

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 5

RIN 2900-AM07

Service-Connected and Other Disability Compensation

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to reorganize and rewrite in plain language its regulations concerning service-connected and other disability compensation. These revisions are proposed as part of VA's reorganization of all of its compensation and pension regulations 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 regulations.

DATES: Comments must be received by VA on or before November 1, 2010.

ADDRESSES: Written comments may be submitted through <http://www.regulations.gov>; by mail or hand-delivery to: Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to "RIN 2900-AM07—Service-Connected and Other Disability Compensation." Copies of 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 (not a toll-free number) for an appointment. In addition, during the comment period comments may be viewed online through the Federal Docket Management System (FDMS) at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: William F. Russo, Director of Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, or call (202) 273-9515 (not a toll-free number).

SUPPLEMENTARY INFORMATION: The Secretary of Veterans Affairs established the 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 was created in response 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 staff assigned to 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 service-connected and other disability compensation. After review and consideration of public comments, final versions of these proposed regulations will ultimately be published in a new part 5 in 38 CFR.

Outline

Overview of New Part 5 Organization
Overview of This Notice of Proposed Rulemaking
Table Comparing Proposed Part 5 Rules with Current Part 3 Rules

Content of Proposed Regulations

Service-Connected and Other Disability Compensation

- 5.240 Disability compensation.
- 5.241 Service-connected disability.
- 5.242 General principles of service connection.
- 5.243 Establishing service connection.
- 5.244 Presumption of sound condition.
- 5.245 Service connection based on aggravation of preservice injury or disease.
- 5.246 Secondary service connection—disability that is proximately caused by service-connected disability.
- 5.247 Secondary service connection—nonservice-connected disability aggravated by service-connected disability.
- 5.248 Service connection for cardiovascular disease secondary to service-connected lower extremity amputation.
- 5.249 Special service connection rules for combat-related injury or disease.
- 5.250 Service connection for posttraumatic stress disorder.

- 5.251 Current disabilities for which VA cannot grant service connection.
- Rating Service-Connected Disabilities
- 5.280 General rating principles.
- 5.281 Multiple 0-percent service-connected disabilities.
- 5.282 Special consideration for paired organs and extremities.
- 5.283 Total and permanent total ratings and unemployability.
- 5.284 Total disability ratings for disability compensation purposes.
- 5.285 Continuance of total disability ratings.

Additional Disability Compensation Based on a Dependent Parent

- 5.300 Establishing dependency of a parent.
- 5.302 General income rules—parent's dependency.
- 5.303 Deductions from income—parent's dependency.
- 5.304 Exclusions from income—parent's dependency.
- Disability Compensation Effective Dates
- 5.311 Effective dates—award of disability compensation.
- 5.312 Effective dates—increased disability compensation.
- 5.313 Effective dates—discontinuance of a total disability rating based on individual unemployability.
- 5.314 Effective dates—discontinuance of additional disability compensation based on parental dependency.
- 5.315 Effective dates—additional disability compensation based on decrease in the net worth of a dependent parent.

Endnote Regarding Amendatory Language

Paperwork Reduction Act
Regulatory Flexibility Act
Executive Order 12866
Unfunded Mandates
Catalog of Federal Domestic Assistance Numbers and Titles
List of Subjects in 38 CFR Part 5

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, delegations of authority, general definitions, and general policy provisions for this part. This subpart was published as proposed on March 31, 2006. *See* 71 FR 16464.

“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 was published in three separate notices of proposed rulemaking (NPRMs) 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. The second, concerning general evidence requirements, effective dates, revision of decisions, and protection of existing ratings, was published as proposed on May 22, 2007. *See* 72 FR 28770. The third, concerning VA benefit claims, was published on April 14, 2008. *See* 73 FR 2136.

“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. This subpart was published as proposed on September 20, 2006. *See* 71 FR 55052.

“Subpart E—Claims for Service Connection and Disability Compensation” would define service-connected disability compensation, including direct and secondary service connection, and disability compensation paid pursuant to section 1151, title 38, United States Code as if the disability were service connected. This subpart would inform readers how VA determines entitlement to 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 in three NPRMs due to its size. The first, concerning presumptions related to service connection, was published as proposed on July 27, 2004. *See* 69 FR

44614. The second, concerning special ratings, was published on October 17, 2008. *See* 73 FR 62004. This NPRM, which includes regulations relating to service-connected and other disability compensation, is the third of the NPRMs making up Subpart E.

“Subpart F—Nonservice-Connected Disability Pensions and Death Pensions” would include information regarding the three types of nonservice-connected pension: Old-Law Pension, Section 306 Pension, and Improved Pension. This subpart would also include those provisions that state how to establish eligibility and entitlement to Improved Pension, and the effective dates governing each type of pension. This subpart was 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. The portion concerning eligibility and entitlement requirements for Improved Pension was published as proposed on September 26, 2007. *See* 72 FR 54776.

“Subpart G—Dependency and Indemnity Compensation, Accrued Benefits, and Special Rules Applicable Upon Death of a Beneficiary” would contain regulations governing claims for dependency and indemnity compensation (DIC); accrued benefits; and various special rules that apply to the disposition of VA benefits, or proceeds of VA benefits, when a beneficiary dies. This subpart was published as two NPRMs due to its size. The portion concerning accrued benefits, 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 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. This subpart was published as proposed on March 9, 2007. *See* 72 FR 10860.

“Subpart I—Benefits for Certain Filipino Veterans and Survivors” would pertain to the various benefits available to Filipino veterans and their survivors. This subpart was published as proposed on June 30, 2006. *See* 71 FR 37790.

“Subpart J—Burial Benefits” would pertain to burial allowances.

“Subpart K—Matters Affecting the Receipt of Benefits” would contain provisions regarding bars to benefits, forfeiture of benefits, and renouncement

of benefits. This subpart was published as proposed on May 31, 2006. *See* 71 FR 31056.

“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 were published in two separate NPRMs. The first, concerning payments to beneficiaries who are eligible for more than one benefit, was published as proposed on October 2, 2007. *See* 72 FR 56136. The second, concerning payments and adjustments to payments, was published on October 31, 2008. *See* 73 FR 65212.

The final subpart, “Subpart M—Apportionments to Dependents and Payments to Fiduciaries and 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** document citation (including the Regulation Identifier Number and Subject Heading) 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.

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 NPRMs.

Overview of This Notice of Proposed Rulemaking

This NPRM pertains to service-connected and other disability compensation. These regulations would be contained in proposed Subpart E 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 in their existing counterparts in 38 CFR part 3. However, a few regulations with substantive differences are proposed, as are some regulations that do not have counterparts in 38 CFR part 3.

Table Comparing Proposed Part 5 Rules With Current Part 3 Rules

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

| Proposed part 5 section or paragraph | Based in whole or in part on 38 CFR part 3 section or paragraph (or "New") |
|--------------------------------------|--|
| 5.240(a) | 3.4(a) and (b)(1). |
| 5.240(b) | 3.4(b)(2). |
| 5.241 introduction | New. |
| 5.241(a) and (b) | 3.1(k), 3.303(a) first and second sentences. |
| 5.241(c) | New. |
| 5.242(a) | 3.303(a). |
| 5.242(b) | 3.304(b)(3). |
| 5.243(a) | New. |
| 5.243(b) | 3.303(a) and (d). |
| 5.243(c) and (d) | 3.303(b). |
| 5.244(a) | 3.304(b). |
| 5.244(b) | New. |
| 5.244(c)(1) | 3.304(b)(1), first sentence. |
| 5.244(c)(2) | New. |
| 5.244(d)(1) | 3.304(b). |
| 5.244(d)(2) | New. |
| 5.245(a)(1) | 3.306(a). |
| 5.245(a)(2) | New. |
| 5.245(b)(1) | New. |
| 5.245(b)(2) | New. |
| 5.245(b)(3) | 3.306(b)(1). |
| 5.245(b)(4) | 3.306(b)(2). |
| 5.245(c) | 3.306(b). |
| 5.246 | 3.310(a). |
| 5.247 | 3.310(b). |
| 5.248 | 3.310(c). |
| 5.249(a)(1) | 3.102, 3.304(d). |
| 5.249(a)(2) | New. |
| 5.249(b) | New. |
| 5.250(a) | 3.304(f). |
| 5.250(b) | New. |
| 5.250(c) | 3.304(f)(1). |
| 5.250(d) | 3.304(f)(2) and (4). |
| 5.250(e) | 3.304(f)(3). |
| 5.250(f) | 3.304(f)(5). |
| 5.251(a) | 3.303(c). |
| 5.251(b)(1) through (3) | New. |
| 5.251(c) | New. |
| 5.251(d) | New. |
| 5.251(e) | 3.380. |
| 5.280 | 3.321(a), (b)(1), (3), and (c). |
| 5.281 | 3.324. |
| 5.282(a) | 3.383(a). |
| 5.282(b) | 3.383(a)(1) through (5). |
| 5.282(c)(1) and (2) | 3.383(b)(1). |

| Proposed part 5 section or paragraph | Based in whole or in part on 38 CFR part 3 section or paragraph (or "New") |
|--------------------------------------|--|
| 5.282(c)(3) | 3.383(c). |
| 5.282(c)(4) | 3.383(d). |
| 5.283 | 3.340. |
| 5.284 | 3.341. |
| 5.285 | 3.343(a) and (c). |
| 5.300(a)(1) | 3.250(a)(1) and (3). |
| 5.300(a)(2) | New. |
| 5.300(b) | 3.250(a)(2). |
| 5.300(b)(1) | 3.250(b). |
| 5.300(b)(1)(i) | 3.250(b)(1). |
| 5.300(b)(1)(ii) | 3.250(c). |
| 5.300(b)(2)(i) | 3.250(a)(2). |
| 5.300(b)(2)(ii) | 3.250(b)(2). |
| 5.300(c) | 3.250(b). |
| 5.300(d) | 3.660(a)(1). |
| 5.300(e) | 3.250(d). |
| 5.302(a) | 3.262(a). |
| 5.302(b) | 3.262(b), 3.262(e)(3). |
| 5.302(c) | 3.261(a)(3), 3.250(b)(2). |
| 5.302(d) | 3.262(k)(1) and (2). |
| 5.302(e) | 3.262(k)(2) and (3). |
| 5.303(a) | 3.262(a)(2). |
| 5.303(b) | 3.261(a)(24), 3.262(i)(1) and (j)(4). |
| 5.303(c) | 3.262(a)(1). |
| 5.304 introduction | New. |
| 5.304(a) | 3.261(a)(7). |
| 5.304(b)(1) | 3.262(h)(1). |
| 5.304(b)(2) | 3.262(h)(2). |
| 5.304(b)(3) | 3.262(h)(3). |
| 5.304(b)(4) | 3.262(h)(4). |
| 5.304(c) | 3.261(a)(12). |
| 5.304(d), except (d)(6) | 3.261(a)(20). |
| 5.304(d)(6) | New. |
| 5.304(e) | 3.261(a)(20). |
| 5.304(f) | 3.261(a)(13). |
| 5.304(g) | 3.261(a)(28), 3.262(t), and 3.262(t)(2). |
| 5.304(h) | 3.262(k)(4). |
| 5.304(i) | 3.261(a)(31). |
| 5.304(j) | 3.262(a)(2), last sentence. |
| 5.304(k) | 3.261(a)(22). |
| 5.304(l) | 3.261, 3.262. |
| 5.311 | 3.400(b)(2). |
| 5.312(a) | New. |
| 5.312(b) | 3.400(o)(2). |
| 5.313(a) | New. |
| 5.313(b) | 3.501(e)(2). |
| 5.313(c) | 3.501(f). |
| 5.314(a) | New. |
| 5.314(b) | 3.500(h), 3.660(a)(2). |
| 5.314(c) | 3.500(h), 3.500(n)(2), 3.660(a)(2). |
| 5.314(d) | 3.500(g)(2), 3.500(h), 3.660(a)(2). |
| 5.315 | 3.660(d). |

Readers who use this table to compare the proposed provisions with the existing regulatory 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

Service-Connected and Other Disability Compensation

Section 5.240 Disability Compensation

The first proposed regulation in this NPRM, based on current § 3.4(a) and (b), would provide a definition of "disability compensation" and a rule concerning additional disability compensation payable to veterans who have dependents. The material in current § 3.4(a) about the death compensation program will have no counterpart in part 5. VA currently pays death compensation to fewer than 300 beneficiaries. Except for one small group of beneficiaries covered under § 3.4(c)(2), death compensation is payable only if the veteran died prior to January 1, 1957. VA has not received a claim for death compensation in over 10 years, and we do not expect to receive such claims any more. We intend to revise proposed § 5.0, 71 FR 16464 (Mar. 31, 2006), the scope provision for part 5, to provide direction that any new claims for death compensation or actions concerning death compensation benefits be adjudicated under part 3.

The proposed definition of "disability compensation" in § 5.240(a) would be simpler than the rules in current § 3.4(a) and (b)(1), because it does not unnecessarily repeat information found elsewhere. For example, current § 3.4(a) states that "[i]f the veteran was discharged or released from service, the discharge or release must have been under conditions other than dishonorable." Similarly, current § 3.1(d) defines "[v]eteran" to mean "a person who served in the active military, naval, or air service and who was discharged or released under conditions other than dishonorable."

The proposed part 5 definition of “veteran” in § 5.1 includes the same information as current § 3.1(d). *See* 71 FR at 16474. Therefore, we propose not to repeat the information in § 5.240. Comparing current §§ 3.4(b)(1) and 3.1(k) reveals another example of unnecessary repetition. Section 3.4(b)(1) states the rule for basic entitlement to disability compensation in terms of a service-connected disability, while current § 3.1(k) defines “service-connected” with respect to disability as meaning that “such disability was incurred or aggravated * * * in line of duty in the active military, naval, or air service.” Section 5.241 in this NPRM would define “service-connected disability” based on current § 3.1(k). We propose to state the definition of service-connected disability once, in proposed § 5.241 below.

In addition, proposed § 5.240(a) would define disability compensation to include compensation for a disability that is treated “as if” it were service connected under 38 U.S.C. 1151, “Benefits for persons disabled by treatment or vocational rehabilitation”. Thus, “disability compensation” in part 5 would be distinguishable from “service-connected disability compensation”. In most cases, the procedures governing the payment of disability compensation are the same, regardless of whether compensation is authorized by 38 U.S.C. 1110, 1131, or 1151. However, where it is important to distinguish between them, our part 5 regulations will do so either by specifically discussing section 1151 or by placing the descriptor “service-connected” before the words “disability compensation.” *See, e.g.,* proposed § 5.20(b), 69 FR 4820 (Jan. 30, 2004). A more complete explanation of what constitutes a “service-connected disability” would be set out in the next proposed regulation in this NPRM, § 5.241. Therefore, proposed § 5.240(a) would cross-reference that rule.

