gov.* Comments should indicate that they are submitted in response to ''RIN 2900–AL87.'' All comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 273–9515 for an appointment.

FOR FURTHER INFORMATION CONTACT: Bob White, Acting Chief, Regulations Rewrite Project (00REG2), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273–9515.

SUPPLEMENTARY INFORMATION: The Secretary of Veterans Affairs has established an Office of Regulation Policy and Management to provide centralized management and coordination of VA's rulemaking process. One of the major functions of this office is to oversee a Regulation Rewrite Project (the Project) to improve the clarity and consistency of existing VA regulations. The Project responds to a recommendation made in the October 2001 ''VA Claims Processing Task Force: Report to the Secretary of Veterans Affairs.'' The Task Force recommended that the compensation and pension regulations be rewritten and reorganized in order to improve VA's claims adjudication process. Therefore, the Project began its efforts by reviewing, reorganizing and redrafting the content of the regulations in 38 CFR part 3 governing the compensation and pension program of the Veterans Benefits Administration. These regulations are among the most difficult VA regulations for readers to understand and apply.

Once rewritten, the proposed regulations will be published in several portions for public review and comment. This is one such portion. It includes proposed rules regarding the scope of the regulations in new part 5, general definitions, and general policy provisions.

Outline

Overview of New Part 5 Organization

We plan to organize the new part 5 regulations so that most provisions governing a specific benefit are located in the same subpart, with general provisions pertaining to all compensation and pension benefits also grouped together. This organization will allow claimants, beneficiaries, and their representatives, as well as VA adjudicators, to find information relating to a specific benefit more quickly than the organization provided in current part 3.

The first major subdivision would be ''Subpart A—General Provisions.'' It would include information regarding the scope of the regulations in new part 5, general definitions and general policy provisions for this part. This subpart is the subject of this document.

''Subpart B—Service Requirements for Veterans'' would include information regarding a veteran's military service, including the minimum service requirement, types of service, periods of war, and service evidence requirements. This subpart was published as proposed on January 30, 2004. *See* 69 FR 4820.

''Subpart C—Adjudicative Process, General'' would inform readers about claims and benefit application filing procedures, VA's duties, rights and responsibilities of claimants and beneficiaries, general evidence requirements, and general effective dates for new awards, as well as revision of decisions and protection of VA ratings. This subpart will be published as three separate Notices of Proposed Rulemaking (NPRM)s due to its size. The first, concerning the duties of VA and the rights and responsibilities of claimants and beneficiaries, was published on May 10, 2005. *See* 70 FR 24680.

''Subpart D—Dependents and Survivors'' would inform readers how VA determines whether an individual is a dependent or a survivor for purposes of determining eligibility for VA benefits. It would also provide the evidence requirements for these determinations.

''Subpart E—Claims for Service Connection and Disability Compensation'' would define service-connected disability compensation and service connection, including direct and secondary service connection. This subpart would inform readers how VA determines service connection and entitlement to disability compensation. The subpart would also contain those provisions governing presumptions related to service connection, rating principles, and effective dates, as well as several special ratings. This subpart will be published as three separate NPRMs due to its size. The first, concerning presumptions related to service connection, was published on July 27, 2004. *See* 69 FR 44614.

''Subpart F—Nonservice-Connected Disability Pensions and Death Pensions'' would include information regarding the three types of nonservice-connected pension: Improved Pension, Old-Law Pension, and Section 306 Pension. This subpart would also include those provisions that state how to establish entitlement to Improved Pension and the effective dates governing each pension. This subpart will be published as two separate NPRMs due to its size. The portion concerning Old-Law Pension, Section 306 Pension, and elections of Improved Pension was published as proposed on December 27, 2004. *See* 69 FR 77578.

''Subpart G—Dependency and Indemnity Compensation, Death Compensation, Accrued Benefits, and Special Rules Applicable Upon Death of a Beneficiary'' would contain regulations governing claims for dependency and indemnity compensation (DIC); death

compensation; accrued benefits; benefits awarded, but unpaid at death; and various special rules that apply to the disposition of VA benefits, or proceeds of VA benefits, when a beneficiary dies. This subpart would also include related definitions, effective-date rules, and rate-of-payment rules. This subpart will be published as two separate NPRMs due to its size. The portion concerning accrued benefits, death compensation, special rules applicable upon the death of a beneficiary, and several effective-date rules, was published as proposed on October 1, 2004. *See* 69 FR 59072. The portion concerning DIC benefits and general provisions relating to proof of death and service-connected cause of death was published on October 21, 2005. *See* 70 FR 61326.

''Subpart H—Special and Ancillary Benefits for Veterans, Dependents, and Survivors'' would pertain to special and ancillary benefits available, including benefits for children with various birth defects.

''Subpart I—Benefits for Certain Filipino Veterans and Survivors'' would pertain to the various benefits available to Filipino veterans and their survivors.

''Subpart J—Burial Benefits'' would pertain to burial allowances.

''Subpart K—Matters Affecting Receipt of Benefits'' would contain provisions regarding bars to benefits, forfeiture of benefits, and renouncement of benefits.

''Subpart L—Payments and Adjustments to Payments'' would include general rate-setting rules, several adjustment and resumption regulations, and election-of-benefit rules. Because of its size, proposed regulations in subpart L will be published in two separate NPRMs.

The final subpart, ''Subpart M—Apportionments and Payments to Fiduciaries or Incarcerated Beneficiaries,'' would include regulations governing apportionments, benefits for incarcerated beneficiaries, and guardianship.

Some of the regulations in this NPRM cross-reference other compensation and pension regulations. If those regulations have been published in this or earlier NPRMs for the Project, we cite the proposed part 5 section. We also include, in the relevant portion of the Supplementary Information, the **Federal Register** page where a proposed part 5 section published in an earlier NPRM may be found. However, where a regulation proposed in this NPRM would cross-reference a proposed part 5 regulation that has not yet been published, we cite to the current part 3 regulation that deals with the same subject matter. The current part 3 section we cite may differ from its eventual part 5 counterpart in some respects, but this method will assist readers in understanding these proposed regulations where no part 5 counterpart has yet been published. If there is no part 3 counterpart to a proposed part 5 regulation that has not yet been published, we have inserted ''[regulation that will be published in a future Notice of Proposed Rulemaking]'' where the part 5 regulation citation would be placed.

Because of its large size, proposed part 5 will be published in a number of NPRMs, such as this one. VA will not adopt any portion of part 5 as final until all of the NPRMs have been published for public comment.

In connection with this rulemaking, VA will accept comments relating to a prior rulemaking issued as a part of the Project, if the matter being commented on relates to both rulemakings.

Overview of Proposed Subpart A Organization

This NPRM pertains to general provisions applicable to compensation and pension programs. These regulations would be contained in proposed Subpart A of new 38 CFR part 5. Although these regulations have been substantially restructured and rewritten for greater clarity and ease of use, most of the basic concepts contained in these proposed regulations are the same as their existing counterparts in 38 CFR part 3. However, a few substantive differences are proposed, as are some regulations that do not have counterparts in 38 CFR part 3.

Table Comparing Current Part 3 Rules With Proposed Part 5 Rules

The following table shows the relationship between the current regulations in part 3 and the proposed regulations contained in this NPRM:

Proposed or redesignated part 5 section or paragraph	Based in whole or in part on 38 CFR part 3 section or paragraph (or ''New'')
5.0	New.
5.1—Active military Service	New.
5.1—Agency of original jurisdiction	New.
5.1—Alien	New.
5.1—Armed Forces	3.1(a).
5.1—Beneficiary	New.
5.1—Benefit	New.
5.1—Certified statement	New.
5.1—Child born of the marriage and child born before the marriage	3.54(d).
5.1—Claimant	New.
5.1—Competent evidence	New.
5.1—Direct service connection	New.
5.1— Discharged or released from active military service (1)	3.1(h).
5.1— Discharged or released from active military service (2)	New.
5.1—Final decision	New.
5.1—Former prisoner of war (or former POW)	Introduction to 3.1(y)(1), 3.1(y)(2)(i), and 3.1(y)(5).
5.1—Fraud (1)	3.901(a).
5.1—Fraud (2)	3.1(aa)(1).
5.1—Fraud (3)	3.1(aa)(2).
5.1—In the waters adjacent to Mexico	3.1(t).
5.1—Insanity	New.
5.1—Notice	3.1(q).
5.1—Nursing home	3.1(z).
5.1—On the borders of Mexico	3.1(s).
5.1—Political subdivision of the United States	3.1(o).
5.1—Reserve component	3.1(b).
5.1—Reserve, or reservist	3.1(c).
5.1—Secretary concerned	3.1(g).