Current § 3.4(b)(2) provides that additional compensation may be paid to a veteran with a dependent if the veteran has “disability evaluated as 30 per centum or more disabling.” VA has consistently interpreted the authorizing statute, 38 U.S.C. 1115, as authorizing additional disability compensation for a dependent whether the veteran has at least a 30-percent rating for a single disability or for combined disabilities. Proposed § 5.240(b) would make this interpretation explicit by stating that “[a]dditional disability compensation is payable to a veteran who has a spouse, child, or dependent parent if the veteran is entitled to disability compensation

based on a single or a combined disability rating of 30 percent or more.”

In § 5.240(b) we would also clarify the relationship between the additional disability compensation that section 1115 authorizes and the rates of disability compensation under 38 U.S.C. 1114. Section 1114 provides the rates and amounts of service-connected disability compensation. The additional disability compensation that section 1115 authorizes is above and beyond any rate that section 1114 authorizes. The second sentence of § 5.240(b) would state that “[t]he additional disability compensation authorized by 38 U.S.C. 1115 is payable in addition to monthly disability compensation payable under 38 U.S.C. 1114.”

Section 5.241 Service-Connected Disability

Proposed § 5.241, which would explain when a disability is considered to be “service connected”, would be based on current § 3.1(k) and the first two sentences of current § 3.303(a). The portion of the definition in current § 3.1(k) that relates to service-connected death was addressed in proposed Subpart G of part 5, in a separate NPRM. *See* 70 FR at 61342.

In the introductory sentence, we would clarify that a service-connected disability must be a “current disability”. *See Disabled Am. Veterans v. Sec’y of Veterans Affairs*, 419 F.3d 1317, 1318 (Fed. Cir. 2005) (*DAV*) (“[g]enerally, a veteran who claims entitlement to disability compensation benefits must show * * * a current disability”); *see also Hogan v. Peake*, 544 F.3d 1295, 1297 (Fed. Cir. 2008) (“[t]o establish a right to benefits, a veteran must show that a current disability is ‘service connected’” (citing *DAV*)). Although neither § 3.1(k) nor § 3.303(a) refers to a “current disability”, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) has held that VA’s interpretation of 38 U.S.C. 1110 and 1131, which govern entitlement to service connection, as requiring a current disability to establish service connection is reasonable. *See Gilpin v. West*, 155 F.3d 1353, 1356 (Fed. Cir. 1998) (holding that VA’s interpretation of 38 U.S.C. 1110 as requiring a current disability is reasonable because “[m]any of the statutes governing the provision of benefits for veterans only allow such benefits be given for disability existing on or after the date of application”) (citing 38 U.S.C. 5110(a), 5111(a), 1710, and 1712); *Degmetich v. Brown*, 104 F.3d 1328, 1332 (Fed. Cir. 1997) (same as to VA’s interpretation of 38 U.S.C. 1131). Thus, the inclusion of a “current disability” requirement would codify

these court holdings but would not produce a different result for claims adjudicated under part 5.

Proposed paragraph (a) would essentially repeat the content of current § 3.1(k) and the first two sentences of current § 3.303(a). We would clarify that a service-connected disability must have been “caused by an injury or disease incurred, or presumed to have been incurred, in the line of duty during active military service.”

Proposed paragraph (b) would incorporate the principle of aggravation, which is also included in § 3.1(k). We would state the principle in a separate paragraph in order to clearly indicate that it is separate from evidence of incurrence, which would be governed by § 5.241(a).

In proposed paragraph (c), we would include in the definition of “service-connected disability” a disability that is secondary to a service-connected disability. This should help convey that secondary service connection is a type of service connection and that regulatory references to a “service-connected disability” include a secondarily service-connected disability. This principle is not contained in § 3.1(k) specifically but is generally established by current § 3.310(a). Therefore, this would not be a substantive change from current practice.

Section 5.242 General Principles of Service Connection

Proposed § 5.242 would be the part 5 counterpart to two general principles VA applies in adjudicating claims for service connection. The first, based on 38 U.S.C. 1154(a), would pertain to VA’s consideration in service connection claims of the places, types, and circumstances of the veteran’s service. The second, based on 10 U.S.C. 1219, would pertain to VA’s consideration of certain statements a veteran might have signed in service.

The third sentence of current § 3.303(a) states that “[e]ach disabling condition shown by a veteran’s service records, or for which he seeks a service connection must be considered on the basis of the places, types and circumstances of his service as shown by service records, the official history of each organization in which he served, his medical records and all pertinent medical and lay evidence.” Paragraph (a) of proposed § 5.242 would be derived from this sentence, which is derived almost verbatim from 38 U.S.C. 1154(a). Section 1154(a) requires VA to give “due consideration * * * to the places, types, and circumstances of such veteran’s service as shown by such

veteran's service record, the official history of each organization in which such veteran served, such veteran's medical records, and all pertinent medical and lay evidence". We do not interpret this statute as adding to the evidence-gathering duties set forth in 38 U.S.C. 5103A, which requires VA to make "reasonable efforts to obtain relevant records * * * that the claimant adequately identifies". 38 U.S.C. 5103A(b)(1).

The requirement that a claimant identify records with potentially relevant information is repeated in section 5103A(c)(3) and is consistent with the claimant's duty to actively participate in the claims process. It would be far too burdensome to require VA to seek out, obtain, and review every official record regarding the unit(s) and circumstance(s) of every veteran's service, and, more importantly, doing so in the vast majority of cases would be unproductive. Hence, proposed § 5.242(a) would require VA to duly consider only "evidence of record" concerning matters such as the places, types, and circumstances of the veteran's service and the history of organizations in which the veteran served, which would be consistent with current § 3.303(a) requiring VA to base its determinations as to service connection on the entire "evidence of record".

The regulatory and statutory history of the third sentence of § 3.303(a) began in 1941, Public Law 77-361, 55 Stat. 847. The statute required "that in each case where a veteran is seeking service connection for any disability[,] due consideration shall be given to the places, types, and circumstances of his service as shown by his service record, the official history of each organization in which he served, his medical records, and all pertinent medical and lay evidence." VA implemented this language in 38 CFR 2.1077(b) (Cum. Supp. 1938-1943), using substantially the same language. 7 FR 1981 (Mar. 13, 1942). VA regulations contained this same language until 1961, when VA revised it to read as it does in current § 3.303(a). The regulatory history does not reveal why VA revised this language.

We propose not to repeat in § 5.242(a) the phrase "[e]ach disabling condition shown by a veteran's service records" for two reasons. First, the phrase creates a distinction between disabilities shown in a veteran's service record and those not shown. This distinction is irrelevant because VA considers all service connection claims "on the basis of the places, types and circumstances" regardless of whether a disability is

shown in the service record or in the evidence of record subsequent to service. Second, the phrase could be misconstrued to mean that, absent any claim by a veteran, VA has a duty to review service records to determine entitlement to service connection for "[e]ach disabling condition" which might possibly exist. Congress did not intend to impose such a duty on VA when it enacted Public Law 77-361. Moreover, such a duty would impose an unreasonable burden on VA's limited resources by requiring VA to comb through veterans' service records for potential claims.

Proposed § 5.242(b) would restate current § 3.304(b)(3), which provides that "[s]igned statements of veterans relating to the origin, or incurrence of any disease or injury made in service if against his or her own interest is of no force and effect if other data do not establish the fact" and that "[o]ther evidence will be considered as though such statement were not of record." This rule is derived from 10 U.S.C. 1219, which states that "[a] member of an armed force may not be required to sign a statement relating to the origin, incurrence, or aggravation of a disease or injury that he has" and that "[a]ny such statement against his interests, signed by a member, is invalid."

The language of current § 3.304(b)(3) does not limit its application to cases involving the presumption of sound condition. Despite the fact that it falls under the "Presumption of soundness" subheading, we believe VA intended this provision to mirror section 1219 and be applied broadly. Section 1219 precludes a service department from using a statement of the sort the statute describes for any purpose. The statute does not describe a context in which such a statement by the servicemember would be invalid. We propose, by locating the rule in the section on general principles of service connection, to make clear that VA also applies the rule broadly. The remaining provisions of current § 3.304(b) are covered under proposed § 5.244, "Presumption of sound condition."

Proposed § 5.242(b) would resolve an ambiguity in the current rule and state the full scope of the statute while limiting its application to a statement that was against a veteran's interest at the time he or she signed the statement. The current rule pertains only to a signed statement about "origin" or "incurrence" of an injury or disease. The proposed rule would also pertain to a signed statement about "aggravation of an injury or disease," which would be consistent with the statute.

The current rule is unclear whether a veteran's statement "against his or her own interest" means a statement that was against the veteran's interest at the time the veteran signed it, or is against the veteran's current interest. Specifying that VA will exclude a statement against the signer's interest at the time signed ensures that the rule protects veterans against VA decisions based on possibly unreliable evidence.

Current § 3.304(b)(3) bars VA consideration of a statement signed in service if against a veteran's interest, which therefore permits VA to consider the statement if in the veteran's interest. The proposed rule would likewise permit VA to consider a statement the veteran signed while in service if the statement was made in the veteran's interest. The current rule bars VA consideration of a signed statement against the veteran's interest to prove a fact "if other data do not establish the fact." This logically permits VA to consider a statement made against a veteran's interest if other data establish the fact. The proposed rule would remove this conditional permission for VA to consider a signed statement made against the veteran's interest, which would make the rule simpler and easier to administer. VA could still consider the other data (that is, evidence) that establish the fact, rather than the statement made against the veteran's interest.

Section 5.243 Establishing Service Connection

Proposed § 5.243 would state the general requirements for establishing service connection. It would be based on concepts in statutes, such as 38 U.S.C. 101(16), 1110, and 1131, and current § 3.303, as interpreted and applied by the U.S. Court of Appeals for Veterans Claims (CAVC) and the Federal Circuit. It would not state the requirements for establishing secondary service connection, which are addressed in proposed §§ 5.246 and 5.247.

Proposed § 5.243(a) would identify the three basic requirements for establishing service connection of a disability: Current disability, incurrence or aggravation of an injury or disease in service, and a causal link between the two. These principles, long embedded in veterans' disability law, have been formally in use as a specific three-part test since 1995 when the CAVC articulated them in its decision in *Caluza v. Brown*, 7 Vet. App. 498, 505 (1995). See *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004) (affirming that the CAVC "has correctly noted that in order to establish service connection or service-connected

aggravation for a present disability the veteran must show: (1) The existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service” (citing *Caluza*). Stating these principles, which reflect current law, would provide clear guidance as to the requirements for establishing service connection.

Proposed § 5.243(a) would not in any way restore the well-grounded-claim requirement eliminated by section 4 of the Veterans Claims Assistance Act of 2000, Public Law 106–475, 114 Stat. 2098. That requirement, based on 38 U.S.C. 5107 as it existed prior to passage of Public Law 106–475, set a well-grounded-claim threshold that had to be met before VA was obligated to provide assistance to VA claimants in developing evidence to support their claims. See generally, *Gilbert v. Derwinski*, 1 Vet. App. 49, 55 (1991). The three *Caluza* requirements are foundational principles that stand apart from the now-eliminated well-grounded-claim requirement. The courts still recognize the three-part test as a means of establishing service connection. See *Shedden*, 381 F.3d at 1166–67 (noting that there are three elements that must be satisfied in order for an appellant to establish service connection: A present disability; in-service incurrence or aggravation of a disease or injury; and a causal relationship between the two). The proposed regulation would simply incorporate current law and practice in a straightforward manner by using currently accepted and understood terminology.

Proposed paragraph (a) would include two notes. Note 1 would make clear that service records alone may be sufficient to meet all of the requirements listed in § 5.243(a) when those records clearly show that an injury or disease incurred or aggravated in service produced disability that is permanent by its very nature. For example, VA would never require a veteran who had suffered an amputation of a limb during service to produce current evidence that the amputation currently exists or that it is causally related to the in-service amputation.

Note 2 would make clear that VA recognizes that certain chronic diseases and chronic residuals of injury can have temporary remissions. It would provide that VA will not deny service connection for lack of a current disability solely because a chronic disease, or a chronic residual of an injury, enters temporary remission. The

note would give examples of the types of chronic diseases and chronic residuals of injury subject to temporary remission.

Proposed § 5.243(b) would be based on the second sentence of current § 3.303(a) and on part of current § 3.303(d). The second sentence of § 3.303(a) provides that a veteran can establish that an injury or disease resulting in disability was incurred or aggravated in active military service “by affirmatively showing inception or aggravation during service or through the application of statutory presumptions.” Section 5.243(b) would restate the substance of the second sentence of § 3.303(a) as it relates to the second element of proof of service connection listed in proposed § 5.243(a). We would use the term “evidence” rather than “affirmatively showing,” because a fact can only be affirmatively shown with evidence.

Current § 3.303(d) states that “[s]ervice connection may be granted for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disease was incurred in service.” We have rewritten this in proposed § 5.243(b) to state that “[p]roof of incurrence of a disease during active military service does not require diagnosis during service if the evidence otherwise establishes that the disease was incurred in service.” The rewritten language maintains the current regulation’s caution to VA employees that an initial diagnosis after discharge from service does not preclude service connection. This would not be a substantive change.

The phrase “all the evidence, including that pertinent to service” in current § 3.303(d) is redundant of the existing language in § 3.303(a), which provides that “[d]eterminations as to service connection will be based on review of *the entire evidence of record*” (emphasis added). It is a statutory requirement and fundamental to VA adjudications (except claims of clear and unmistakable error) that VA considers “all information and lay and medical evidence of record in a case”. 38 U.S.C. 5107(b). Proposed § 5.242(a) explicitly applies this principle to service connection claims. In *Cosman v. Principi*, 3 Vet. App. 503, 506 (1992), the CAVC concluded that the “all the evidence” language in § 3.303(d) does not mean that only positive evidence must be of record to support a finding that a disease was incurred in service when there is a post-service diagnosis, but rather means only that “all the evidence be considered and that the equipoise rule of 38 U.S.C. § 5107(b)

applies to questions of service connection under [§] 3.303(d).” *Id.* Because the phrase “all the evidence, including that pertinent to service” in current § 3.303(d) provides no unique rule, we propose not to repeat it in § 5.243(b).

Proposed § 5.243(c)(1) would restate the first sentence of current § 3.303(b). This sentence states that VA will grant service connection for a current disability if competent evidence establishes that the veteran had a chronic disease in service, or within an applicable presumptive period, and that the current disability is the result of the same chronic disease, unless the veteran’s current disability is clearly due to an intercurrent cause. VA’s long-standing practice is to apply the principles of chronicity and continuity to residuals of injury. This practice provides a fair and efficient means to determine service connection in certain cases, and it is logical to apply these principles to injuries as well as to diseases. Therefore, proposed § 5.243(c)(1) would also apply to an injury incurred or aggravated in service where the current disability is due to “the chronic residuals of the same injury.”

The third and second sentences of current § 3.303(b) would be restated as a Note to § 5.243(c)(2) with minor, nonsubstantive changes.

Proposed § 5.243(d), based on portions of current § 3.303(b), would provide rules for establishing service connection based on the continuity of signs or symptoms. That is, if the chronicity provisions do not apply, VA will grant service connection if there is competent evidence of signs or symptoms of an injury or disease during service or the presumptive period, of continuing signs or symptoms, and of a relationship between the signs or symptoms demonstrated over the years and the veteran’s current disability. See *Savage v. Gober*, 10 Vet. App. 488, 498 (1997).

Current part 3 refers only to “symptoms”. We would add “signs” because the contemporary view of the medical profession distinguishes between signs and symptoms. A sign is “any objective evidence of a disease, i.e., such evidence as is perceptible to the examining physician, as opposed to the subjective sensations (symptoms) of the patient.” *Dorland’s Illustrated Medical Dictionary* 1733 (31st ed. 2007). A symptom is “any subjective evidence of disease or of a patient’s condition, i.e., such evidence as perceived by the patient.” *Id.* at 1843. Subjective and objective evidence are equally relevant to establishing continuity of

symptomatology, and the inclusion of more specific terminology does not represent a departure from current VA practice.

Section 5.244 Presumption of Sound Condition

Proposed § 5.244 would assemble in one regulation the statutory and regulatory principles concerning the presumption of sound condition at entry into military service. For purposes of basic entitlement to wartime disability compensation, 38 U.S.C. 1111, "Presumption of sound condition", states that "every veteran [who served during a period of war] shall be taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment, or where clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment and was not aggravated by such service." Section 1137 of title 38, U.S.C., "Wartime presumptions for certain veterans", extends this presumption to all veterans who served after December 31, 1946, including veterans who served during peacetime.

In part 5, we would not repeat current § 3.305, which implements the presumption of sound condition for veterans of entirely peacetime service before World War II. See 38 U.S.C. 1132, "Presumption of sound condition". The presumption under section 1132 applies only to a very small and decreasing population of veterans. If a veteran of pre-World War II peacetime service initiates a claim for service connection after part 5 goes into effect, we would apply section 1132 without a specific implementing regulation. All generally applicable rules in part 5 for developing and evaluating evidence and rebutting presumptions would apply to claims from pre-World War II peacetime veterans. Neither section 1132 nor 38 CFR 3.305 imposes an extraordinary burden on VA to rebut the presumption (compared to the statute and the current regulation applying the presumption of sound condition to veterans who served during or after World War II). See 38 U.S.C. 1111; 38 CFR 3.304(b). A claimant would have the same assistance in developing a claim and the same protection against rebuttal of the presumption that he or she would have if we included a part 5 counterpart to § 3.305.

Proposed paragraph (a) would define the presumption of sound condition generally. Current § 3.304(b) states that "[t]he veteran will be considered to have

been in sound condition when examined, accepted and enrolled for service". We would describe the time as of which VA presumes a veteran was sound with the phrase "upon entry into active military service", rather than with the phrase "when examined, accepted and enrolled for service". This proposed phrase would be plain language with the same meaning as "when examined, accepted and enrolled for service." In addition to its simplicity, the proposed phrase should prevent readers from mischaracterizing the examination as at the time of entry. Examinations for entry could have been some time prior to entry (as with entry through a deferred enlistment program), rather than contemporaneous with entry.

Proposed paragraph (a) would state the limitations on the presumption more simply, and more consistently with the overall scheme of service connection, compared to the statute and current regulation. Where 38 U.S.C. 1111 provides that a veteran is presumed to have been in sound condition "except as to defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment", see also current § 3.304(b), we would state that the veteran is presumed to have been sound "except [for injury or disease] as noted in the report of a medical examination conducted for entry into active military service." Precluding a presumption of sound condition for injury or disease noted in the entry examination report is consistent with 38 U.S.C. 1110 and 1131, which authorize VA to pay disability compensation for "disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military * * * service". The proposed language would make it easier to understand how the presumption functions in the scheme of VA disability compensation than the part 3 language. Additionally, the change from "defects, infirmities, or disorders" to "injury or disease" affords consistency of terms among proposed § 5.241, defining service-connected disability; proposed § 5.244, governing the presumption of sound condition; and proposed § 5.245, governing the presumption of aggravation. The language was chosen for consistency. VA does not intend it to expand or limit the scope of section 1111.

Proposed § 5.244(b) would follow long-standing VA practice and clarify that the presumption of sound condition attaches even if the military service department did not conduct an entry medical examination or if there is no

record of an entry examination. To relate this rule to the authorizing statute, if there was no entry medical examination, then there could be no "defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment" that would serve to prevent the presumption from arising. See 38 U.S.C. 1111. The same reasoning would apply if there were no record of an entry examination. It is fair and reasonable to apply the presumption of sound condition the same way to a veteran whose record of examination is missing as to a veteran whose service records show no examination was done in connection with entry.

Proposed § 5.244(c)(1) would be derived from current § 3.304(b)(1), which provides in part that "[h]istory of preservice existence of conditions recorded at the time of examination does not constitute a notation of such conditions but will be considered together with all other material evidence in determinations as to inception."

Proposed § 5.244(c)(2) would be new. It would clarify that the presumption of sound condition is rebuttable even if an entrance physical examination report shows that the examiner tested for and did not find the condition in question, provided that other evidence of record is sufficient to overcome the presumption. See *Kent v. Principi*, 389 F.3d 1380, 1383 (Fed. Cir. 2004).

Proposed paragraph (d) would state the statutory burden of proof for rebutting the presumption of sound condition. VA bears this burden. The paragraph would provide the standards VA must apply to determine whether the evidence meets this burden. The paragraph would be consistent with current § 3.304(b). Proposed paragraph (d)(1) would require, in the case of veterans with any wartime service and of veterans with peacetime service after December 31, 1946, clear and unmistakable evidence that the injury or disease both preexisted service and was not aggravated by service to rebut the presumption of sound condition at the time of entry into military service.

Paragraph (d)(2) would refer the reader to proposed § 5.245, "Service connection based on aggravation of preservice injury or disease", for the substance of the rules governing whether service aggravated a preexisting injury or disease. Proposed § 5.245 would implement the statutory presumption of aggravation. 38 U.S.C. 1153.

The Federal Circuit suggested that VA could meet the "not aggravated by [active military] service" element of rebuttal for the presumption of sound

condition under 38 U.S.C. 1111 with a standard similar to that contained in 38 U.S.C. 1153. *Wagner v. Principi*, 370 F.3d 1089, 1096 (Fed. Cir. 2004) (noting that “[t]he government may show a lack of aggravation by establishing that there was no increase in disability during service or that any ‘increase in disability [was] due to the natural progress of the’ preexisting condition” (quoting 38 U.S.C. 1153)).

We adopt this suggestion as it applies to veterans with any wartime service and of veterans with peacetime service after December 31, 1946. It is rational to treat aggravation consistently in the context of the presumption of sound condition and in the context of the presumption of aggravation. The significant difference is that in the context of the presumption of sound condition, VA must determine whether there was aggravation if the disability claimed for service connection was not noted on examination for entry. In the presumption of aggravation, VA must determine whether there was aggravation of the disability claimed for service connection if the injury or disease resulting in the disability was noted on examination for entry. The criteria for finding that active military service did not aggravate a preexisting injury or disease are the same for purposes of both rebutting the presumption of sound condition and rebutting the presumption of aggravation. We would state the criteria in detail in proposed § 5.245, which would govern the presumption of aggravation. The discussion of proposed § 5.245, below, provides additional information about these factors.

Current § 3.304(b)(1) and (b)(2) includes complex provisions concerning the factors VA considers in determining whether the presumption of sound condition has been rebutted. Among other things, these provisions include standards that could be construed as requiring VA employees adjudicating claims to use medical judgment. Among these are provisions for assessment of “accepted medical principles,” “clinical factors,” the “clinical course,” and the like. The sentences containing the quoted language advise claim adjudicators to consider certain aspects of the evidence. However, it is now clear that VA employees may not exercise their own medical judgment in adjudicating disability compensation claims. *See Gambill v. Shinseki*, 576 F.3d 1307, 1329 (Fed. Cir. 2009) (noting that “rating specialists are not permitted to make their own medical judgments”); *Colvin v. Derwinski*, 1 Vet. App. 171, 172 (Vet. App. 1991) (holding that, in making decisions, VA must consider

only “medical evidence to support [its] findings rather than provide [its] own medical judgment.”), *overruled in part on other grounds, Hodge v. West*, 155 F.3d 1356, 1360 (Fed. Cir. 1998). Moreover, VA’s duty to assist claimants with their claims includes providing a medical examination or obtaining a medical opinion based upon a review of the evidence of record if VA determines it is necessary to decide the claim. 38 U.S.C. 5103A(d); 38 CFR 3.159(c)(4). Therefore, we propose to omit provisions that might be misconstrued as requiring VA personnel adjudicating claims to exercise their own medical judgment or allowing VA to solicit a VA medical opinion when it is not necessary to decide the claim.

As mentioned above in discussing § 5.242(b), the proposed rewrite of the regulation implementing the presumption of soundness would not repeat current § 3.304(b)(3).

Section 5.245 Service Connection Based on Aggravation of Preservice Injury or Disease

Proposed § 5.245 would be derived from current § 3.306, “Aggravation of preservice disability”. Current § 3.306(a) provides for the presumption of aggravation “where there is an increase in disability during [active military, naval, or air] service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease”, as does 38 U.S.C. 1153. Current § 3.306(b) then provides the standard of proof for rebutting the presumption by finding that the increase in severity of a preexisting disease was due to the natural progress of the disease, for veterans of wartime service or of peacetime service after December 21, 1946.

We propose not to repeat in part 5 the current § 3.306(c) provisions for applying the presumption of aggravation to veterans of entirely peacetime service prior to World War II for the same reasons we propose not to repeat the presumption of sound condition as it applies to this population of veterans.

In proposed § 5.245(a), based on current § 3.306(a), we would replace the phrase “active military, naval, or air service” with “active military service”. “Active military service” is defined in proposed § 5.1 as having the same meaning as “active military, naval, or air service”. *See* 71 FR at 16473. We make this change throughout part 5.

We would restate the presumption in the active voice to provide that “VA will presume that active military service aggravated a preexisting injury or disease if there was an increase in disability resulting from the injury or

disease during service (or during any applicable presumptive period).” In addition to improving clarity, this restatement would put the focus of the regulation on the severity of disability, consistent with 38 U.S.C. 1153 and the basic scheme of VA disability compensation as being for disability. 38 U.S.C. 1110, 1131. Section 1153 of title 38, United States Code, provides that “[a] preexisting injury or disease will be considered to have been aggravated by active military * * * service, where there is an increase in *disability* during such service * * *” (emphasis added). Current § 3.306(b), which explains how to implement the presumption of aggravation, states that “[a]ggravation may not be conceded where the disability underwent no increase in severity”.

Proposed § 5.245(a) would state the presumption and when the presumption applies. Paragraph (b) would prescribe how to determine whether the evidence in a claim triggers the presumption. Paragraph (c) would prescribe the standard of proof and factors VA must consider to rebut the presumption.

To clarify when to apply the presumption of aggravation and when to apply the presumption of sound condition, proposed paragraph (a) would state that the presumption under § 5.245 applies only “[w]hen an injury or disease was noted in the report of examination for entry into active military service.” This is so because, if an injury or disease was not noted in the report of examination for entry, the veteran would be presumed sound on entry as to that injury or disease and the injury or disease would not have preexisted active military service.

The presumption of sound condition (proposed § 5.244(a)) would apply, unless it is rebutted. To rebut the presumption of sound condition as to any injury or disease, VA would have to determine by clear and unmistakable evidence that the injury or disease both preexisted service and was not aggravated by service. Thus, if VA determines that the presumption of sound condition has been rebutted as to an injury or disease, VA will necessarily have found by clear and unmistakable evidence that service did not aggravate the injury or disease, and the presumption of aggravation would not apply. Further, if service connection is granted based on application of the presumption of soundness in proposed § 5.244, the disability rating principles in 38 CFR 4.22, “Rating of disabilities aggravated by active service”, would not apply. *See Wagner*, 370 F.3d at 1096 (“However, if the government fails to rebut the presumption of soundness

under section 1111, the veteran's claim is one for service connection. This means that no deduction for the degree of disability existing at the time of entrance will be made if a rating is awarded.”).

Proposed § 5.245(b)(1) through (b)(3) would provide points to consider in determining whether disability increased during service (or during any applicable presumptive period). Current § 3.306(b) provides that “[a]ggravation may not be conceded where the disability underwent no increase in severity during service”. The Federal Circuit has held that a disability is not presumed aggravated by service when there was no increase in the severity of disability during service. *See, e.g., Davis v. Principi*, 276 F.3d 1341, 1345 (Fed. Cir. 2002) (citation omitted).

Proposed § 5.245(b)(3) would restate current § 3.306(b)(1). Proposed paragraphs (b)(1) and (b)(2) would be new. Paragraph (b)(1) would provide an explicit meaning for “increase in disability” as the term is used in 38 U.S.C. 1153. Paragraph (b)(2) would provide that a temporary flare-up of a preexisting injury or disease is not an “increase in disability”. These paragraphs would be consistent with long-standing VA practice and judicial precedents holding that temporary flare-ups of symptoms are not “increase in disability” as the phrase is meant in section 1153. *Davis*, 276 F.3d at 1346 (citing *Maxson v. West*, 12 Vet. App. 453, 459 (1999); *Verdon v. Brown*, 8 Vet. App. 529, 537 (1996); *Hunt v. Derwinski*, 1 Vet. App. 292, 296 (1991)).

Hunt established that temporary flare-ups of symptoms of a preexisting injury or disease in service are not an “increase in disability”. 1 Vet. App. at 297. The Federal Circuit has stated that “[a] corollary to the Secretary's usage [of ‘disability’] is that an increase in disability must consist of worsening of the enduring disability and not merely a temporary flare-up of symptoms associated with the condition causing the disability.” *Davis*, 276 F.3d at 1344. In *Maxson*, 12 Vet. App. at 460, the CAVC held that the presumption of aggravation is applicable “only after it has been demonstrated * * * that a permanent increase in disability has occurred or, pursuant to section 3.306(b)(2), has been deemed to have occurred.” (We discuss below the part 5 counterpart of current § 3.306(b)(2), proposed paragraph (b)(4).) Codifying in part 5 judicial precedents that prescribe the meaning of “increase in disability” would help VA apply the presumption of aggravation consistently. The rules in proposed paragraphs (b)(1) and (b)(2) would codify these precedents.

Proposed § 5.245(b)(2) would provide for an exception “as provided in paragraph (b)(4)”. Proposed paragraph (b)(4) would provide a liberalized standard for the presumption of aggravation for combat veterans and former prisoners of war (POWs), which would be consistent with current § 3.306(b)(2) and 38 U.S.C. 1154(b). The Federal Circuit has recognized that section 1154(b) affords combat veterans and former POWs different treatment and held that “evidence of temporary flare-ups symptomatic of an underlying preexisting [injury or disease], alone, is not sufficient for a non-combat veteran to show increased disability under [38 U.S.C. 1153] unless the underlying condition is worsened.” *Davis*, 276 F.3d at 1346–47. Because a combat veteran or former POW is unlikely to have contemporaneous medical records of a development of signs or symptoms of a preexisting injury or disease, it would be difficult for a combat veteran or former POW to prove that a development of signs or symptoms of a preexisting injury or disease was of a permanent nature rather than just a temporary flare-up.