Proposed or redesignated part 5 section or paragraph	Based in whole or in part on 38 CFR part 3 section or paragraph (or ''New'')
5.1—Service medical records	New.
5.1—State	3.1(i).
5.1—Uniformed services	New.
5.1—Veteran	3.1(d).
5.2	[Reserved].
5.3(a)	New.
5.3(b)(1)	Second and third sentences of 3.102.
5.3(b)(2)	Fourth and sixth sentences of 3.102.
5.3(b)(3)	Seventh sentence of 3.102.
5.3(c) and (d)	New.
5.4(a)	3.103(a), second sentence.
5.4(b)	First sentence of 3.102; 3.103(a), second sentence.

Readers who use this table to compare existing regulatory provisions with the proposed provisions, and who observe a substantive difference between them, should consult the text that appears later in this document for an explanation of significant changes in each regulation. Not every paragraph of every current part 3 section regarding the subject matter of this rulemaking is accounted for in the table. In some instances, other portions of the part 3 sections that are addressed in these proposed regulations will appear in subparts of part 5 that are being published separately for public comment. For example, a reader might find a reference to paragraph (a) of a part 3 section in the table, but no reference to paragraph (b) of that section because paragraph (b) will be addressed in a separate NPRM. The table also does not include provisions from part 3 regulations that will not be repeated in part 5. Such provisions are discussed specifically under the appropriate part 5 heading in this preamble. Readers are invited to comment on the proposed part 5 provisions and also on our proposals to omit those part 3 provisions from part 5.

Content of Proposed Regulations

5.0 Scope of Applicability

The first proposed regulation in this NPRM is a new general scope provision. The regulation informs readers that, except as otherwise provided, the provisions of the regulations in proposed part 5 apply only to benefits governed by part 5.

We are aware that some parts of 38 CFR that do not relate to benefits governed by part 5 may rely expressly or implicitly on certain part 3 regulations and that part 3 will eventually be superceded by part 5. As part of the Project, VA will determine whether adjustments in other parts are necessary to specifically adopt part 5 regulations by reference, or whether to add equivalent regulations to other parts to ensure continued coverage after part 3 is removed from title 38, CFR. We anticipate that we will make the determination regarding other parts of title 38, CFR, on or about the time that the final version of part 5 is adopted.

We propose not to carry forward the scope provision in current § 3.2100, which applies only to the provisions in subpart D of part 3, because the content of that provision would be subsumed by proposed § 5.0.

5.1 General Definitions

The next proposed regulation in this NPRM is based primarily on current § 3.1 and includes definitions of words and phrases commonly used in proposed part 5. Some of the definitions in current § 3.1 would simply be rewritten in proposed § 5.1 to provide the same information in a more logically organized form. Some proposed definitions are new. Some current § 3.1 definitions are not addressed in proposed § 5.1 because we propose to incorporate them into new part 5 subparts dealing with specific types of benefits. (Those definitions will be, or have already been, addressed in other NPRMs.) All terms defined in proposed § 5.1 would be arranged in alphabetical order.

Proposed § 5.1 provides a general definition for ''active military service.'' We propose to use this term in lieu of the longer term ''active military, naval, and air service'' used in 38 U.S.C. 101(24) and current part 3 for simplicity with no change in meaning. We have also included a cross-reference to proposed § 5.21, the section that describes service VA recognizes as active military service. *See* 69 FR 4820, 4833 (Jan. 30, 2004).

Proposed § 5.1 includes the following definition of the term ''agency of original jurisdiction'': ''Agency of original jurisdiction means the VA activity that is responsible for making the initial determination on an issue affecting a claimant's or beneficiary's right to benefits.'' We note that this definition differs somewhat from a definition of the same term in 38 CFR 20.3(a) which reads as follows:''*Agency of original jurisdiction* means the Department of Veterans Affairs activity or administration, that is, the Veterans Benefits Administration, Veterans Health Administration, or National Cemetery Administration, that made the initial determination on a claim.'' The difference is because of the narrower scope of part 5 and because the definitions in § 20.3 are geared to an appellate context while the definitions in proposed § 5.1 are not.

Proposed § 5.1 provides the definition of the term ''alien,'' which appears several times throughout current part 3, but it is not defined in current part 3 or in title 38, United States Code. Such a definition is contained in chapter 12, ''Immigration And Nationality, General Provisions,'' of title 8, ''Aliens And Nationality,'' of the United States Code. ''Alien'' is defined in 8 U.S.C. 1101(a)(3) as ''any person not a citizen or national of the United States.'' We propose to adopt this definition for part 5. It is simple and clear and is the definition used in the U.S.C. title primarily applicable to determinations of immigration and nationality matters by the United States.

Proposed § 5.1 defines ''beneficiary'' as ''an individual in receipt of benefits under any of the laws administered by VA.''

We propose to define ''benefit'' as ''any payment, service, commodity, function, or status, entitlement to which is determined under laws administered by VA pertaining to veterans and their dependents and survivors.'' The definition of ''benefit'' parallels the definition of that term at 38 CFR 20.3(e).

Proposed § 5.1 defines a ''certified statement,'' another undefined term used in current part 3, as a ''statement made and signed by an individual who affirms that the statement's content is true and accurate to the best of that individual's knowledge and belief.'' This is consistent with VA usage and

consistent with the common understanding of that term. For example, see the definition of ''certify'', *Black's Law Dictionary* 220 (7th ed. 1999), ''1. To authenticate or verify in writing. 2. To attest as being true or as meeting certain criteria.''

Proposed § 5.1 next addresses the concepts of ''child born of the marriage'' and ''child born before the marriage.'' The recognition of an individual as the veteran's surviving spouse can turn on whether a child was born of his or her marriage to the veteran, or was born to the veteran and the surviving spouse before their marriage. *See* 38 U.S.C. 103(a) (concerning claims from spouses who entered into a marriage with a veteran without knowledge of a legal impediment to the marriage); 1102(a) (concerning marriage requirements for death compensation); 1304 and 1318(c) (concerning marriage requirements for dependency and indemnity compensation); 1532(d), 1534(c), 1536(c), and 1541(f) (concerning marriage requirements for various pension benefits). The proposed definition is based on current § 3.54(d) with the clarification that adopted children and stepchildren are not included in these terms, for the following reasons.

The United States Court of Appeals for Veterans Claims (CAVC) interpreted the language ''child born of the marriage'' and ''child born before the marriage'' in the context of a claim for pension under chapter 15, title 38, United States Code, as follows:

> Applying the ''fundamental canon of statutory construction'' that ''unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning'' * * *, the statutory phrase ''child * * * born of the marriage'' of § 1541(f)(3) cannot be expanded by the B[oard of Veterans Appeals] or this Court to read ''child * * * born of *or adopted during* the marriage''. When a statute is clear and unambiguous, and a term of that statute is ''plain on the face of the statute, our statutory inquiry is at an end.'' * * * An adopted child is not a ''child * * * born of the marriage'' for the purpose of determining whether a surviving spouse is qualified for a pension under 38 U.S.C. 1541 and 38 CFR 3.54.

Tapuro v. *Derwinski*, 2 Vet. App. 154, 155 (1992) (citations omitted). The Court has clearly construed the relevant statutory language to exclude adopted children in the context of 38 U.S.C. 1541, and identical language appears in the other statutes governing the benefits to which the proposed regulation applies, i.e., to 38 U.S.C. 103(a), 1102(a), 1304, 1318(c), 1532(d), 1534(c), 1536(c) and 1541(f). Therefore, we propose to adopt the CAVC's interpretation in proposed § 5.1. Following the Court's logic, which is sound, we also propose to clarify that stepchildren are not included. Clearly, a stepchild cannot be a ''child * * * born of the marriage'' between a veteran and his or her spouse.