Proposed § 5.245(b)(4) would be derived from the sentence of current § 3.306(b)(2) about establishing aggravation with evidence of “symptomatic manifestations of a preexisting disease or injury during or proximately following action with the enemy or following a status as a prisoner of war”. We would use “signs or symptoms” rather than “symptomatic manifestations”. As noted in our discussion of proposed § 5.243 above, the term “signs or symptoms” would be consistent with contemporary medical usage. *See Dorland's Illustrated Medical Dictionary* at 1733 (defining “sign” in contrast to “symptom”); *see also* 38 CFR 3.317 (using “signs or symptoms” and defining “signs”). We would use the term “signs or symptoms” throughout part 5. We would also use “combat” rather than “action with the enemy” because they mean the same thing and 38 U.S.C. 1154(b) uses “combat”. It would be appropriate to include this provision among factors for determining the severity of a disability increased in service because it would afford veterans of combat or of former prisoner-of-war status a specific evidentiary rule for finding aggravation of a preexisting injury or disease in exception to the temporary flare-up provision of proposed paragraph (b)(2).

Proposed § 5.245(c), based on current § 3.306(b), would address rebuttal of the presumption of aggravation. Section 1153 provides that “[a] preexisting injury or disease will be considered to

have been aggravated by active military, naval, or air service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease.” The statute does not specify whether a specific finding regarding natural progress prevents the application of the presumption of aggravation or rebuts the presumption. VA's long-standing interpretation of § 1153 is that such a finding rebuts the presumption. 26 FR 1561, 1581 (Feb. 24, 1961). The statute is also silent about natural progress of injuries. Consistent with section 1153, the rebuttal under proposed § 5.245(c) would apply to specific findings of natural progress to diseases, not to injuries.

The statute does not define “natural progress”. 38 U.S.C. 1153. The only regulatory definition of “natural progress” is in current § 3.306(c), “Peacetime service prior to December 7, 1941”. Though the standard of proof to rebut the presumption is more stringent for wartime veterans or veterans who served after World War II than it is for pre-World War II peacetime veterans, VA does not construe “natural progress” to be something different between these groups of veterans. Therefore, the definition of “natural progress” in § 5.245(c) would be derived from § 3.306(c), which defines natural progress as “the increase in severity * * * normally to be expected by reason of the inherent character of the condition” (emphasis added). This is a wordy way to say the increase in severity was normal for the condition, with “normal” meaning “conforming, adhering to, or constituting a typical or usual standard, pattern, level, or type.” *Webster's II New College Dictionary* 746 (Houghton Mifflin 2001 ed.). We intend no change in the meaning of “natural progress”. The restatement in proposed § 5.245(c) is not substantive.

Part 5 would not repeat current § 3.322. Section 3.322(a) addresses how to rate a disability that is service connected as aggravated in service. It is materially the same as, and redundant of, 38 CFR 4.22, which is in VA's Schedule for Rating Disabilities in part 4 of this chapter. In the flow of processing claims for VA disability compensation, VA must grant service connection before it determines a rate of disability compensation. VA cannot apply the rule in current § 3.322(a) until reaching the rating phase of a claim. Rules about how to determine a rate of disability compensation are more germane to part 4 than to part 5. There is no benefit to veterans to state the rule in two places, and it simplifies the rules

for obtaining service connection to omit a counterpart to § 3.322(a) from part 5.

Current § 3.322(b) provides that, if an injury or disease incurred in peacetime service is aggravated during wartime service, or conversely, if an injury or disease incurred in wartime service is aggravated during peacetime service, the entire disability that results from the injury or disease will be service connected based on wartime service. Because there is no longer a distinction between wartime and peacetime rates of disability compensation, there is no current need to explain how to treat conditions incurred in wartime or peacetime service that are aggravated during peacetime or wartime service, respectively. The only situation in which payment of wartime versus peacetime disability compensation could arise presently would be in retroactive awards based on clear and unmistakable error. However, in such cases, VA must apply the version of § 3.322 in effect at the time the erroneous decision was rendered, not the current version of that section. Since § 3.322(b) no longer serves a useful purpose, we have not included similar material in part 5.

Section 5.246 Secondary Service Connection—Disability That Is Proximately Caused by Service-Connected Disability

Proposed § 5.246 would be based on current § 3.310(a). To be consistent throughout part 5, proposed § 5.246 would contain a few nonsubstantive differences from current § 3.310(a), including its use of the phrase “proximately caused by” rather than “proximately due to”.

In addition, proposed § 5.246 would refer to a service-connected “disability” rather than to a service-connected “disease or injury” as used in current § 3.310(a). This would not be a substantive change but, rather, would be the use of clear and consistent terminology. In part 3, we often refer to a “service-connected disease or injury” where, to be technically correct, we intend to refer to the disability for which VA actually grants service connection. As explained in this and other NPRMs, VA does not service connect an event that occurred during service; rather, VA service connects a current disability associated with such an event. We hope that using terminology that is more precise will eliminate any confusion on this point.

We propose not to repeat the second sentence of current § 3.310(a), which states that “[w]hen service connection is thus established for a secondary condition, the secondary condition shall

be considered a part of the original condition.” Regarding this sentence, the CAVC stated that, “[b]ased on the regulatory history, [the court] finds that the plain meaning of the regulation is and has always been to require VA to afford secondarily service-connected conditions the same treatment (no more or less favorable treatment) as the underlying service-connected conditions for all determinations.” *Roper v. Nicholson*, 20 Vet. App. 173, 181 (2006); *accord Ellington v. Peake*, 541 F.3d 1364, 1370 (Fed. Cir. 2008) (approving CAVC’s *Roper* decision construing § 3.310(a)). There is no statute or regulation pertaining to secondary service connection that inhibits a veteran’s rights, diminishes a veteran’s benefits, or reduces VA’s duties to a veteran as they relate to a secondarily service-connected disability. Consequently, the second sentence of § 3.310(a) conveys no benefit to the veteran who obtains secondary service connection for a disability. Its omission would infringe no rights. Rather, its omission would clarify that an award of secondary service connection would have its own disability rating and effective date separate from the underlying service-connected condition. Omitting the sentence would also simplify the secondary-service-connection regulation, consistent with that purpose of part 5.

Section 5.247 Secondary Service Connection—Nonservice-Connected Disability Aggravated by Service-Connected Disability

Proposed § 5.247 would be derived from current § 3.310(b). It would restate the current rule in plain language. We intend no change in meaning. For the reasons discussed above in relation to proposed § 5.246, proposed § 5.247 would use the phrase “proximately caused” rather than “proximately due to”, and it would refer to a nonservice-connected or service-connected “disability” rather than to a nonservice-connected or service-connected “disease or injury”.

Section 5.248 Service Connection for Cardiovascular Disease Secondary to Service-Connected Lower Extremity Amputation

The rule concerning awards of secondary service connection for cardiovascular disease is currently stated in § 3.310(c). We propose to state this rule as a separate regulation in § 5.248 because it is a discrete rule of secondary service connection that effectively establishes an irrebuttable

presumption of service connection. We intend no substantive change.

Section 5.249 Special Service Connection Rules for Combat-Related Injury or Disease

Proposed § 5.249 would provide special service connection rules for veterans who served in combat. It would implement 38 U.S.C. 1154(b) and is based on current §§ 3.102 (last sentence), 3.304(d), and 3.305(c). The proposed rule would specifically clarify that VA will accept a combat veteran’s description of an event, disease, or injury in service as sufficient to establish that an injury or disease was incurred or aggravated in service.

We would explicitly state that the regulation applies only to determinations of incurrence or aggravation of an injury or disease in service, whereas the current laws state that VA may accept lay evidence “as sufficient proof of service-connection.” 38 U.S.C. 1154(b); *see also* 38 CFR 3.304(d). Despite the language used in the current laws (that is, that lay evidence is “proof of service connection”), VA does not generally allow a combat veteran’s lay evidence of an in-service injury, by itself, to establish a current disability or a nexus between that injury and a current disability. This interpretation of the authorizing statute and the implementing regulations is consistent with judicial precedent. *See Collette v. Brown*, 82 F.3d 389, 392 (Fed. Cir. 1996) (holding that “[s]ection 1154(b) does not create a statutory presumption that a combat veteran’s alleged disease or injury is service-connected” but, rather, still requires a veteran to “meet his evidentiary burden with respect to service connection” while “considerably lighten[ing] the burden”). Also pursuant to section 1154(b), proposed § 5.249(a) would explicitly provide that the finding of incurrence or aggravation relating to combat with the enemy would be subject to rebuttal under a heightened “clear and convincing evidence” standard.

Proposed paragraph (a)(2) would be new. Paragraph (a)(2) would codify the definition of “engaged in combat with the enemy” in VAOPGCPREC 12–99. Where the General Counsel uses the term “instrumentality”, we would use the term “instrument or weapon”, which is more readily understood. Whether any particular set of circumstances constitutes engagement in combat with the enemy for the purposes of 38 U.S.C. 1154(b) must be resolved on a case-by-case basis. *See* VA General Counsel’s opinion, VAOPGCPREC 12–99, 65 FR 6257, 6258, Feb. 8, 2000 (discussing the

meaning of “engaged in combat with the enemy” as used in 38 U.S.C. 1154(b)). Based on the plain language of 38 U.S.C. 1154(b), the phrase “engaged in combat with the enemy” requires that the veteran have personally participated in events constituting an actual fight or encounter with a military foe or hostile unit or instrumentality. *Id.* We would add this clarification in proposed § 5.249(a)(2). We also propose to clarify that participation in such events includes performing certain noncombatant duties, such as providing medical care to the wounded.

Proposed § 5.249(b) would be a new provision. It would provide that, when a veteran has received one of the listed combat decorations, VA will not require additional evidence to verify that the veteran engaged in combat with the enemy, unless there is clear and convincing evidence to the contrary. Such decorations are reliable proof that a veteran engaged in combat. We realize that new types of combat decorations may be issued in the future and have provided for that contingency in proposed § 5.249(b)(17). We additionally propose to include the Combat Action Badge in § 5.249(b)(16). On February 11, 2005, the Army announced this new decoration, with the intent to provide special recognition to ground combat arms soldiers who are trained and employed in direct combat missions similar to Infantry and Special Forces.

Section 5.250 Service Connection for Posttraumatic Stress Disorder

Proposed § 5.250 would be dedicated entirely to the adjudication of claims for service connection for posttraumatic stress disorder (PTSD). This new regulation would contain the substance of current § 3.304(f) with some technical revision and additional content stating VA’s policy and procedures for adjudicating these claims.

Proposed § 5.250(a) would list the elements of proof of a PTSD claim, which are similar to the requirements to establish service connection for any other current disability and would be derived from current § 3.304(f). Paragraph (a)(1) would require evidence of a current disability. Paragraph (a)(2) would require a link between “current signs or symptoms” of PTSD and “an in-service stressor”. In PTSD cases, the in-service injury is always the “stressor” that caused the PTSD. We refer to “signs or symptoms” because the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1994) (DSM–IV) includes objective phenomena among the diagnostic criteria for PTSD, for

example, “physiological reactivity,” “hypervigilance,” and “exaggerated startle response.” *Id.* at diagnostic code 309.81 B(5), D(4) and (5). VA uses the diagnostic criteria of the DSM–IV to diagnose PTSD. *See* 38 CFR 4.125(a).

Proposed paragraph (a)(3) would require “credible supporting evidence that the claimed in-service stressor occurred.” Although this is an evidentiary requirement, we would state it as an element of a PTSD claim because it is often the central issue to the adjudication of such a claim, being the focus of most of the evidentiary development. Multiple judicial opinions have upheld the validity of the requirement. *See, e.g., Nat’l Org. of Veterans’ Advocates, Inc. v. Sec’y of Veterans Affairs*, 330 F.3d 1345, 1350–51 (Fed. Cir. 2003); *Moran v. Principi*, 17 Vet. App. 149, 155–59 (2003). Given the number of court decisions the “credible supporting evidence” requirement has engendered, we propose to identify the two salient features of such evidence: (1) It can be from any source other than the claimant’s statement; and (2) It must corroborate the occurrence of the alleged in-service stressor. *See Moran*, 17 Vet. App. at 159. The definition would make no substantive change in the regulation, but it would lend it certainty.

Proposed § 5.250(b) would be new. It would require, generally, that VA seek verification of a stressor before denying a claim solely on the ground that the stressor is not verified. The revision is designed to make it clear when VA must seek verification from the appropriate entity, such as the U.S. Army and Joint Services Records Research Center. Verification will not be possible when the claimant’s statements describing the claimed in-service stressor are too vague to enable the appropriate agency to try to corroborate the events described. Therefore, the proposed rule would not require VA to seek verification when the claimant fails to provide information requested by VA that is needed to try to verify the event(s) described in his or her statement.

Proposed § 5.250(c) would be derived from current § 3.304(f)(1). Proposed paragraph (d) would explicitly state that the presumptions at proposed § 5.249, “Special service connection rules for combat-related injury or disease”, would apply to establish an in-service stressor for combat veterans. The current rule, in § 3.304(f)(2), repeats the language of the evidentiary presumption applicable to combat veterans, where this rule would simply refer the reader to that presumption. The proposed rule would also reference former prisoners of war

because current § 3.304(f)(4) treats such veterans in the same manner as combat veterans for purposes of PTSD claims. Again, no substantive changes are intended.

Proposed § 5.250(e) is based on § 3.304(f)(3), which governs cases where a VA psychiatrist or psychologist has confirmed the stressor. The first sentence of paragraph (f)(3) is 103 words and the second is 100 words. We have reorganized these sentences by breaking them into subparagraphs, which will make this provision easier to read and apply.

Proposed paragraph (f) would be a plain-language rewrite of current § 3.304(f)(5) with no substantive differences.

Section 5.251 Current Disabilities for Which VA Cannot Grant Service Connection

Proposed § 5.251 would list disabilities for which VA cannot grant service connection and distinguish them from similarly named disabilities for which VA can grant service connection. Current § 3.303(c) identifies certain disabilities that “are not diseases or injuries within the meaning of applicable legislation.” We would restate the rule in proposed § 5.251(a) by identifying specific disabilities for which “VA will not grant service connection * * * because they are not the result of an injury or disease for purposes of service connection”. By using the “not the result of” language, the proposed rule would recognize that the listed conditions are indeed disabilities, but clarify that they are not caused by an injury or disease. Also, in paragraph (a) we would omit the phrase “within the meaning of applicable legislation” because the “applicable legislation”, 38 U.S.C. 1110 and 1131, is cited as the statutory authority for § 5.251.

In addition, proposed § 5.251 would update some of the terms used to identify the listed disabilities. In proposed paragraphs (a)(1) and (a)(2), we would refer to “[c]ongenital or developmental defects (such as congenital or developmental refractive error of the eye)” and to “[d]evelopmental personality disorders”, rather than to “refractive error of the eye” and to “personality disorders”, respectively, as stated in current § 3.303(c). These changes would distinguish disorders that do not result from injury or disease, like myopia or personality disorder, from similarly named disorders for which VA permits service connection, such as “malignant or pernicious myopia” or “personality

change due to general medical condition”, both discussed below.

Personality disorders have onset by adolescence or early adulthood. DSM-IV at 629. Although technically redundant, paragraph (a)(2) uses the term “developmental personality disorder” to distinguish clearly between “personality disorder” and “personality change”. This clarification is necessary because in paragraph (b)(2), we would state that VA is not precluded from granting service connection for the disability of “[p]ersonality change” if it is the result of an organic mental disorder, *see* 38 CFR 4.130 Diagnostic Code 9327, or is an interseizure manifestation of psychomotor epilepsy, *see* 38 CFR 4.122(b), 4.124a Diagnostic Code 8914. Section 5.251(a)(2) and (b)(2) would help ensure that personality changes due to general medical conditions are given appropriate consideration, in light of the above rating-schedule provisions.

In proposed paragraph (a)(3), we would refer to “[d]evelopmental intellectual disability (mental retardation)” rather than to “mental deficiency”, as stated in current § 3.303(c). The term “intellectual disability” would represent current medical terminology. “Mental deficiency” is an archaic term, replaced decades ago by “mental retardation”, and more recent medical usage has replaced the term “mental retardation” with “intellectual disability.” *See* Robert L. Schalock, et al., *The Renaming of Mental Retardation: Understanding the Change to the Term Intellectual Disability*, Intellectual and Developmental Disabilities, April 2007, at 116–124. VA would use the term “developmental intellectual disability” to distinguish the intellectual disability formerly called mental retardation from impairment of intellect resulting from injury or disease incurred during active service.

In proposed paragraph (b), we would set forth several disabilities that are distinguishable from the disabilities listed in the rule in paragraph (a). Paragraph (b) would list those disabilities for which VA can grant service connection because, although the disabilities manifest like those precluded in paragraph (a), they are scientifically distinguishable and actually result from an injury or disease. VA currently distinguishes these two categories of disabilities based on long-standing internal VA guidance, which is implicit in current § 3.303(c) and may be discerned from multiple sections of the VA Schedule for Rating Disabilities in part 4 of this chapter. It would be advantageous to claimants and to VA

employees to state these rules explicitly. Thus, this would not be a substantive change in VA practice, even if proposed paragraph (b) would be the first explicit regulatory discussion of these disabilities.

Proposed paragraph (b)(1) would list “[m]alignant or pernicious myopia” as a disability for which VA will grant service connection because malignant or pernicious myopia is associated with a disease, while other types of myopia are congenital or developmental refractive errors of the eye. *Compare* “myopia” with “malignant m., pernicious m.” *Dorland’s Illustrated Med. Dictionary*, at 1243.

In proposed paragraph (b)(2), we would use the term “personality change” to identify the personality altering effects of an injury or disease that VA can service connect. This paragraph would distinguish personality change from “developmental personality disorder”, which VA cannot service connect. The VA Schedule for Rating Disabilities in part 4 of this chapter (Schedule for Rating Disabilities) identifies personality changes by several different names. *See* § 4.122(b) of this chapter (referring to interseizure manifestation of psychomotor epilepsy); § 4.124a of this chapter, Diagnostic Code 8045 (neurobehavioral effects of traumatic brain injury not otherwise classified); § 4.130 of this chapter, Diagnostic Code 9304 (dementia due to head trauma), Diagnostic Code 9326 (dementia due to other neurologic or general medical conditions or that are substance induced), and Diagnostic Code 9327 (organic mental disorder, including personality change due to a general medical condition).

Proposed paragraph (b)(3) would allow service connection of an “intellectual disability”, or “mental retardation” as referred to in part 4 of this chapter, that results from a service-connected disability. We would use the term “nondevelopmental intellectual disability” to distinguish it from “developmental intellectual disability”, or “mental retardation” as it is called in § 4.127, which may not be service connected. As with personality change due to general medical condition or injury, this rule would codify long-standing VA practice without implementing any substantive change. For example, the Schedule for Rating Disabilities allows compensation for disability resulting from mental retardation and personality disorder “as provided in § 3.310(a) of this chapter.” *See* 38 CFR 4.127. Section 3.310(a) provides for compensation for disability proximately due to or the result of

service-connected injury or disease (secondary service connection).

Despite using the terms “personality disorder” and “mental retardation”, § 4.127 allows VA to compensate those disabilities that proposed § 5.251(b)(2) and (3) would refer to as “personality change” and “nondevelopmental intellectual disability”, respectively. VA’s regulation for rating residuals of traumatic brain injury also demonstrates that VA service connects intellectual disability resulting from injury incurred in service. *See* § 4.124a of this chapter, Diagnostic Code 8045, “Residuals of traumatic brain injury”, which provides criteria for “[f]acets of cognitive impairment and other residuals of [traumatic brain injury] not otherwise classified”. Consistent with § 4.127 regarding secondary service connection for “mental retardation”, proposed § 5.251(b)(3) would allow service connection for “nondevelopmental intellectual disability” proximately caused by a service-connected disability. With the changes in terminology discussed above, we propose to explicitly identify in proposed § 5.251(b)(1) through (3) the disabilities that are distinguishable from those listed in current § 3.303(c). The listing of these distinguishable disabilities would not result in a substantive change to existing regulations.

Section 4.127 of this chapter permits service connection for a disability from a mental disorder superimposed on mental retardation or a personality disorder. In § 5.251(c) we would make clear that this concept applies to all disabilities, not only mental disorders. A veteran could incur a disability affecting the same body part or system as a defect listed in proposed § 5.251(a). Proposed § 5.251(c) would clarify that proposed § 5.251(a) does not preclude granting service connection for such a separate disability.

VA has long held that the rules in the last sentence of current § 3.303(c), upon which proposed § 5.251(a)(1) would be based, do not preclude granting service connection for disability due to an inherited disease. We propose to clarify, in § 5.251(d), that congenital or developmental defects are distinguishable from “inherited or familial diseases” and that § 5.251(a) does not bar service connection for disability due to an inherited or familial disease. For the text of proposed § 5.261(f), which is cross-referenced in proposed § 5.251(d), *see* 69 FR 44625 (July 27, 2004).

Proposed § 5.251(e) would be derived from current § 3.380, “Diseases of allergic etiology”, which essentially

advises the reader not to assume that diseases of allergic etiology are constitutional or developmental abnormalities. Section 3.380 also states:

Service connection must be determined on the evidence as to existence prior to enlistment and, if so existent, a comparative study must be made of its severity at enlistment and subsequently. Increase in the degree of disability during service may not be disposed of routinely as natural progress nor as due to the inherent nature of the disease. Seasonal and other acute allergic manifestations subsiding on the absence of or removal of the allergen are generally to be regarded as acute diseases, healing without residuals. The determination as to service incurrence or aggravation must be on the whole evidentiary showing.

These provisions are hortatory and provide no rights or duties beyond those already contained in other regulations. We note that 38 CFR 3.303(a) prescribes that VA must decide claims for service connection “based on review of the entire evidence of record”. Proposed § 5.4(b) would expand that rule to apply to all compensation and pension claims, stating that “VA decisions will be based on a review of the entire record”. Under that provision, VA must consider the entire record in determining whether an increase in severity is due to the natural progress of a disease; this principle applies to allergies just like any other disease. Thus, VA cannot assume that any increase in severity of a particular disease must be due to the natural progress of that disease. Therefore, we would not include the quoted portion of current § 3.380 in part 5.

Rating Service-Connected Disabilities

Section 5.280 General Rating Principles

Proposed § 5.280 would be based on current § 3.321(a), pertaining to use of the Schedule for Rating Disabilities in part 4 of this chapter, and current § 3.321(b)(1), (b)(3), and (c), pertaining to extra-schedular disability compensation ratings. The part 5 counterpart of current § 3.321(b)(2), pertaining to extra-schedular pension ratings, would be § 5.381(b)(5). See 72 FR at 54793 (Sep. 26, 2007).

We are not repeating the language in current § 3.321(a), or similar language in § 3.321(b)(1), that “[t]he provisions contained in the rating schedule will represent as far as can practicably be determined, the average impairment in earning capacity in civil occupations resulting from disability.” This language is redundant of similar language in current § 4.1 of this chapter and is beyond the scope of the topic of part 5. It represents a basic precept of the rating schedule appropriately stated in part 4.

It is not an actual instruction for extra-schedular rating. Omitting the statement from part 5 simplifies the part 5 regulation. As the language conveys no specific right to claimants, its omission cannot deprive a claimant of any right.

We also propose not to repeat the phrase in current § 3.321(b)(1) that “the Secretary shall from time to time readjust this schedule of ratings in accordance with experience.” This phrase quotes 38 U.S.C. 1155 verbatim. It imposes no duty on VA not stated completely in the statute. It conveys no right applicable to any specific claim. The statutory charge to the Secretary to readjust the rating schedule is not pertinent to instructions for extra-schedular rating. VA affords an extra-schedular rating to those for whom the schedule cannot provide an adequate rating for the reasons stated in the regulation, regardless of what the schedule provides at any given time. Omitting the phrase from part 5 is not a substantive change in the regulation on extraschedular ratings.

Proposed § 5.280 would update certain VA terminology consistent with current usage and with choices of terms used consistently throughout part 5. Where current § 3.321(b)(1) requires that a VA “field station” submit a claim for extra-schedular “evaluation”, proposed § 5.280(b) would require that a “Veterans Service Center (VSC)” submit a claim for extra-schedular “rating”. The terms “rate” and “rating” are used throughout part 5, rather than “evaluate”, “evaluating”, and “evaluation”, when referring to the process of applying the Schedule for Rating Disabilities in part 4 of this chapter to the facts of an individual claim for benefits. Where current § 3.321(c) provides that a field station may submit a claim to “[VA] Central Office” for an advisory opinion under certain circumstances, proposed § 5.280(c) would provide that a VSC may submit a claim to “the Director of the Compensation and Pension Service”, to reflect long-standing VA practice accurately. We intend no substantive change with these changes of terminology.

Additionally, we would not repeat current § 3.323(a). Paragraph (a)(1) is another instance of providing rating instructions in part 3 that do not afford specific rights to claimants or impose any duty on VA other than those contained in part 4. See § 4.25 of this chapter, “Combined ratings table”; § 4.26 of this chapter, “Bilateral factor.” Current § 3.323(a)(2) reads as follows:

(2) *Wartime and peacetime service.* Evaluation of wartime and peacetime service-

connected compensable disabilities will be combined to provide for the payment of wartime rates of compensation. (38 U.S.C. 1157) Effective July 1, 1973, it is immaterial whether the disabilities are wartime or peacetime service-connected since all disabilities are compensable under 38 U.S.C. 1114 and 1115 on and after that date.

This paragraph no longer serves a useful purpose. As it indicates, there has been no distinction between wartime and peacetime rates of disability compensation for many years. Any retroactive award involving those distinctions would be based on statutes and regulations in effect at the time.

Section 5.281 Multiple 0-Percent Service-Connected Disabilities

Proposed § 5.281 would be based on current § 3.324. We propose to change the term “noncompensable” in the section heading to “0 percent” for simplicity. “0 percent” would be more understandable for many regulation users. VA interprets current § 3.324 as requiring the relevant disabilities be permanent and the combined effect of the disabilities interfere with normal employability. The proposed regulation would state this clearly.

Section 5.282 Special Consideration for Paired Organs and Extremities

Proposed § 5.282 would be based on current § 3.383. The rule would provide for disability compensation for certain paired organs and extremities, where disability from one of the pair is service-connected and disability from the other is not. Consistent with current § 3.383, proposed § 5.282(a) would state that “VA will not pay compensation for the nonservice-connected disability if the veteran’s willful misconduct proximately caused it.” The term “proximately caused” would be equivalent to “the result of”. “Veteran’s” rather than “veteran’s own” would eliminate redundancy, as “veteran’s own” means the same thing as “veteran’s”. Though “own” might add emphasis, it would add no meaning.

Proposed § 5.282(b)(1) would provide that VA will pay compensation for the combination of service-connected and nonservice-connected “impairment of vision” of both eyes if “(i) The impairment of vision in each eye is rated at a visual acuity of 20/200 or less; or (ii) The peripheral field of vision for each eye is 20 degrees or less.”

Current § 3.383 refers to “loss or loss of use” of certain body parts. In § 5.282(b)(2) and (b)(4), we propose to use “anatomical loss or loss of use” of the named body part. The proposed usage would be like that in 38 U.S.C. 1114(k), which provides increased

compensation benefits for “anatomical loss or loss of use” of certain body parts. “Loss” means “anatomical loss” in the phrase “loss or loss of use” in current § 3.383. The proposed usage of the phrase “anatomical loss” would preclude misconstruing “loss” as some other type of loss that is neither anatomical loss nor loss of use.

Proposed § 5.282(c) would be based on rules in current § 3.383(b) requiring offset against VA disability compensation for money or property veterans recover in a judgment, settlement, or compromise of a cause of action concerning their qualifying nonservice-connected disability. We propose to omit current § 3.383(b)(2), which pertains to the October 28, 1986, effective date for the offset provisions. Any award that would be granted under proposed § 5.282 would require offset because the award would be made “on or after October 28, 1986.” Retaining the effective date of a statutory change occurring over 23 years ago would serve no useful purpose.

Section 5.283 Total and Permanent Total Ratings and Unemployability

Proposed § 5.283 would be based on current § 3.340, “Total and permanent total ratings and unemployability.” Proposed § 5.283 would expand several dense paragraphs of current § 3.340 into individually designated rules for clarity, would update certain obsolete terms, and would promote consistency of terms throughout part 5. None of the differences between current § 3.340 and proposed § 5.283 would be substantive.

Current § 3.340(a) prescribes the criteria for total disability and distinguishes it from permanent disability by stating that “[t]otal disability may or may not be permanent.” Proposed § 5.283(a)(1) would include this distinction by stating that “[f]or compensation purposes, a total disability rating may be granted without regard to whether the impairment is shown to be permanent.”

Proposed § 5.283(a)(2) would refer to §§ 4.16 and 4.17 of this chapter rather than to “paragraph 16, page 5 of the rating schedule” and to “paragraph 17, page 5 of the rating schedule”, respectively, as current § 3.340(a)(2) does. Current §§ 4.16 and 4.17 of this chapter are the counterparts of the references in current § 3.340(a)(2) to rules in the 1945 edition of the Schedule for Rating Disabilities. This change would update references to paragraphs of the 1945 edition of the Schedule for Rating Disabilities to the equivalent sections of the current Schedule for Rating Disabilities in part 4 of this chapter.