The definition of ''claimant'' in proposed § 5.1, ''any individual applying for, or submitting a claim for, any benefit under the laws administered by VA,'' is based on the statutory definition of that term found at 38 U.S.C. 5100, ''Definition of 'claimant'.''

Proposed § 5.1 provides a definition of the term ''competent evidence.'' Since the process of adjudicating claims is not adversarial, VA is not concerned with the technical ''admissibility'' of evidence and does not exclude any evidence from the record (as we propose to remind readers in a note associated with the proposed definition). However, VA must evaluate the probative value of evidence. One of the qualities upon which VA evaluates whether evidence is probative is whether or not it is ''competent.'' Basically, this means that VA evaluates evidence on whether its source was someone who had a sound basis for stating the opinion or reporting the facts contained in the evidence.

The new proposed definition would specify that competent evidence is evidence of one of two types, ''competent expert evidence'' or ''competent lay evidence.'' In that respect, this new definition is similar to § 3.159(a)(1) and (2), which distinguishes between ''competent medical evidence'' and ''competent lay evidence.'' However, instead of defining ''competent medical evidence,'' paragraph (1) of the proposed definition defines ''competent expert evidence,'' which would be evidence that must be provided by someone with specialized education, training, or experience. ''Expert evidence'' is sufficiently broad to encompass requiring a valid foundation for any evidence, not just medical evidence, which is based on special technical expertise. Examples might include such things as opinions from a handwriting analysis expert or an accident reconstruction expert.

Paragraph (2) of the proposed definition defines ''competent lay evidence.'' It is substantively similar to the definition of the same term in current § 3.159(a)(2) in most respects. However, we propose to add that to be competent the lay evidence must be provided by a person who has *personal* knowledge of the facts or circumstances addressed by the evidence. Mere hearsay would not be competent evidence. ''It bears repeating that [lay] testimony is competent only so long as it remains centered upon matters within the knowledge and personal observations of the witness. Should the testimony stray from this basic principle and begin to address, for example, medical causation, that portion of the testimony addressing the issue of medical causation is not competent.'' *Layno* v. *Brown*, 6 Vet.App. 465, 470 (1994). We also propose to state that a lay person is a person without *relevant* specialized education, training, or experience. A person could be an expert in a field unrelated to the subject matter of the evidence at hand and still be considered to be a ''lay person'' in the context of evaluating the competency of that evidence. For example, with respect to evaluating a medical opinion provided by a witness without medical training, that person would be considered to be a lay person even though he or she might have the credentials to provide expert evidence concerning structural engineering.

Proposed § 5.1 defines direct service connection in language consistent with VA's traditional usage. ''Direct service connection'' is a term commonly used in veterans law. For example, the term is used in the titles of current §§ 3.304 and 3.305. However, it is not specifically defined anywhere in current part 3. The term ''direct service connection'' is commonly used within VA to distinguish service connection granted on the basis of evidence showing that a disease or injury was incurred in or aggravated in line of duty during active military service from service connection granted on the basis of a presumption; service connection for a disease or injury that is secondary to another service-connected disease or injury; or service connection based on aggravation of a nonservice-connected disability by a service-connected disability. For that reason, the proposed definition clarifies that direct service connection is ''established without consideration of presumptions of service connection in subpart E of this part or secondary service connection under § 3.310 of this chapter.''

Currently, § 3.310(a) provides that except as provided in § 3.300(c), disability which is proximately due to or the result of a service-connected disease or injury shall be service connected. When service connection is thus established for a secondary condition, the secondary condition shall be considered a part of the original condition.

The holding of *Allen* v. *Brown*, 7 Vet.App. 439, 448 (1995), states that when aggravation of a nonservice-connected disability is proximately due to or the result of a service-connected disability, the veteran is entitled to

compensation for the degree of disability over and above the disability in existence prior to the aggravation.

In order to conform § 3.310 to this judicial precedent, VA drafted a proposed regulation entitled ''Claims Based on Aggravation of a Nonservice-Connected Disability,'' an amendment that reflects the principles stated in *Allen,* supra. 62 FR 30547 (1997). In referencing § 3.310 in our definition for direct service connection we intend to include the principles stated in that proposed amendment, which we anticipate will be issued as a final rule in the near future.

Proposed § 5.1 includes an expanded definition of ''discharged or released from active military service.'' The current definition of that term in § 3.1(h) simply notes that discharge or release includes retirement from the active military, naval, or air service. This concept, which is based on 38 U.S.C. 101(18)(A), would be retained in paragraph (1) of the proposed definition.

However, under 38 U.S.C. 101(18)(B), ''discharge or release'' also includes the following:

> [T]he satisfactory completion of the period of active military, naval, or air service for which a person was obligated at the time of entry into such service in the case of a person who, due to enlistment or reenlistment, was not awarded a discharge or release from such period of service at the time of such completion thereof and who, at such time, would otherwise have been eligible for the award of a discharge or release under conditions other than dishonorable.

Paragraph (2) of the proposed definition of ''discharge or release'' restates this aspect of the definition in somewhat simpler language. It also substitutes the phrase ''intervening change in military status'' for the statutory phrase ''enlistment or reenlistment.'' ''Change in military status'' is defined in § 5.37, ''Effect of extension of service obligation due to change in military status on eligibility for VA benefits.'' See 69 FR 4820 (Jan. 30, 2004) for a full explanation of the meaning of the term, its relationship to 38 U.S.C. 101(18)(B) as interpreted by VA, and the text of proposed § 5.37.

Proposed § 5.1 includes a definition of the term ''final decision.'' The proposed definition, which is similar to the definition of ''finally adjudicated claim'' in current § 3.160(d), provides that a decision on a claim for VA benefits is final if VA provides notice of that decision and the claimant either does not initiate and complete a timely appeal or the Board of Veterans' Appeals issues a final decision on the claim. The definition includes references to the relevant regulations outlining the notice requirement and the applicable steps in the administrative appellate process.

Proposed § 5.1 defines the term ''former prisoner of war (former POW)'' and is based on portions of current § 3.1(y). Portions of § 3.1(y) that contain substantive rules concerning proof of POW status will be addressed in another regulation in a separate NPRM.

Proposed § 5.1 provides definitions for the term ''fraud,'' which vary depending upon context. It is derived from current §§ 3.1(aa) and 3.901(a).

Although the definition of ''fraud'' in current § 3.901(a) appears in a regulation dealing with forfeiture for fraud, it is an accurate general definition that need not be confined to the forfeiture context. Therefore, we propose it as a general definition of fraud in paragraph (1) of the § 5.1 definition of fraud.

Current § 3.1(aa)(1) references fraud ''[a]s used in 38 U.S.C. 103 and implementing regulations.'' Current § 3.1(aa)(2) references fraud ''[a]s used in 38 U.S.C. 110 and 1159 and implementing regulations.'' We believe it would be much more useful to regulation users to directly reference the regulations that implement the cited statutes, rather than to reference the statutes and their unidentified ''implementing regulations.'' Therefore we have made this change in paragraphs (2) and (3) of the proposed definition of fraud.

Current § 3.1(t) defines ''in the waters adjacent thereto.'' This definition applies only to the definition of a period of war known as the ''Mexican Border Period'' defined in current § 3.2(h) and in proposed § 5.20(a). (For the text of the latter, see 69 FR 4820, 4832 (Jan. 30, 2004).) We propose no substantive change to the definition, but the definition in § 5.1 is of ''in the waters adjacent to Mexico,'' rather than of ''in the waters adjacent thereto,'' to conform to revisions to § 5.20(a). We intend no substantive change.

In § 5.1 we propose to define insanity in the context of insanity as a defense to commission of an act. The standard for determining insanity for purposes of administering VA benefits is contained in current 38 CFR 3.354(a), which states ''An insane person is one who, while not mentally defective or constitutionally psychopathic, except when a psychosis has been engrafted upon such basic condition, exhibits, due to disease, a more or less prolonged deviation from his normal method of behavior; or who interferes with the peace of society; or who has so departed (become antisocial) from the accepted standards of the community to which by birth and education he belongs as to lack the adaptability to make further adjustment to the social customs of the community in which he resides.''

This standard is difficult to apply and has not met with judicial favor. For example, in *Zang* v. *Brown,* 8 Vet. App. 246 (1995), the CAVC stated that the regulation is ''less than clear given its obvious drafting defects,'' *id.* at 252; that ''a literal interpretation of the regulation would produce an illogical and absurd result that could not have been intended by the Secretary,'' *id.* at 253; and that the regulation ''illustrates still another 'confusing tapestry''' of VA regulations. *Id.* at 256 (Steinberg, J., separate views).

However, the CAVC commented favorably in *Cropper* v. *Brown,* 6 Vet. App. 450 (1994), on VA's application of the insanity defense articulated in a now-superseded section of VA Adjudication Procedure Manual M21–1. In *Cropper,* the Court stated:

> Thus, [38 U.S.C. 5303(b)] sets out the authority for allowing veterans benefits where a party has received an [other than honorable (OTH)] discharge but has been adjudged insane, and [38 CFR 3.354] simply define[s] the term ''insanity.'' It is the VA ADJUDICATION PROCEDURE MANUAL, Part IV, §§ 11.01, 11.04, 11.05 (Apr. 3, 1992) and Part VI, § 4.10 (Sept. 21, 1992), which sets out the application of the insanity defense and the application of the definition of insanity. The M21–1 Manual defines insanity as ''whether, at the time of commission of the act(s), the veteran was laboring under such a defect of reason, from disease or mental deficiency, as not to know or understand the nature or consequence of the act(s) or that what he or she was doing was wrong.'' M21–1 Part VI, § 4.10(c); *see also* M21–1 Part IV, § 11.10(d)(2)(a)–(b) (Apr. 3, 1992) (for purposes of considering factors in wrongful and intentional killing cases, it defines insanity as a condition when, ''at the time of commission of the act, the party accused was laboring under such a defect of reason, from disease of mind or mental deficiency, that he or she did not know the nature and consequence of the act or * * * [i]f known, that the claimant did not perceive the act as wrong''). We find this provision to be consistent with both the statute and the regulation because it serves to limit the use of the insanity defense to those situations where the acts leading to the discharge were the result of insanity. Thus, the M21–1 Manual provision allows the insanity defense only where it should be most properly applied. That is, the defense may not be used where a claimant has received an OTH discharge due to acts of misconduct over which he ultimately had control but failed, in fact, to control. Conversely, the defense may be used properly where the claimant has received a dishonorable discharge due to some ''defect of reason, from disease or mental deficiency,'' which is beyond his control.

Cropper, 6 Vet. App. at 453.

We propose to adopt a definition of insanity based on the definition approved by the CAVC in *Cropper,* and to make that definition applicable to all cases where an insanity determination may provide ''a defense to a commission of an act'' (as opposed to limiting the definition to the issue in *Cropper,* i.e., cases where insanity led to an act causing an OTH discharge). This definition has the advantage of incorporating a concept long familiar to the law. The law has recognized since at least the mid-19th century that a person should not be held criminally responsible for his or her behavior if that person was ''insane'' at the time of committing a crime. *M'Naghten's Case,* 8 Eng.Rep. 718 (1843). In addition, the definition we propose is similar to the following insanity-defense test endorsed by the American Psychiatric Association: ''A person charged with a criminal offense should be found not guilty by reason of insanity if it is shown that as a result of mental disease or mental retardation he was unable to appreciate the wrongfulness of his conduct at the time of the offense.'' *The Insanity Defense,* American Psychiatric Association, at *http://www.psych.org/edu/other_res/lib_archives/archives/198202.pdf.*

We propose to supplement the definition of ''insanity'' discussed by the CAVC in *Cropper* by adding injury to the list of potential sources of impairment of the ability to reason responsibly. For example, brain trauma can produce severe mental impairment.

Current § 3.303(c) states that a personality disorder is not a disease or injury for VA disability purposes. We anticipate that part 5 will have a counterpart to § 3.303(c).) In addition, a personality disorder is not mental deficiency. Our proposed definition of insanity requires that a person be laboring under a defect of reason resulting from injury, disease, or mental deficiency. Therefore, we propose to add in proposed § 5.1, an additional sentence explicitly stating that behavior attributable to a personality disorder does not satisfy the definition of insanity.

Accordingly, we propose to provide in § 5.1 that insanity, as a defense to commission of an act, means a person was laboring under such a defect of reason resulting from injury, disease, or mental deficiency as not to know or understand the nature or consequence of the act, or that what he or she was doing was wrong. Behavior that is attributable to a personality disorder does not satisfy the definition of insanity.

The definition of ''insanity'' in proposed § 5.1 is quite different from the definition in § 3.354. We have previously referenced the § 3.354 regulatory definition of insanity in § 5.33, ''Insanity as a defense to acts leading to a discharge or dismissal from the service that might be disqualifying for VA benefits.'' 69 FR 4820, 4839 (Jan. 30, 2004). We explained, however, that the definition of ''insanity'' would be revised and published for comment as a proposed part 5 regulation. Accordingly, we intend that when proposed § 5.33 is issued as a final rule, it will cross reference § 5.1 rather than § 3.354. Readers are invited to comment at this time on the effect of § 5.1 on § 5.33. We do not anticipate or intend any effect on insanity determinations by VA.

The proposed definition of ''notice'' in § 5.1 is based on current § 3.1(q). We propose to add that, if a claimant or beneficiary is represented, the notice must also be sent to the representative. *See* 38 U.S.C. 5104(a) (requiring that notice of a decision affecting the provision of benefits to a claimant be provided to the claimant's representative). We also propose to require that if a claimant or beneficiary has a fiduciary, notice must also be sent to the fiduciary.

Proposed § 5.1 defines ''on the borders of Mexico,'' with regard to service during the Mexican border period, by listing applicable border States and countries. The definition is based on the definition of ''on the borders thereof'' in current § 3.1(s), which includes British Honduras. British Honduras is now Belize. The proposed definition includes the current name of that nation. We have defined ''on the borders of Mexico,'' rather than ''on the borders thereof,'' to conform to revisions to proposed § 5.20(a).

Proposed § 5.1 includes a definition of a ''political subdivision of the United States'' that is based on the definition in current § 3.1(o). The definition in current § 3.1(o) states that a ''[p]olitical subdivision of the United States includes the jurisdiction defined as a State in paragraph (i) of this section, and the counties, cities or municipalities of each.'' The word ''includes'' suggests that this is a partial list. We propose to omit it in the new definition, because, with one possible exception, that is not the case. (Note that the definition includes ''a State'' and that the definition of ''State'' brings in ''the several States, Territories, and possessions of the United States; the District of Columbia; and the Commonwealth of Puerto Rico.'') The possible exception is that the current definition includes counties, but not parishes. Parishes in Louisiana are the equivalent of counties in other states. Therefore, we propose to define a political subdivision of the United States as ''the jurisdictions defined as a State and the counties (or parishes), cities or municipalities of each.''

Proposed § 5.1 departs from the definition of ''reserve'' in current § 3.1(c) in three respects. First, it would change ''reserves'' to ''reserve,'' as is the case in 38 U.S.C. 101(26). This is not a substantive change. Second, it would define ''reserve or reservist.'' ''Reservist'' is a more commonly used word with the same meaning. Finally, we propose to shorten the current ''Reserve component of one of the Armed Forces'' to just ''reserve component.'' ''[O]f one of the Armed Forces'' is redundant because of the way that reserve component is defined in § 5.1.

Proposed § 5.1 carries forward the current definition of ''Secretary concerned'' in § 3.1(g) with one revision. The Coast Guard is now under the jurisdiction of the Secretary of Homeland Security, not the Secretary of Transportation. *See* Public Law 107–296, § 888(b), 116 Stat. 2135.

Proposed § 5.1 defines ''service medical records'' as ''records of medical treatment or medical examination provided by the Armed Forces to either an applicant for membership into, or a member of, the Armed Forces.'' We are aware that, for a variety of reasons, the Armed Forces may provide a service member with medical care through civilian resources. Therefore, the proposed definition also provides that service medical records ''include records of medical examination and treatment by a civilian health care provider at Armed Forces' expense.''