Proposed § 5.283(a)(3), based on current § 3.340(a)(3), would reformat the factors to consider in determining whether to rate a disability that has undergone some recent improvement as total based on its history. The proposed rule would state the factors in the same sequence as the current rule but would designate the factors individually for clarity.

Proposed § 5.283(b), based on current § 3.340(b), would reformat the factors VA must consider in determining whether a total disability is permanent. The proposed rule would state the factors in the same sequence as the current rule but would designate the factors individually for clarity.

Current § 3.340(b) provides that a total disability is permanent when it is reasonably certain that “such disability” will continue throughout the life of the disabled person. “Such disability” refers to the disability described in current § 3.340(a) as total, that is, “any impairment of mind or body which is sufficient to render it impossible for the average person to follow a substantially gainful occupation.” Proposed § 5.283(b) would restate the definition of total disability in place of “such”, so the user need not trace the regulation to find what is meant by “such” disability.

Proposed § 5.283(b)(1) would use the phrases “anatomical loss or loss of use” of certain body parts and “anatomical loss or loss of sight of both eyes” where current § 3.340(b) uses the phrase “loss or loss of use” of certain body parts or the sight of both eyes. As stated in our preamble discussion of § 5.282, the proposed usage would be like that in 38 U.S.C. 1114(k), which provides increased compensation benefits for “anatomical loss or loss of use” of certain body parts. “Loss” means “anatomical loss” in the phrase “loss or loss of use” in current § 3.340(b). The proposed usage of the phrase “anatomical loss” would preclude misconstruing “loss” as some other type of loss that is neither anatomical loss nor loss of use.

Proposed § 5.283(b)(1) and (3) would use the phrase “permanently so significantly disabled as to need regular aid and attendance” where current § 3.340(b) uses the phrase “permanently helpless”. We would replace the term “helpless” with the term “so significantly disabled as to need regular aid and attendance” to conform to the Veterans’ Housing Opportunity and Benefits Improvement Act of 2006 (Pub. L. 109–233), which amended certain sections of title 38, U.S.C., to replace the obsolete term “helpless” with the term “significantly disabled” (and similar terminology) when describing persons

who need regular aid and attendance. *See, e.g.*, 38 U.S.C. 1114(l), 1115(1)(E), and 1502(b). Additionally, where current § 3.340(b) refers to the state of being “permanently helpless or bedridden”, proposed § 5.283(b)(3) would refer to the state of being “permanently bedridden” apart from the state of being “permanently so significantly disabled as to need regular aid and attendance”. This would preclude any ambiguity about whether bedridden status must also be permanent to qualify as a criterion of a “permanent total disability”. The differences between proposed § 5.283(b)(1) and (3) and current § 3.340(b) would not be substantive.

Section 5.284 Total Disability Ratings for Disability Compensation Purposes

Proposed § 5.284 would be based on current § 3.341, “Total disability ratings for compensation purposes.” To eliminate redundancy with part 4, we would not repeat the second sentence of current § 3.341(a), which prohibits VA from considering the age of a veteran in determining whether the veteran is unemployable even though his or her schedular rating is less than 100 percent. That rule is sufficiently stated in § 4.19 of this chapter. The omission would not be substantive.

Proposed § 5.284(c) would omit the reference in current § 3.341(c) to “the period beginning after January 31, 1985” because any VA ratings pursuant to this proposed rule would take place after January 31, 1985. The omission would not be substantive.

Section 5.285 Continuance of Total Disability Ratings

Proposed § 5.285 would be based on paragraphs (a) and (c) of current § 3.343, “Continuance of total disability ratings.” (The part 5 counterpart to § 3.343(b), “Tuberculosis; compensation”, was published in another NPRM as proposed § 5.347. *See* 73 FR 62004 (Oct. 17, 2008)). The proposed rule would be more succinct than current § 3.343, for example, by changing the phrase “temporary interruptions in employment which are of short duration” in current § 3.343(c) to “brief interruptions in employment” in proposed § 5.285(b)(4).

Proposed § 5.285 would reorganize current § 3.343. It would first state the rule that “VA will not reduce a total disability rating that was based on the severity of a person’s disability or disabilities without examination showing material improvement in physical or mental condition.” Proposed § 5.285(a) would clarify in a separate sentence that “VA may reduce a total

disability rating that was based on the severity of a person's disability or disabilities without examination if the rating was based on clear error." This rule would constrain VA from reducing total disability ratings based on the severity of a person's disability or disabilities unless VA examines the totally disabled person and considers the listed factors. Paragraph (a)(1) would articulate the factors VA must consider before it can reduce a total rating. Paragraph (a)(2) would prescribe the circumstances that require VA to reexamine the person before it may reduce a total rating, and when the reexamination must occur. Paragraph (a)(3) would clarify that the rules contained in paragraph (a), (a)(1), and (a)(2) do not apply when a total rating is purely based on hospital, surgical, or home treatment or individual unemployability. This clarification is currently imbedded in the first sentence of current § 3.343(a).

Proposed § 5.285(b) would be based on current § 3.343(c), "Individual unemployability." Proposed paragraph (b) would reorganize the elements of § 3.343(c) without making any substantive changes. The proposed rule would not repeat the instruction in § 3.343(c)(1) to apply the procedural protections for reductions of disability ratings to the reduction of a total disability rating based on individual unemployability (TDIU). The procedural protections apply to all reductions of compensation, not just to TDIU reductions. Including the reference to procedural protections here could lead readers to believe incorrectly that those protections do not apply elsewhere. The paragraph would therefore begin with the substance of the rules governing the reduction of a TDIU rating. The contents of the proposed rule are the same as in § 3.343(c), but the constituent elements of the long paragraph in § 3.343(c) would be reformatted for clarity and to avoid ambiguity. Proposed paragraph (b)(1) would state VA's standard of proof for reducing a TDIU rating. Paragraph (b)(2) would prescribe specific types of evidence VA must receive to meet the standard of proof for reduction of a TDIU rating of a veteran in vocational rehabilitation, education, or training. Paragraph (b)(3) would provide that a veteran's participation in certain VA programs will be considered evidence of employability for purposes of reducing a TDIU rating. Paragraph (b)(4) would restate current § 3.343(c)(2) with the change for succinctness mentioned above. Paragraph (b)(4) would also omit the reference in current § 3.343(c) to "the period beginning after

January 1, 1985" because any VA ratings pursuant to this proposed rule would take place after January 1, 1985. The omission would not be substantive.

Additional Disability Compensation Based on a Dependent Parent

Parental dependency is significant in the context of VA disability compensation for veterans because VA pays a veteran additional compensation under certain circumstances if the veteran has a dependent parent. *See* 38 U.S.C. 1115, "Additional compensation for dependents"; 38 U.S.C. 1135, "Additional compensation for dependents"; and proposed § 5.240(b) included in this NPRM. Proposed §§ 5.300 and 5.302 through 5.304 would address parental dependency for purposes of disability compensation for veterans.

Section 5.300 Establishing Dependency of a Parent

VA is authorized by statute to pay additional compensation to a veteran with service-connected disability rated 30-percent or more disabling who has a parent who is dependent upon the veteran for support. 38 U.S.C. 1115(1)(D), (2). Proposed § 5.300 would describe how to establish the dependency of a parent. For consistency throughout part 5 and for simplicity in this rule, we would use the singular "parent" or "parent's" where current § 3.250 uses the plural. This would not be a substantive change.

Proposed paragraph (a) would be substantively equivalent to current § 3.250(a), which prescribes specific income requirements for a conclusive finding of the dependency of a parent. Proposed § 5.300(a)(1)(i) would clarify that the income threshold for a mother or father not living together would be the same for a remarried parent and parent's spouse not living together. This is implicit under current § 3.250(a) because, if a remarried parent and parent's spouse were not living together, the appropriate income limitation category would be the amount under current § 3.250(a)(1)(i) for "a mother or father not living together". Proposed § 5.300(a)(2) would clarify that net worth is not a consideration when a parent's income is at or below the prescribed levels in proposed paragraph (a)(1). This information is implicit in current § 3.250(a)(1) and (2), but it is not clearly stated.

When proposed paragraph (a) would not apply, VA must determine dependency on a case-by-case basis. Proposed § 5.300(b) would explain when VA must make a factual finding of dependency. Proposed paragraph

(b)(1) would provide the general rule for establishing factual dependency. Proposed paragraph (b)(2) would state the requirements for consideration of net worth when VA must establish factual dependency.

Proposed paragraph (b)(1)(ii) would restate current § 3.250(c). We removed the qualification of "habitual contributions" and made the rule simpler. Contributions from the veteran to a parent would be considered income under the rule governing income. *See* proposed § 5.302, "General income rules—parent's dependency". A single contribution to the parent, for example, of \$50,000, would be considered income. The regularity of the contribution would not be determinative. This would be consistent with current VA practice. The object of the rule would be to ensure that a Veterans Service Representative does not assume a parent is a veteran's dependent merely because the veteran gives the parent money. Also, even if the parent's receipt of money from the veteran is the parent's only income, *i.e.*, the parent is entirely dependent on the veteran, if the veteran's contribution is sufficient to provide reasonable maintenance for the parent, the parent will not be considered a veteran's dependent for purposes of proposed paragraph (b)(1). We intend no substantive change.

Proposed § 5.300(c) would define the term "family member" by incorporating provisions contained in the introduction to current § 3.250(b) and in current § 3.250(b)(2). The introduction to current § 3.250(b) describes a family member as a member under legal age or an adult member of the family who is dependent due to mental or physical incapacity. However, paragraph (b)(2), incorporating language in 38 U.S.C. 102(b)(2), defines a family member as one whom the father or mother is under a legal or moral obligation to support. We propose to combine this information into one definition. We also propose to define family member as a relative. This has always been VA's intent, which is why current § 3.250(b) and (b)(2) refers to a "member of the family" rather than to a member of the household. This change would standardize the application of this section nationally and would be consistent with long-standing VA practice.

We have not repeated in proposed § 5.300(c) a provision of current § 3.250(b)(2) that limits VA's consideration of the expenses a parent incurs for the support of a relative whom the parent is under a legal or moral obligation to support to expenses of a relative "in the ascending as well as

descending class”, which we construe to mean relatives in a parent’s direct line. (“Ascendant” means “[o]ne who precedes in lineage, such as a parent or grandparent.” *Black’s Law Dictionary* 121 (8th ed. 2004). “Descendant” means “[o]ne who follows in lineage, in direct (not collateral) descent from a person. Examples are children and grandchildren.” *Id.* at 476.) This current provision excludes, for example, the expenses of an orphaned niece or nephew who is still a minor for whom the parent is providing support.

This restriction to the ascending and descending class is not required by statute. The authorizing statute, 38 U.S.C. 102, merely states that “[d]ependency of a parent * * * shall be determined in accordance with regulations prescribed by the Secretary [of Veterans Affairs].” 38 U.S.C. 102(a). We do not believe that the restriction is necessary, particularly because the qualifying expenses are already limited to expenses of persons who are relatives whom the parent has a moral or legal obligation of support. We also note that there is no such restriction with respect to expense deductions used in calculating VA’s largest income-based program, Improved Pension. *See, e.g.*, current § 3.272(g)(1)(i); proposed § 5.413(b)(2)(i), 72 FR at 54776. VA’s rules for determining income for purposes of administering its income-based programs should be consistent unless the law requires otherwise.

Current § 3.660(a)(1) provides, in part, that “in compensation claims subject to § 3.250(a)(2), notice must be furnished of any material increase in corpus of the estate or net worth.” Current § 3.250(a)(2) provides that VA may consider the factual dependency of a veteran’s parents. Paragraph (d) of proposed § 5.300 would substitute “report” for “notice” because notifications are typically provided by VA and not by claimants. In addition, proposed § 5.300(d) would clarify that the report regarding an increase in the parent’s income or net worth must be furnished by the veteran who is receiving additional disability compensation based on a dependent parent, and that failure to report such an increase may result in creation of indebtedness based on an overpayment subject to recovery by VA. Consistent with current § 3.660(a)(1), this reporting requirement would only apply when a parent’s increased income exceeds the amounts specified in proposed § 5.300(a)(1).

Section 5.302 General Income Rules—Parent’s Dependency

Current §§ 3.261 and 3.262 provide the regulatory framework VA uses to calculate income for purposes of determining eligibility for Section 306 Pension, parents’ DIC, and additional disability compensation for the dependency of a parent. Current §§ 3.261 and 3.262 are lengthy and complex because those sections combine provisions concerning the evaluation of income in three very different contexts. As a result, §§ 3.261 and 3.262 can be difficult to understand and use. Therefore, in part 5 we propose to divide the subject matter addressed by current §§ 3.261 and 3.262 into separate regulations, each dealing with the evaluation of income for a specific purpose. This division is also consistent with the benefit-specific organizational plan of proposed new part 5. Proposed §§ 5.302 through 5.304 would pertain only to calculating income for the purpose of determining a veteran’s entitlement to additional disability compensation for parent’s dependency. Income regulations for pension and parent’s DIC are addressed in NPRMs dealing with those subjects.

Because there are numerous similarities between the way income is calculated for determining a parent’s dependency and for determining eligibility for parents’ DIC, and to promote as much consistency as the subject matter allows, we have based the structure of proposed §§ 5.302 through 5.304 on their proposed counterparts for income calculations for purposes of parents’ DIC eligibility. *See* § 5.531, “General income rules”; § 5.532, “Deductions from income”; and § 5.533, “Exclusions from income”, 70 FR at 61326. The text of proposed §§ 5.302 through 5.304 would also reflect the differences in the way that income is calculated for parent’s dependency purposes.

Proposed § 5.302(a) would state the basic rule that VA must count all payments of any kind from any source in determining income. Beginning with this basic rule would simplify the proposed regulation because the all-inclusive nature of the rule would eliminate any need to catalog types of countable income. *All* income that a parent receives is income for parent’s dependency purposes unless there is a specific exclusion. For example, with this beginning point, provisions such as the first sentence of current § 3.262(j)(2) (providing that, with respect to life insurance, “the full amount of payments is considered income as received”)

become redundant and need not be carried forward.

Because VA must count all payments, it is necessary to know what VA includes in, and excludes from, the term “payments”. To eliminate redundancy, we would cross-reference proposed § 5.370, “Definitions for Improved Pension”, 72 FR at 54776, which defines “payments”. This definition would apply throughout part 5.

Proposed § 5.302(b) would provide that, if a parent is married, “income” would be the combined income of the parent and the parent’s spouse, except where the marriage has been terminated or the parent is separated from his or her spouse. We would also state that “[i]ncome is combined whether the parent’s spouse is the veteran’s other parent or the veteran’s stepparent” and that “[t]he income of the parent’s spouse will be subject to the same rules that are applicable to determining the income of the veteran’s parent.” This would be a clearer statement of the principle in the introduction to current § 3.262(b), which provides that “[i]ncome of the spouse will be determined under the rules applicable to income of the claimant.” The income rules in proposed § 5.302 would be applicable to a parent. The spouse of a veteran’s parent will always be either the veteran’s other parent (in which case the rules would expressly apply) or the veteran’s stepparent. In the context of additional disability compensation to a veteran for parent’s dependency, the veteran, and not the parent, is the claimant.