Proposed § 5.1 defines ''uniformed services.'' As with the several other new terms we have defined, the term ''uniformed services'' (or ''uniformed service'') is used in current part 3, but is not defined. *See* 38 CFR 3.157, 3.211, and 3.804 (all using the term ''uniformed service'' or ''uniformed services''). The statute that contains the definitions generally applicable to title 38 United States Code (38 U.S.C. 101), does not include a definition of ''uniformed services.'' However, there is a definition in 38 U.S.C. chapter 43, ''Employment and Reemployment Rights of Members of the Uniformed Services.'' *See* 38 U.S.C. 4303(16). We propose to adopt this definition for part 5.

Proposed § 5.1 defines ''veteran.'' This definition is based on the definition in current § 3.1(d) and largely mirrors that provision except that we propose to

slightly modify the language of current § 3.1(d)(1) (pertaining to the definition of a veteran for purposes of DIC or death compensation).

The current provision, § 3.1(d)(1), reads: ''For compensation and dependency and indemnity compensation the term veteran includes a person who died in active service and whose death was not due to willful misconduct.'' The language specifying that this alternative definition of veteran applies to cases of death compensation and DIC is unnecessary. Eligibility criteria for various benefits are contained in separate provisions. The key issue is whether a veteran by definition may only be a person who was alive when he or she was discharged from active military service, or whether a veteran can also be a person who died in active military service. Therefore proposed § 5.1 will simply provide ''The term veteran also includes a person who died in active service and whose death was not due to willful misconduct.''

We also propose to add a cross-reference to the regulation that defines ''willful misconduct,'' and to add a cross-reference (which concerns the meaning of ''veteran'' in the context of death pension claims) to the subpart of proposed part 5 that deals with pension eligibility.

Current § 3.1(e) defines ''veteran of any war.'' We have not included a similar definition in § 5.1 because we anticipate that the term would be used, at most, in one part 5 regulation. If that should be the case, the definition could be included in that regulation.

5.2 [Reserved]

Proposed § 5.1 contains definitions applicable throughout part 5, but proposed part 5 will also contain a number of definitions that are more limited in scope. In keeping with our goal of locating information applicable to specific programs together in one subpart of proposed part 5 to the extent possible, definitions that apply to specific VA programs and procedures would be located in subparts of proposed part 5 that deal with those programs and procedures. We do not currently know with certainty what all of those definitions will be and where they will be located because some proposed part 5 subparts are still in development. We have reserved proposed § 5.2 as the future location for a convenient cross-reference table to assist claimants, beneficiaries, and VA staff in locating these definitions in other subparts of part 5. We plan to publish § 5.2 for notice and comment in a future NPRM issued for the Project.

5.3 Standards of proof.

The next regulation in this NPRM, proposed § 5.3, addresses the standards of proof used in the adjudication of claims for VA benefits. New proposed § 5.3(a), ''Applicability,'' explains that § 5.3 states the general standards of proof for proving facts and rebutting presumptions and that these standards apply unless a statute or another regulation specifically provides otherwise. For example, 38 U.S.C. 1111 requires ''clear and unmistakable evidence'' that an injury or disease existed before acceptance and enrollment for service and was not aggravated by service to rebut the presumption that a veteran was in sound condition when examined, accepted, and enrolled for service. Accordingly the default standard in § 5.3(b) for rebutting a presumption would not apply because there is a statute that specifically provides another standard.

Proposed § 5.3(b) addresses the default standard for proving a specific fact or facts material to the determination of a claim. The relevant statute, 38 U.S.C. 5107(b), specifies that in cases where ''there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, [VA] shall give the benefit of the doubt to the claimant.'' This language has been interpreted to mean, essentially, that when there is a balance of evidence for and against the existence of a fact, and proof of that fact would support a veteran's claim, VA must consider the fact proven. An excellent illustration of this point may be found in *Gilbert* v. *Derwinski,* 1 Vet. App. 49 (1991), an early opinion by the CAVC in which it first considered the ''benefit of the doubt'' doctrine (then contained in 38 U.S.C. 3007).

> Perhaps the analogy most helpful to an understanding of the application of the ''benefit of the doubt'' rule was provided by Deputy Assistant General Counsel Mullen at oral argument when he stated that the ''benefit of the doubt'' standard is similar to the rule deeply embedded in sandlot baseball folklore that ''the tie goes to the runner.'' If the ball clearly beats the runner, he is out and the rule has no application; if the runner clearly beats the ball, he is safe and, again, the rule has no application; if, however, the play is close, then the runner is called safe by operation of the rule that ''the tie goes to the runner.'' * * * Similarly, if a fair preponderance of the evidence is against a veteran's claim, it will be denied and the ''benefit of the doubt'' rule has no application; if the veteran establishes a claim by a fair preponderance of the evidence, the claim will be granted and, again, the rule has no application; if, however, the play is close, *i.e.*, ''there is an approximate balance of positive and negative evidence,'' the veteran prevails by operation of 38 U.S.C. 3007(b).
>
> *Gilbert,* 1 Vet. App. at 55–56.

Turning to the exact language of proposed § 5.3(b), we propose to define ''equipoise'' in paragraph (b)(1). Although the language is considerably simpler than current § 3.102, the definition of ''equipoise'' that we propose is consistent with the longstanding explanation of the ''reasonable doubt'' doctrine in current § 3.102 concerning ''an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim.'' This proposed definition is that equipoise means that there is ''an approximate balance between the weight of the evidence for and the weight of the evidence against the truth of the asserted fact, such that it is as likely as not that the asserted fact is true.''

Paragraph (b)(2) would require VA to apply the benefit of the doubt ''[w]hen the evidence is in equipoise and the fact or issue to be proven would support a claim.'' Paragraph (b)(2) would emphasize that if the evidence is in equipoise and ''the fact or issue to be proven would not support a claim, the matter will not be considered proven.'' Such facts or issues must be established by a preponderance of the evidence. Finally, paragraph (b)(2) clarifies that the ''benefit of the doubt applies even in the absence of official records,'' as described in current § 3.102. This rule is consistent with the statutory statement of these same principles in 38 U.S.C. 5107(b): ''When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.''

Proposed paragraph (b)(3) would define the ''preponderance of the evidence'' by stating: ''A fact or issue is established by a preponderance of evidence when the weight of the evidence in support of that fact or issue is greater than the evidence in opposition to it.'' This definition accords with the generally accepted definition of the term. *See* Black's Law Dictionary 1064 (5th Ed., 1981).

Proposed § 5.3(b)(5) provides that the equipoise standard does not govern determinations as to whether evidence is new and material when offered to reopen a previously denied claim; instead ''VA will reopen a claim when the new and material evidence merely raises a reasonable possibility of substantiating the claim. While the explicit statement of this exception is new, the law underlying it is not. This

rule is consistent with *Annoni* v. *Brown,* 5 Vet. App. 463 (1993). In *Annoni,* the CAVC, citing *Gilbert,* noted that the benefit of the doubt rule (the equipoise standard) does not apply during the process of gathering evidence and that it does not shift the initial burden to submit a valid claim from the claimant to VA. *Annoni,* 5 Vet. App. at 467. Additionally, new and material evidence determinations do not involve the usual weighing of ''all information and lay and medical evidence of record'' within the meaning of 38 U.S.C. 5107(b), but instead require threshold determinations of the significance of discrete items of evidence, which VA must presume credible and to which VA must give full weight. *See Justus* v. *Principi,* 3 Vet. App. 510, 513 (1992). Such threshold determinations as to whether a claimant has submitted new and material evidence are governed by the standards set forth in 38 CFR 3.156(a).

The default standard of proof applicable to rebuttal of a presumption is addressed in proposed § 5.3(c). In some cases, Congress has specifically provided the standard of proof applicable to rebutting a presumption. For example, Congress has imposed rather high standards of proof in two circumstances. Section 1111 of title 38, ''Presumptions of sound condition,'' requires ''clear and unmistakable evidence'' to rebut the presumption of sound condition upon entry into military service. Section 1154(b) of title 38 requires ''clear and convincing evidence'' to rebut a combat veteran's satisfactory evidence of combat incurrence of a disease or injury. The question remains as to what standard of proof applies to the rebuttal of a presumption where Congress has not provided a specific standard.

The Court of Appeals for the Federal Circuit addressed this issue recently in *Thomas* v. *Nicholson,* 423 F.3d 1279 (Fed. Cir. 2005). The specific issue considered by the court was determining the correct standard of proof for rebutting the presumption in 38 U.S.C. 105(a) that an injury or disease incurred during service was incurred in line of duty. Section 105(a) does not specify a standard. Because of the significance of the court's opinion in this case, we quote from it at length.