Current § 3.250(b)(2) provides that “[i]n determining whether other members of the family under legal age are factors in necessary expenses of the mother or father, consideration will be given to any income from business or property (including trusts) actually available, directly or indirectly, to the mother or father for the support of the minor but not to the corpus of the estate or the income of the minor which is not so available.” Proposed § 5.302(c), based on §§ 3.250(b)(2) and 3.261(a)(3), would refer to the veteran’s “parent” rather than to the veteran’s “mother or father” to make it clear that these regulatory provisions refer to the veteran’s parent whose dependency is at issue, rather than to the mother or father of the minor. Under the applicable definition of “family member” (*see* proposed § 5.300(c)) the minor family member would not necessarily be another child of the veteran’s parent. Also, to be consistent with the new proposed definition of “family member”, we propose to refer to a family member who is under “21 years of age” rather than to

a family member who is under “legal age”, as stated in current 3.250(b)(2).

Proposed § 5.302(d), based on current § 3.262(k)(2), would state the rule that income from a parent’s property is income of the parent. Property ownership is an important indicator of the right to income from that property, but it is not always controlling. To eliminate redundancy, we would cross-reference § 5.410(f), 72 FR at 54776, for how VA determines ownership of property. This provision would apply throughout part 5.

Proposed § 5.302(e) would state the rules for calculating the amount of profit from the sale of real or personal property. Current § 3.262(k)(3) provides that the basis for calculating net profit on the sale of such property is the value of the property at the date of entitlement to benefits (in this case, the veteran’s entitlement to additional disability compensation based on parent’s dependency), if the property was owned prior to the date of entitlement. However, it does not state the basis for calculating the net profit on the sale of property acquired after the date of entitlement. We propose to adopt the commonly used principle that the value to be deducted from the sales price to determine profit in such circumstances is the cost of the property, including improvements. This rule would be one with which many claimants should be familiar. It would be, for example, similar to the rule used in determining profit for Federal income tax purposes.

Section 5.303 Deductions From Income—Parent’s Dependency

Even though all income is counted except where there is specific authority to exclude it, VA permits deductions from income in some instances. That is, the amount of income ultimately counted is the difference between income and certain deductible expenses directly associated with that income. Proposed § 5.303 would list permitted deductions.

Proposed § 5.303(b), concerning the deductibility of expenses associated with recoveries for death and disability, would be based on rules found in current §§ 3.261(a)(24) and 3.262(i)(1) and (j)(4). Current § 3.262(i)(1) refers to “the Bureau of Employees’ Compensation, Department of Labor (of the United States).” The Bureau of Employees’ Compensation was abolished in 1974. *See* 20 CFR 1.5. Its functions are now carried out by the Office of Workers’ Compensation Programs of the U.S. Department of Labor. *See* 20 CFR 1.6(b). This change would be reflected in proposed § 5.303(b)(2).

Section 5.304 Exclusions From Income—Parent’s Dependency

Proposed § 5.304 would list income that VA does not count when calculating a parent’s income. Proposed paragraph (c) would be based on current § 3.261(a)(12), which excludes the “[s]ix-months’ death gratuity”. However, we propose to change the description to “[d]eath gratuity payments by the Secretary concerned under 10 U.S.C. 1475 through 1480.” The phrase “six-months’ death gratuity” is obsolete. While the death gratuity consisted of six-months’ pay when originally enacted (*see* Pub. L. 66–99, § 1, 41 Stat. 367 (1919)), that is no longer the case. Over the years, these death gratuity payments have evolved into a fixed sum, rather than a variable amount equal to six-months’ pay. *See* 10 U.S.C. 1478. As covered in proposed paragraph (c), this exclusion would extend to death gratuity payments in lieu of payments under 10 U.S.C. 1478 made to certain survivors of “Persian Gulf conflict” veterans as authorized by the Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991. *See* Public Law 102–25, § 307, 105 Stat. 82 (1991). Note that the phrase “Secretary concerned” is defined in proposed § 5.1. *See* 71 FR at 16474.

Proposed § 5.304 would combine rules from current § 3.262 that permit a parent to exclude from his or her income the value of certain income received by that parent. One of these is found in current § 3.262(f), which requires VA to treat “[b]enefits received under noncontributory programs, such as old age assistance, aid to dependent children, and supplemental security income” as charitable donations. We propose to remove the references to the Old Age Assistance program and the Aid to Dependent Children program because these programs no longer exist. The Old Age Assistance program was phased out and totally replaced by the Supplemental Security Income program in 1972 and the Aid to Dependent Children program became a federal block grant known as Temporary Assistance to Needy Families in 1996.

There are a number of other Federal statutes that exempt specific kinds of income from consideration in determining either eligibility for all Federal income-based programs, or eligibility for all of VA’s income-based benefit programs. Because those exclusions affect more than a parent’s dependency, they will be addressed in § 5.412, 72 FR at 54776, “Income exclusions for calculating countable annual income”. Proposed § 5.304 would list only those income exclusions

that are unique to a parent’s dependency allowance.

Current § 3.261(a)(20) excludes VA benefit payments for World War I adjusted compensation. We would remove this exclusion because there is currently only one World War I veteran. We do not envision receiving any new claims for this benefit.

Proposed § 5.304(h), based on current § 3.262(k)(4), would provide an exclusion for net profit from the sale of the parent’s principal residence when that profit is used to purchase another principal residence within specified time constraints. In drafting proposed § 5.304(h), we intentionally omitted the rule in current § 3.262(k)(4) that makes the exclusion available only when the net profit is applied to the purchase of a new principal residence after January 10, 1962. Inclusion of that effective date has been rendered unnecessary due to the passage of time. This is particularly true in view of the fact that, to qualify for this exclusion, the application of the net profit from the sale of the old residence to the purchase of a replacement residence must be reported to VA within 1 year after the date it was so applied.

Current § 3.261(a)(11) excludes “mustering-out pay” from income for purposes of determining parental dependency. We propose to omit this provision from § 5.304. Mustering-out pay was repealed by Public Law 89–50, 79 Stat. 173, in 1965.

We propose to omit an exclusion listed in current § 3.261(a)(20) because it is now obsolete. That section excludes “[s]ervicemember’s indemnity” from income for purposes of determining parental dependency. The Servicemen’s Indemnity Act of 1951, Public Law 82–23, 65 Stat. 33, authorized VA to pay indemnity in the form of \$10,000 automatic life insurance coverage to the survivors of members of the Armed Forces who died in service. However, the Act authorizing this benefit was repealed in 1956. *See* Public Law 84–881, § 502(9), 70 Stat. 886 (1956).

Disability Compensation Effective Dates

This section would begin with a note cross-referencing effective date rules for temporary total disability compensation ratings under current 38 CFR 4.29 based upon a veteran’s hospitalization for treatment or observation of a service-connected disability or under current 38 CFR 4.30 based on convalescence. We propose not to include, in part 5, provisions similar to those in current §§ 3.401(h) and 3.501(m) because current §§ 4.29 and 4.30 contain effective date rules that apply in

situations covered by §§ 3.401(h) and 3.501(m).

Section 5.311 Effective Dates—Award of Disability Compensation

Proposed § 5.311, based on current § 3.400(b)(2), would provide the effective date rules for an award of disability compensation. We propose to omit the distinction in current § 3.400(b)(2)(i) and (ii) between awards of compensation based on direct service connection and those based on presumptive service connection. In proposed § 5.1, we would define “direct service connection” as distinguishable from service connection based on a legal presumption. 71 FR at 16473. This distinction would be unnecessary in § 5.311 because the effective date rules in current § 3.400(b)(2)(i) and (ii) are the same. By combining the two rules we would eliminate redundancy. No substantive change would be intended.

Proposed § 5.311(a) would implement 38 U.S.C. 5110(b)(1), which permits VA to make retroactive payments of disability compensation when a veteran files a benefit claim within 1 year after separation from service. There are several differences between proposed § 5.311(a) and its current part 3 equivalent, § 3.400(b)(2).

Current § 3.400(b)(2)(i) states that the effective date of disability compensation is the “[d]ay following separation from active service or date entitlement arose if claim is received within 1 year after separation after service; otherwise, date of receipt of claim, or date entitlement arose, whichever is later.” We propose to replace the word “separation” with the statutory phrase “discharge or release”. We would define the term “discharge or release” in proposed § 5.1. 71 FR at 16464. We also propose to replace “active service” with “active military service.” In proposed § 5.1, we would define “active military service” to mean the same as the statutory term “active military, naval, or air service”. 71 FR at 16473.

In paragraph (b) of § 5.311, we propose to restate the rule contained in the phrase “otherwise, date of receipt of claim, or date entitlement arose, whichever is later” in current § 3.400(b)(2)(i) and (ii). Rather than repeat this language, we propose to simply reference the general part 5 effective date rule found at § 5.150(a). 72 FR 28,770, 28,876 (May 22, 2007).

Section 5.312 Effective Dates—Increased Disability Compensation

Proposed § 5.312, based on current § 3.400(o)(2), would state the effective date rules for an award of increased disability compensation. It would

implement 38 U.S.C. 5110(a) and (b)(2) as they pertain to an award of increased disability compensation. An increase in disability compensation most often results from an increase in a disability rating governed by the Schedule for Rating Disabilities in part 4 of this chapter. Section 5110(b)(2) and current § 3.400(o)(2) also govern the effective date of an award of or increase in special monthly compensation (SMC) to a veteran with a current disability compensation award, even though the Schedule for Rating Disabilities does not govern SMC; no other statute or regulation provides an effective date of an award of SMC to a veteran with a current compensation award. We would title the section to refer to an increase in disability compensation, consistent with 38 U.S.C. 5110(b)(2) and current § 3.400(o)(2), and draft the regulation to apply to an award of increased disability compensation, rather than to an increase in a disability rating. This would not be a change in scope of the current regulation or otherwise a substantive change.

Proposed § 5.312(a) would be new. It would inform readers of the type of awards that VA considers to be subject to 38 U.S.C. 5110(b)(2): A higher disability rating under subpart B of the Schedule for Rating Disabilities in part 4 of this chapter; a higher disability rating under the extra-schedular provision in evaluation under § 5.280(b); a higher disability rating under § 4.16 of this chapter, “Total disability ratings for compensation based on unemployability of the individual”; and an award or higher rate of special monthly compensation.

The note after proposed § 5.312(a) would explain that this section does not establish the effective date of an award of secondary service connection under § 5.246 or § 5.247. This would be consistent with the holding of the CAVC in *Ross v. Peake*, 21 Vet. App. 528, 532 (2008), that “an award of ‘increased compensation’ within the meaning of section 5110(b)(2) does not encompass an award of secondary service connection because, by definition, secondary service connection requires the incurrence of an *additional* disability.” We would apply the reasoning in *Ross* to claims for secondary service connection under § 5.246 and § 5.247.

Proposed § 5.312(b) would restate in plain language the current effective-date rule for an award of increased disability compensation. Current § 3.400(o)(2) provides for an effective date on the “[e]arliest date as of which it is factually ascertainable that an increase in disability had occurred if claim is

received within 1 year from such date”. This provision is based on 38 U.S.C. 5110(b)(2), which states that “[t]he effective date of an award of increased compensation shall be the earliest date as of which it is ascertainable that an increase in disability had occurred, if application is received within one year from such date.” Rather than use the term “ascertainable”, we would simply state in proposed § 5.312(b)(1) that the effective date will be “the date that the evidence warrants a higher disability rating, or an award or higher rate of special monthly compensation, if VA received a claim for increased disability compensation within 1 year after that date.” This would be consistent with current VA practice and the authorizing statute. This would not be a substantive change.

Section 5.313 Effective Dates—Discontinuance of a Total Disability Rating Based on Individual Unemployability

Proposed § 5.313 would be based on current § 3.501(e)(2) and (f). Section 3.501(e)(2) states an effective date rule for discontinuance of a TDIU rating if a veteran regains employability. However, it does not provide guidance on what rating to assign in place of the TDIU rating. Section 3.501(f) provides an effective date rule for discontinuance of TDIU if a veteran fails to return an employment questionnaire to VA. It provides that the award will be reduced to the “amount payable for the schedular evaluation shown in the current rating as of the day following the date of last payment.” It has been long-standing VA practice to also apply the schedular evaluation to cases where a veteran regains employability under § 3.501(e)(2). We propose to codify in § 5.313(b) this practice, which produces a fair result for veterans and is simple to administer. We also propose to replace the term “current rating” in § 3.501(f) with “existing schedular rating.” The term “current rating” could be confusing because the most “current” rating would be for TDIU. Using “existing schedular rating” would clarify that we mean the rating that was in effect when TDIU was awarded.

We are proposing to rephrase effective date rules concerning reductions and discontinuances of VA benefits throughout part 5. Stating the first day VA will pay the new reduced rate or discontinue making payment, rather than stating the last day of the old rate or the last day of payment, would make these effective-date provisions easier to apply. Therefore, proposed paragraphs (b) and (c) would state that the reduction “will be effective” as specified

in each paragraph. Similar proposed changes would also appear in subsequent reduction and discontinuance effective date rules in the NPRM. VA intends no substantive change by this new language.

Section 5.314 Effective Dates— Discontinuance of Additional Disability Compensation Based on Parental Dependency

Proposed § 5.314 would be based on rules in current §§ 3.500(g), (h), and (n) and 3.660(a)(2), which govern the effective dates of discontinuance of awards of additional disability compensation to a veteran with a dependent parent when parental dependency ends. Current § 3.500(h) refers the reader to various statutes and other regulations, some of which pertain to disability compensation rules and some of which refer to rules concerning other benefits where parental dependency is relevant, such as death compensation for a parent. Proposed § 5.314 would only include information from the sources cross-referenced in current § 3.500(h) that relate to the discontinuance of additional disability compensation to a veteran when the financial dependency of a parent ends.

Current §§ 3.500(g)(2), (h), (n)(2), and 3.660(a)(2) contain rules that apply to discontinuance of additional disability compensation based on parental dependency that are related to events (marriage, divorce, annulment, and death) that occurred prior to October 1, 1982. We propose to omit these provisions. With the passage of time, they have become unnecessary. It is unlikely that VA would now retroactively discontinue additional disability compensation because of events involving a veteran's parent that occurred more than 28 years ago.

Proposed § 5.314 would be a counterpart to only the third sentence of § 3.660(a)(2) that pertains to discontinuance of additional disability compensation based on parental dependency. Current § 3.660(a)(2) addresses reduction or discontinuance of multiple VA benefits. Some, such as pension, are susceptible to reduction of the award of benefits because of increases in income or other financial events. The additional disability compensation based on parental dependency is not one of them. It is an all-or-nothing benefit. If the parent ceases to meet the criteria for the veteran's entitlement, VA discontinues the additional disability compensation. Consequently, proposed § 5.314 would refer only to discontinuance of the additional disability compensation.