> The government acknowledges that § 105(a) does not specify the evidentiary standard necessary to rebut the presumption that a peacetime disability was incurred in line of duty, but argues that Congress established the general evidentiary standard for factual determinations of veterans' cases in 38 U.S.C. 5107(b). The government urges this court to apply § 5107, and the evidentiary standard applicable to § 5107, to § 105(a) in this case.
>
> In support, the government points out that this court in *Forshey* examined 38 U.S.C. 5107 for the purpose of determining the proper evidentiary standard under § 105(a), although *Forshey* declined to decide whether § 5107 set out a ''preponderance of evidence'' or ''clear and convincing'' standard. *Forshey,* 284 F.3d at 1351–52. The government therefore contends that 38 U.S.C. 5107 establishes a general evidentiary standard governing determinations by the Board on issues material to the resolution of claims which is applicable to § 105(a) and the determination of willful misconduct for peacetime disabilities.
>
> The government further relies on language in other opinions by this court as support that § 5107 sets out the ''preponderance of evidence'' standard. Although acknowledging that § 5107 does not explicitly state an evidentiary standard, the government points out that this court has found that § 5107(b), ''the benefit of the doubt rule,'' does not apply ''in cases in which the Board finds that a preponderance of the evidence is against the veteran's claim for benefits.'' *Ortiz* v. *Principi,* 274 F.3d 1361, 1364 (Fed. Cir. 2001). Furthermore, the government points to language by this court quoting similar language by the Veterans Court. *Forshey,* 284 F.3d at 1340–41 (relying upon *Gilbert* v. *Derwinski,* 1 Vet. App. 49 (1990)).
>
> We need not rely on the applicability of § 5107(b) alone, however, to reject Thomas's argument that ''clear and convincing'' rather than ''preponderance of the evidence'' is the proper evidentiary standard here. Indeed, we find as strong or stronger argument to be that Congress did not specifically set out that a heightened standard was necessary to rebut the presumption of service connection in § 105(a) where the veteran's own willful misconduct or abuse of alcohol was involved.
>
> ''The 'preponderance of the evidence' formulation is the general burden assigned in civil cases for factual matters.'' *St. Paul Fire & Marine Ins. Co.* v. *United States,* 6 F.3d 763, 769 (Fed. Cir. 1993). The Supreme Court has explained that suits over money damages, as opposed to suits to deny liberty or life or individual interests, appropriately fall under the less stringent ''fair preponderance of the evidence'' standard. *Santosky* v. *Kramer,* 455 U.S. 745, 755, 71 L. Ed. 2d 599, 102 S. Ct. 1388 (1982); *see also Gilbert,* 1 Vet. App. at 53. Indeed, the normal standard in civil suits is the ''preponderance'' standard. The ''clear and convincing'' standard is ''reserved to protect particularly important interests in a limited number of civil cases'' where there is a clear liberty interest at stake, such as commitment for mental illness, deportation, or denaturalization. *California ex rel. Cooper* v. *Mitchell 'Bros. Santa Ana Theater,* 454 U.S. 90, 93, 70 L. Ed. 2d 262, 102 S. Ct. 172 (1981); *Addington* v. *Texas,* 441 U.S. 418, 424, 60 L. Ed. 2d 323, 99 S. Ct. 1804 (1979) (commitment for mental illness); *Woodby* v. *Immigration & Naturalization Serv.,* 385 U.S. 276, 285, 17 L. Ed. 2d 362, 87 S. Ct. 483 (1966) (deportation); *Chaunt* v. *United States,* 364 U.S. 350, 353, 5 L. Ed. 2d 120, 81 S. Ct. 147 (1960) (denaturalization). The liberties at stake in those cases are easily and clearly distinguishable from this case, where the issue is whether an injury was incurred by a veteran in the line of duty.
>
> It is true that Congress has established specific, heightened evidentiary standards for other determinations in veterans cases in 38 U.S.C. 1111 and 1154(b). In those sections, Congress provided that certain decisions adverse to claimants must meet the heightened thresholds of either ''clear and unmistakable evidence'' or ''clear and convincing evidence.'' Notably, however, Congress did not similarly do so for determinations under § 105(a), supporting the assertion that Congress did not intend for a higher standard to apply here. *See Grogan* v. *Garner,* 498 U.S. 279, 286, 112 L. Ed. 2d 755, 111 S. Ct. 654 (1991) (finding that ''silence is inconsistent with the view that Congress intended to require a special, heightened standard of proof''); *Russello* v. *United States,* 464 U.S. 16, 23, 78 L. Ed. 2d 17, 104 S. Ct. 296 (1983) (finding that where ''Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'') (quoting *United States* v. *Wong Kim Bo,* 472 F.2d 720, 722 (5th Cir. 1972)); *Cook* v. *Principi,* 318 F.3d 1334, 1339 (Fed. Cir. 2002) (''Applying the familiar canon of expressio unius est exclusio alterius, we conclude that Congress did not intend to allow exceptions to the rule of finality in addition to the two that it expressly created.''); *St. Paul Fire & Marine Ins. Co.,* 6 F.3d at 768–69 (Fed. Cir. 1993) (''Given that Congress explicitly imposed a high burden of persuasion on the importer when mounting a pre-importation challenge to a Customs ruling, and given that subsection (b) which contains the ''clear and convincing'' standard follows subsection (a) in the statute, we find no reason in the statute or its legislative history to import the clear and convincing standard from subsection 2639(b) to subsection 2639(a).'').
>
> Accordingly, while Thomas argues that these other statutes support incorporating a ''clear and convincing'' standard into § 105(a), we find the opposite to be correct. Sections 1111 and 1154(b) implicate distinguishable circumstances to justify a heightened evidentiary standard. Specifically, § 1111 relates to wartime disability compensation, creating a presumption of soundness only for veterans found ''to have been in sound condition when examined, accepted, and enrolled for service'' unless there is ''clear and unmistakable evidence'' that the injury existed before service and was not aggravated by wartime service. Similarly, § 1154 relates to injuries sustained by a ''veteran who engaged in combat with the enemy in active service'' unless service connection of such injuries are ''rebutted by clear and convincing evidence.'' We therefore find that the absence of a heightened standard in § 105(a) supports a finding that Congress did not intend for such a standard to apply where the veteran's own willful misconduct or abuse of alcohol was involved. *See Wagner*

v. *Principi,* 370 F.3d 1089, 1094–96 (Fed. Cir. 2004). Thus, we find that preponderance of the evidence is the proper evidentiary standard necessary to rebut a § 105(a) presumption and determine that a peacetime disability was the result of willful misconduct. Accordingly, the Veterans Court properly affirmed the Board's application of a preponderance of the evidence standard to rebut the § 105(a) presumption and the Board's determination that Thomas did not incur his injuries in the line of duty.

Thomas, 423 F.3d at 1282–84 (footnotes omitted).

Although the court was specifically discussing the standard applicable to rebuttal of the presumption in 38 U.S.C. 105(a), the court's analysis clearly applies to the rebuttal of any presumption in those cases where Congress has not provided a specific standard. Therefore, § 5.3(c) would adopt the preponderance standard in such cases.

VA does not consider all evidence of equal weight and does not merely count pieces of evidence for and against an issue. That is, in weighing the evidence, VA is as much or more concerned with the quality of evidence as it is with its quantity. The CAVC stated in *Gilbert* that a determination under 38 U.S.C. 5107(b) (then 3007(b)) is ''* * * more qualitative than quantitative; it is one not capable of measurement with mathematical precision and certitude. Equal weight is not accorded to each piece of material contained in a record; every item of evidence does not have the same probative value.'' Judgments must be made * * *.'' *Gilbert,* 1 Vet. App. at 57. While this remark was made in the context of an exposition of the equipoise standard, we believe it is also applicable to the evaluation of evidence generally, as we propose to provide in § 5.3(d).

We propose not to include the fifth sentence of current § 3.102, which states with regard to reasonable doubt that ''[i]t is not a means of reconciling actual conflict or a contradiction in the evidence.'' The reconciliation of actual conflict between evenly balanced ''positive'' and ''negative'' evidence in a manner that favors the claimant is precisely the function of the equipoise standard. We therefore propose not to include this sentence because retaining it would be misleading.

5.4 Claims Adjudication Policies

The final regulation in this NPRM, proposed § 5.4, includes statements of general policy regarding claims adjudication that are derived from the first sentence of current § 3.102 and from portions of current § 3.103(a).

We propose several changes. We propose to omit from § 5.4 the last sentence of current § 3.103(a), which states that ''[t]he provisions of this section apply to all claims for benefits and relief, and decisions thereon, within the purview of this part 3.'' Such a statement would be redundant in part 5 because of proposed § 5.0.

In proposed § 5.4(a), we have provided an explanation of the term ''ex parte.'' This explanation notes the nonadversarial relationship between VA and claimants and is not a substantive change from the reference to ''ex parte'' in current § 3.103(a). The second sentence of current § 3.103(a) states, in part, that ''it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim.'' This statement in § 3.103(a) predates the passage of the Veterans Claims Assistance Act of 2000 (VCAA), Public Law 106–475, and VA's amendment to current § 3.159 implementing the provisions of the VCAA. Section 3.159 contains much more detailed information about VA's duty to provide assistance in developing claims than was included in the old § 3.103(a) statement. We have previously proposed to restate the content of § 3.159 in § 5.90. *See* 70 FR 24680, 24683 (May 10, 2005). Therefore we propose to state in § 5.4(a) that ''VA will assist a claimant or beneficiary in developing his or her claim as provided in § 5.90, 'VA assistance in developing claims.' ''

Endnote Regarding Amendatory Language

We intend to ultimately remove part 3 entirely, but we are not including amendatory language to accomplish that at this time. VA will provide public notice before removing part 3.

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 proposed 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. This proposed amendment would not affect any small entities. Therefore, pursuant to 5 U.S.C. 605(b), this proposed amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Order 12866

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 proposed rule and has concluded that ''it is a significant regulatory action because it may raise novel legal or policy issues.''

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, 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 rule would have no such effect on State, local, or tribal governments, or the private sector.

Catalog of Federal Domestic Assistance Numbers

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; 64.104, 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; 64.115, Veterans Information and Assistance; and 64.127, Monthly Allowance for Children of Vietnam Veterans Born with Spina Bifida.

List of Subjects in 38 CFR Part 5

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

Approved: December 22, 2005.

R. James Nicholson,

Secretary of Veterans Affairs.

For the reasons set out in the preamble, VA proposes to further amend 38 CFR part 5 as proposed to be added at 69 FR 4832, January 30, 2004, by adding subpart A to read as follows:

PART 5—COMPENSATION, PENSION, BURIAL, AND RELATED BENEFITS

Subpart A—General Provisions

Sec.

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

Subpart A—General Provisions

§ 5.0 Scope of applicability.

Except as otherwise provided, this part applies only to benefits governed by this part.

(Authority: 38 U.S.C. 501(a))

§ 5.1 General definitions.

The following definitions apply to this part:

Active military service means active military, naval, or air service, as defined in 38 U.S.C. 101(24) and as described in § 5.21, ''Service VA recognizes as active military service.''

(Authority: 38 U.S.C. 501(a))

Agency of original jurisdiction means the VA activity that is responsible for making the initial determination on an issue affecting a claimant's or beneficiary's right to benefits.

(Authority: 38 U.S.C. 501(a))

Alien means any person not a citizen or national of the United States.

(Authority: 38 U.S.C. 501(a))

Armed Forces means the United States Army, Navy, Marine Corps, Air Force, and Coast Guard, including their Reserve components.

(Authority: 38 U.S.C. 101(10))

Beneficiary means an individual in receipt of benefits under any of the laws administered by VA. Under certain circumstances, a beneficiary may also meet the definition of claimant (e.g., when seeking an increased compensation rating or contesting a proposed reduction in benefits).

(Authority: 38 U.S.C. 501(a))

Benefit means any payment, service, commodity, function, or status, entitlement to which is determined under laws administered by VA pertaining to veterans and their dependents and survivors.

(Authority: 38 U.S.C. 501(a))

Certified statement means a statement made and signed by an individual who affirms that the statement's content is true and accurate to the best of that individual's knowledge and belief.

(Authority: 38 U.S.C. 501(a))

Child born of the marriage and child born before the marriage. A ''child born of the marriage'' means a child of a deceased veteran born on or after the date of a marriage that is the basis of a surviving spouse's entitlement to VA benefits. A child born ''before the marriage'' means a child of a deceased veteran born before the date of a marriage that is the basis of a surviving spouse's entitlement to VA benefits. Neither of these terms includes an adopted child or a stepchild.

(Authority: 38 U.S.C. 103))

Claimant means any individual applying for, or submitting a claim for, any benefit under the laws administered by VA.

(Authority: 38 U.S.C. 5100)

Competent evidence means evidence of one of the following types that meets the standard of competency stated.

(1) *Competent expert evidence.* Expert evidence is a statement or opinion based on scientific, medical, technical, or other specialized knowledge. Examples include, but are not limited to, medical or scientific opinions. Expert evidence also includes statements in treatises and other authoritative writings conveying sound principles, such as statements in medical and scientific articles and research reports. Expert evidence is competent if the person upon whose knowledge the evidence is based is qualified through education, training, or experience to offer the statement or opinion comprising the evidence.

(2) *Competent lay evidence.* Lay evidence is a statement or opinion offered by a lay person. A lay person is a person without relevant specialized education, training, or experience. Lay evidence is competent if it is provided by a person who has personal knowledge of facts or circumstances described in the statement or opinion comprising the evidence and if those facts or circumstances can be observed and described by a lay person.

(Authority: 38 U.S.C. 501(a))

Note to definition of competent evidence: In VA's nonadversarial system, all evidence is admitted into the record. VA does not exclude from the record evidence that is not ''competent'' under this section; however, such evidence may not be probative because it is not competent.

Direct service connection means that the veteran's injury or disease resulting in disability or death was incurred or aggravated in line of duty during active military service, and was established without consideration of presumptions of service connection in subpart E of this part or secondary service connection under § 3.310 of this chapter.

(Authority: 38 U.S.C. 501(a))

Discharged or released from active military service includes, but is not limited to, either of the following:

(1) Retirement from the active military service.

(2) Completion of active military service for the period of time an individual was obligated to serve at the time of entry into that period of service in cases where both of the following are true:

(i) The individual was not discharged or released at the end of that period of time due to an intervening change in military status, as defined in § 5.37, ''Effect of extension of service obligation due to change in military status on eligibility for VA benefits,'' and

(ii) The individual would have been eligible for a discharge or release under conditions other than dishonorable at the end of that period of time except for the intervening change in military status.

(Authority: 38 U.S.C. 101(18))

Final decision means a decision on a claim for VA benefits with respect to which VA provided the claimant with written notice as required by § 5.83, ''Right to notice of decisions and proposed reductions, discontinuances, or other adverse actions,'' and:

(1) The claimant did not file a timely Notice of Disagreement in compliance with § 20.302(a) of this chapter or, with respect to simultaneously contested claims, in compliance with § 20.501(a) of this chapter;

(2) The claimant filed a timely Notice of Disagreement, but did not file a timely Substantive Appeal in compliance with § 20.302(b) of this chapter or, with respect to simultaneously contested claims, in compliance with § 20.501(b) of this chapter; or

(3) In the case of a decision by the Board of Veterans' Appeals, the decision is final under § 20.1100 of this chapter.

(Authority: 38 U.S.C. 5104, 7102(a), 7103(a), 7105)

Former prisoner of war (or former POW) means a person who, while serving in the active military service, was forcibly detained or interned in the line of duty by an entity described in paragraph (1) or (2) of this definition:

(1) An enemy, the agents of an enemy, or a hostile force, during a period of war; or

(2) A foreign government or its agents, or a hostile force, under circumstances comparable to the circumstances under which persons have generally been detained or interned by enemy governments during periods of war. Such circumstances include, but are not limited to, physical hardships or abuse, psychological hardships or abuse, malnutrition, and unsanitary conditions.

(3) ''Hostile force'' means any entity other than an enemy or foreign government or the agents of either whose actions are taken to further or enhance anti-American military, political or economic objectives or views, or to attempt to embarrass the United States.

(Authority: 38 U.S.C. 101(32))

Fraud means any of the following, as applicable:

(1) Except as provided in paragraphs (2) and (3) of this definition, fraud means an act committed when a person knowingly makes or causes to be made or conspires, combines, aids, or assists in, agrees to, arranges for, or in any way procures the making or presentation of a false or fraudulent affidavit, declaration, certificate, statement, voucher, or paper, concerning gratuitous VA benefits.

(2) As used in §§ 3.55 and 3.207 of this chapter relating to divorces and annulments obtained through fraud, fraud means an intentional misrepresentation of fact, or the intentional failure to disclose pertinent facts, for the purpose of obtaining, or assisting an individual to obtain, an annulment or divorce, with knowledge that the misrepresentation or failure to disclose may result in the erroneous granting of an annulment or divorce. *See* [regulation that will be published in a future Notice of Proposed Rulemaking] (concerning fraud and marriage).

(3) As used in §§ 3.951(b) and 3.957 of this chapter relating to service connection and disability ratings obtained through fraud, fraud means an intentional misrepresentation of fact, or the intentional failure to disclose pertinent facts, for the purpose of obtaining or retaining, or assisting an individual to obtain or retain, eligibility for VA benefits, with knowledge that the misrepresentation or failure to disclose may result in the erroneous award or retention of such benefits.

(Authority: 38 U.S.C. 103, 110, 1159, 6103(a))

In the waters adjacent to Mexico means, with regard to service during the Mexican border period, the waters (including the islands therein) that are within 750 nautical miles (863 statute miles) of the coast of the mainland of Mexico.

(Authority: 38 U.S.C. 101(30))

Insanity, as a defense to commission of an act, means a person was laboring under such a defect of reason resulting from injury, disease, or mental deficiency as not to know or understand the nature or consequence of the act, or that what he or she was doing was wrong. Behavior that is attributable to a personality disorder does not satisfy the definition of insanity.

(Authority: 38 U.S.C. 501(a))

Notice means written notice sent to a claimant or beneficiary at his or her latest address of record, and to his or her designated representative and fiduciary, if any.

(Authority: 38 U.S.C. 501(a))

Nursing home means any of the following:

(1) Any extended care facility that is licensed by a State to provide skilled or intermediate-level nursing care;

(2) A nursing home care unit in a State veterans' home which is approved for payment under 38 U.S.C. 1742, ''Inspections of such homes; restrictions on beneficiaries;'' or

(3) A VA Nursing Home Care Unit.

(Authority: 38 U.S.C. 101(28))

On the borders of Mexico means, with regard to service during the Mexican border period, the States of Arizona, California, New Mexico, and Texas, and the nations of Guatemala and Belize (formerly British Honduras).

(Authority: 38 U.S.C. 101(30))

Political subdivision of the United States means a State, as defined in this section, and the counties (or parishes), cities or municipalities of a State.

(Authority: 38 U.S.C. 501(a))

Reserve, or *reservist,* means a member of a reserve component.

(Authority: 38 U.S.C. 101(26))

Reserve component means the reserves of one of the Armed Forces and the Army National Guard and Air National Guard of the United States.

(Authority: 38 U.S.C. 101(27))

Secretary concerned means any of the following, as applicable:

(1) The Secretary of the Army, with respect to matters concerning the Army;

(2) The Secretary of the Navy, with respect to matters concerning the Navy or the Marine Corps;

(3) The Secretary of the Air Force, with respect to matters concerning the Air Force;

(4) The Secretary of Homeland Security, with respect to matters concerning the Coast Guard;

(5) The Secretary of Health and Human Services, with respect to matters concerning the Public Health Service; and

(6) The Secretary of Commerce, with respect to matters concerning the Coast and Geodetic Survey, the Environmental Science Services Administration, and the National Oceanic and Atmospheric Administration.

(Authority: 38 U.S.C. 101(25))

Service medical records means records of medical treatment or medical examination that was provided by the Armed Forces to either an applicant for membership into, or a member of, the Armed Forces. Such records include records of medical examination and treatment of such persons by a civilian health care provider at Armed Forces' expense.

(Authority: 38 U.S.C. 501(a))

State means each of the several States, Territories, and possessions of the United States; the District of Columbia; and the Commonwealth of Puerto Rico.

(Authority: 38 U.S.C. 101(20))

Uniformed services means the Armed Forces; the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty; the commissioned corps of the Public Health Service; and any other category of persons designated by the President in time of war or national emergency.

(Authority: 38 U.S.C. 501(a))

Veteran means any of the following, as applicable:

(1) A person who had active military service and who was discharged or released under conditions other than dishonorable.

(Authority: 38 U.S.C. 101(2))

(2) A person who died in active military service and whose death was not due to willful misconduct. *See* [regulation that will be published in a future Notice of Proposed Rulemaking] (defining willful misconduct).

(Authority: 38 U.S.C. 1101(1), 1301)

(3) In addition, for death pension purposes, a person who died in active military service under conditions that prevent payment of service-connected death benefits. The person must have completed at least two years of honorable military service, as certified by the Secretary concerned. *See* subpart F of this part, ''Nonservice-Connected Disability Pensions and Death Pensions,'' for eligibility information.

(Authority: 38 U.S.C. 1541(h))

§ 5.2 [Reserved]

§ 5.3 Standards of proof.

(a) *Applicability.* This section states the general standards of proof for proving facts and for rebutting presumptions. These standards of proof apply unless specifically provided otherwise by statute or a section of this part.

(b) *Proving a fact or issue.*—(1) *Equipoise.* ''Equipoise'' means that there is an approximate balance between the weight of the evidence in support of and the weight of the evidence against a particular finding of fact, such that it is as likely as not that the fact is true.

(2) *Benefit of the doubt rule.* When the evidence is in equipoise and a fact or issue would support a claim, VA will give the benefit of the doubt to the claimant and the matter will be considered proven. However, if the evidence is in equipoise and a fact or issue would tend to disprove a claim, the matter will not be considered proven. A fact or issue that would tend to disprove a claim must be established by a preponderance of the evidence. The benefit of the doubt applies even in the absence of official records. For example, in applying the standard, VA will consider that no official records may have been kept in cases where an alleged incident arose under combat or similarly strenuous conditions if the incident is consistent with the probable results of such known hardships.

(3) *Preponderance of evidence.* A fact or issue is established by a preponderance of evidence when the weight of the evidence in support of that fact or issue is greater than the evidence in opposition to it.

(4) *Weighing the evidence.* In determining whether the evidence is in equipoise, VA will consider whether evidence favoring the existence, or nonexistence, of a relevant fact is supported or contradicted by the evidence as a whole and by known facts. Objectively unsupported personal speculation, suspicion, or doubt on the part of persons adjudicating claims is not a sufficient basis for concluding that equipoise does not exist.

(5) *Application to reopening claims.* In determining whether to reopen a claim based on new and material evidence, the evidence need not be in equipoise. VA will reopen a claim when the new and material evidence merely raises a reasonable possibility of substantiating the claim. *See* § 3.156(a) of this chapter. However, the standards of proof otherwise provided in this section apply after the claim is successfully reopened.

(c) *Rebuttal of a presumption.* A presumption is rebutted if the preponderance of evidence is contrary to the presumed fact.

(d) *Quality of evidence to be considered.* VA does not simply count the pieces of evidence for or against the existence, or nonexistence, of a relevant fact when it is determining whether the applicable standard of proof has been met. VA will assess the credibility and probative value of individual pieces of evidence and then weigh all the relevant evidence for and against the issue. Not all pieces of evidence will carry equal weight.

(Authority: 38 U.S.C. 501(a), 5107(b))

§ 5.4 Claims adjudication policies.

(a) *Ex parte proceedings and assistance.* VA conducts its proceedings *ex parte,* which means that VA is not an adversary of the claimant. VA will assist a claimant or beneficiary in developing his or her claim as provided in § 5.90, ''VA assistance in developing claims.''

(b) *VA decision-making.* It is the defined and consistently applied policy of VA to administer the law under a broad interpretation, consistent with the facts shown in every case. VA will make decisions that grant every benefit that the law supports while at the same time protecting the interests of the Government.

(Authority: 38 U.S.C. 501(a))

§§ 5.5—5.19 [Reserved]

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