Proposed paragraph (b) would clarify that, if a veteran's parent ceases to be dependent because the parent's economic status has improved, the effective date of the discontinuance of the additional disability compensation depends on whether the improvement is due to an increase in income or an increase in net worth. In the former case, the effective date would be the first day of the month after which the change occurred. In the latter case, the effective date would be the first day of the year after which the change occurred. This result is required by 38 U.S.C. 5112(b)(4).

Section 5.315 Effective Dates— Additional Disability Compensation Based on Decrease in the Net Worth of a Dependent Parent

Proposed § 5.315, based on current § 3.660(d), would provide the effective date rule that would apply if entitlement to additional disability compensation based on the dependency of a parent is reestablished after VA had previously denied or discontinued the additional disability compensation because of the parent's net worth. VA proposes to separate the new section into two paragraphs—an introductory paragraph, which explains when the rule would apply, and a paragraph explaining the rule itself. Consistent with other proposed regulations in this NPRM, VA proposes to use the term "net worth" instead of "corpus of estate".

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 new collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would 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 rule would not affect any small entities. Therefore, pursuant to 5 U.S.C. 605(b), this proposed rule would be 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 Executive Order classifies a "significant regulatory action," requiring review by the Office of Management and Budget (OMB) unless OMB waives such review, as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

VA has examined the economic, interagency, budgetary, legal, and policy implications of this proposed rule and has determined that it is not a significant regulatory action under the Executive Order because it will not result in a rule that may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

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

Catalog of Federal Domestic Assistance Numbers and Titles

The catalog of Federal Domestic Assistance program numbers 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.

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, Department of Veterans Affairs, approved this document on August 12, 2010, for publication.

List of Subjects in 38 CFR Part 5

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

Dated: August 19, 2010.

William F. Russo,

*Director, Regulations Management,
Department of Veterans Affairs.*

For the reasons set forth in the preamble, VA proposes to amend 38 CFR part 5 (as proposed to be added at 69 FR 4832, January 30, 2004, and as amended by adding subpart E at 69 FR 44624, July 27, 2004) as follows:

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

1. The authority citation for part 5, subpart E, continues to read as follows:

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

2. Sections 5.240 through 5.251 and their undesignated center heading are added to subpart E and §§ 5.252 through 5.259 are reserved to read as follows:

Subpart E—Claims for Service Connection and Disability Compensation

Service-Connected and Other Disability Compensation

Sec.

- 5.240 Disability compensation.
- 5.241 Service-connected disability.
- 5.242 General principles of service connection.
- 5.243 Establishing service connection.

- 5.244 Presumption of sound condition.
- 5.245 Service connection based on aggravation of preservice injury or disease.
- 5.246 Secondary service connection—disability that is proximately caused by service-connected disability.
- 5.247 Secondary service connection—nonservice-connected disability aggravated by service-connected disability.
- 5.248 Service connection for cardiovascular disease secondary to service-connected lower extremity amputation.
- 5.249 Special service connection rules for combat-related injury or disease.
- 5.250 Service connection for posttraumatic stress disorder.
- 5.251 Current disabilities for which VA cannot grant service connection.
- 5.252–5.259 [Reserved]

Subpart E—Claims for Service Connection and Disability Compensation

Service-Connected and Other Disability Compensation

§ 5.240 Disability compensation.

(a) *Definition.* “Disability compensation” means a monthly payment VA makes to a veteran for a service-connected disability, as described in § 5.241, or for a disability compensated as if it were service connected, under § 5.350, “Benefits under 38 U.S.C. 1151(a) for additional disability or death due to hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program.”

(b) *Additional disability compensation based on having dependents.* Additional disability compensation is payable to a veteran who has a spouse, child, or dependent parent if the veteran is entitled to disability compensation based on a single or a combined disability rating of 30 percent or more. The additional disability compensation authorized by 38 U.S.C. 1115 is payable in addition to monthly disability compensation payable under 38 U.S.C. 1114.

(Authority: 38 U.S.C. 101(13), 1110, 1114, 1115, 1131, 1135, 1151)

§ 5.241 Service-connected disability.

A “service-connected disability” is a current disability as to which any of the following is true:

(a) The disability was caused by an injury or disease incurred, or presumed to have been incurred, in the line of duty during active military service. See §§ 5.260 through 5.269 (concerning presumptions of service connection).

(b) The disability was caused by a preservice injury or disease aggravated,

or presumed to have been aggravated, in the line of duty during active military service. See § 5.245, “Service connection based on aggravation of preservice injury or disease.”

(c) The disability is secondary to a service-connected disability, pursuant to §§ 5.246–5.248 (governing awards of secondary service connection).

(Authority: 38 U.S.C. 1110, 1112, 1116, 1117, 1118, 1131, 1133, 1137)

§ 5.242 General principles of service connection.

When a veteran seeks service connection:

(a) VA will give due consideration to any evidence of record concerning the places, types, and circumstances of the veteran’s service as shown by the veteran’s service record, the official history of each organization in which the veteran served, the veteran’s medical records, and all pertinent medical and lay evidence; and

(b) VA will not consider a statement that a veteran signed during service that:

(1) Pertains to the origin, incurrence, or aggravation of an injury or disease; and

(2) Was against the veteran’s interest at the time he or she signed it.

(Authority: 10 U.S.C. 1219; 38 U.S.C. 1154(a))

§ 5.243 Establishing service connection.

(a) *Requirements.* Except as provided in §§ 5.246, “Secondary service connection—disability that is proximately caused by service-connected disability”, and 5.247, “Secondary service connection—nonservice-connected disability aggravated by service-connected disability”, and paragraph (c) of this section, proof of the following elements is required to establish service connection:

(1) A current disability;

(2) Incurrence or aggravation of an injury or disease in active military service; and

(3) A causal link between the injury or disease incurred in, or aggravated by, active military service and the current disability.

Note 1 to paragraph (a): *Permanent disability shown in service.* VA will consider all three elements of paragraph (a) of this section proven if service records establish that an injury or disease incurred in or aggravated by active military service produced a disability that is clearly permanent by its nature, such as the amputation of a limb or the anatomical loss of an organ.

Note 2 to paragraph (a): *Chronic disease or chronic residual of an injury in temporary remission.* VA will not deny service connection for lack of a current disability

solely because a chronic disease, or a chronic residual of an injury, enters temporary remission. Examples of chronic diseases and chronic residuals of injury subject to temporary remission include chronic tinnitus, malaria, mental illness, skin disease, and intervertebral disc syndrome.

(b) *Time of diagnosis is not necessarily controlling.* Proof of incurrence of a disease during active military service does not require diagnosis during service if the evidence otherwise establishes that the disease was incurred in service.

(c) *Chronic residuals of injuries and chronic diseases*—(1) *General rule.* VA will grant service connection for a current disability not clearly due to an intercurrent cause if:

(i) The current disability is caused by a chronic disease and competent evidence establishes that the veteran had the same chronic disease in service or within an applicable presumptive period; or

(ii) The veteran had an injury in service and currently has a disability due to chronic residuals of the same injury.

(2) *Proof that a disease or residual of an injury is chronic.* For purposes of this paragraph (c), VA will consider the following to be chronic:

(i) A chronic disease listed in § 5.261(d);

(ii) A disease shown to be chronic by competent evidence; or

(iii) A residual of an injury (such as scarring or nerve, muscle, skeletal, or joint impairment) shown to be chronic by competent evidence. (See also paragraph (d) of this section on establishing chronicity through evidence of continuity of signs or symptoms).

Note to paragraph (c): Proof that a disease was chronic in service requires a combination of manifestations in service sufficient to identify the disease entity, and sufficient observation to establish chronicity at the time, as distinguished from merely isolated findings or a diagnosis in service including the word “chronic.” See also § 5.260(c), “Rebutting a presumption of service connection set forth in §§ 5.261 through 5.268.” Isolated findings in service, such as joint pain, any abnormality of heart action or heart sounds, any urinary findings of casts, or any cough, would not alone establish the presence in service of a chronic disease, such as arthritis, disease of the heart, nephritis, or pulmonary disease, first shown as a clear-cut clinical entity at some later date.

(d) *Continuity of signs or symptoms.* Where signs or symptoms noted in service, or during an applicable presumptive period, are not considered a chronic disease or residual of an injury under paragraph (c)(2) of this

section, service connection is established when all of the following are shown by competent evidence:

(1) The veteran had signs or symptoms of an injury or disease during active military service or during an applicable presumptive period for a disease;

(2) The signs or symptoms continued from the time of discharge or release from active military service or from the end of the applicable presumptive period, until the present; and

(3) The signs or symptoms currently demonstrated are signs or symptoms of an injury or disease, or the residuals of an injury or disease, to which paragraph (d)(1) of this section refers.

(Authority: 38 U.S.C. 101(16), 501, 1110, 1131)

§ 5.244 Presumption of sound condition.

(a) *Presumption of sound condition.* VA will presume that a veteran was in sound condition upon entry into active military service, which means that the veteran was free from injury or disease except as noted in the report of a medical examination conducted for entry into active military service.

(b) *Report of entry examination not a condition for application of the presumption.* The presumption of sound condition applies even if:

(1) The veteran did not have a medical examination for entry into active military service; or

(2) There is no record of the examination.

(c) *Medical history recorded in entry examination reports*—(1) *Medical histories.* The presumption of sound condition applies if an examiner recorded a history of injury or disease in an entry examination report, but the examiner did not report any contemporaneous clinical findings related to such injury or disease. VA may consider the notation of history together with other evidence in determining whether the presumption of sound condition is rebutted under paragraph (d) of this section.

(2) *Medical examination reports.* The presumption of sound condition is rebuttable even if an entry medical examination shows that the examiner tested specifically for a certain injury or disease and did not find that injury or disease, if other evidence of record is sufficient to overcome the presumption.

(d) *Rebutting the presumption.*

(1) For veterans with any wartime service and for veterans with peacetime service after December 31, 1946, VA can rebut the presumption only with clear and unmistakable evidence that the injury or disease resulting in the

disability for which the veteran claims service connection both:

(i) Preexisting service; and

(ii) Was not aggravated by service, which means that

(A) During service the disability resulting from the preexisting injury or disease did not increase in severity or

(B) Any such increase was due to the natural progress of a disease.

(2) To determine whether there was an increase in the severity of disability during service (or during any applicable presumptive period) resulting from a preexisting injury or disease, see § 5.245(b).

(3) If there was an increase in the severity of disability during service (or during any applicable presumptive period) resulting from a preexisting injury or disease, to determine whether the increase was due to the natural progress of a disease, see § 5.245(c).

(Authority: 38 U.S.C. 1110, 1111, 1131, 1137)

§ 5.245 Service connection based on aggravation of preservice injury or disease.

(a) *Presumption of aggravation.* When an injury or disease was noted in the report of examination for entry into active military service, VA will presume that active military service aggravated a preexisting injury or disease if there was an increase in disability resulting from the injury or disease during service (or during any applicable presumptive period).

(b) *Determining whether disability increased during service*—(1) *Increase in severity.* For purposes of this section, increase in disability during active military service means the disability resulting from the preexisting injury or disease permanently became more severe during service (or during any applicable presumptive period) than it was before active military service.

(2) *Temporary flare-ups.* Except as provided in paragraph (b)(4) of this section, temporary or intermittent flare-ups of signs or symptoms of a preexisting injury or disease do not constitute aggravation in service unless the underlying condition worsened, resulting in increased disability.

(3) *Effects of medical or surgical treatment.* The usual effects of medical or surgical treatment in service that ameliorates a preexisting injury or disease, such as postoperative scars, or absent or poorly functioning parts or organs, are not an increase in the severity of the underlying condition and they will not be service connected unless the preexisting injury or disease was otherwise aggravated by service.

(4) *Combat or prisoner-of-war service.* The development of signs or symptoms, whether temporary or permanent, of a

preexisting injury or disease during or proximately following combat with the enemy, as defined in § 5.249(a)(2), or following status as a prisoner of war will establish aggravation of the disability resulting from that preexisting injury or disease.

(c) *Rebutting the presumption—natural progress of a disease.* The presumption of aggravation is rebutted if VA specifically finds by clear and unmistakable evidence that the increase in the severity of disability during service (or during an applicable presumptive period) was normal for the disease, that is, active military service did not contribute to the increase.

(Authority: 38 U.S.C. 1153, 1154)

§ 5.246 Secondary service connection—disability that is proximately caused by service-connected disability.

Except as provided in § 5.365(a), VA will grant service connection for a disability that is proximately caused by a service-connected disability.

(Authority: 38 U.S.C. 501(a), 1110, 1131)

§ 5.247 Secondary service connection—nonservice-connected disability aggravated by service-connected disability.

VA will grant service connection for any increase in severity of a nonservice-connected disability if the increase was proximately caused by a service-connected disability, and the increase was not due to the natural progress of a nonservice-connected disease. However, VA cannot grant service connection under this section without medical evidence establishing the severity of the nonservice-connected disability before or contemporaneous with the increase in severity due to the service-connected disability. The agency of original jurisdiction (AOJ) will use the Schedule for Rating Disabilities in part 4 of this chapter to rate the severity level of the nonservice-connected disability prior to aggravation, any increase in severity due to the natural progress of the disease, and the current severity level of the disability. The AOJ will then determine the amount of aggravation by subtracting the rating prior to aggravation and any increase in severity due to the natural progress of the disease from the current severity level. The result will be the increase proximately caused by a service-connected disability. VA will grant service connection only for that increase.

(Authority: 38 U.S.C. 501(a), 1110, 1131)

§ 5.248 Service connection for cardiovascular disease secondary to service-connected lower extremity amputation.

VA will grant secondary service connection for ischemic heart disease or other cardiovascular disease that develops after a veteran has a service-connected amputation of one lower extremity at or above the knee or service-connected amputations of both lower extremities at or above the ankles.

(Authority: 38 U.S.C. 501(a), 1110, 1131)

§ 5.249 Special service connection rules for combat-related injury or disease.

(a) *Combat-related incurrence or aggravation of injury or disease shown by lay or other evidence.* (1) VA will accept that an injury or disease was incurred or aggravated in service if a veteran engaged in combat with the enemy during a period of war, campaign, or expedition, and there is satisfactory lay or other evidence that the injury or disease was incurred in or was aggravated by such combat. Lay evidence may include a veteran's description of an event, disease, or injury. VA will accept such evidence as sufficient proof of incurrence or aggravation in service of an injury or disease even though there is no official record of the incurrence or aggravation. The evidence must be consistent with the circumstances, conditions, or hardships of the veteran's combat with the enemy. Incurrence or aggravation established under this paragraph may be rebutted by clear and convincing evidence to the contrary.

(2) "Combat with the enemy" means personal participation in an actual fight or encounter with a military foe, hostile unit, or instrument or weapon of war either:

- (i) As a combatant; or
- (ii) While performing a duty in support of combatants, such as providing medical care to the wounded.

(b) *Decorations as evidence of combat.* When a veteran has received any of the combat decorations listed below, VA will presume that the veteran engaged in combat with the enemy, unless there is clear and convincing evidence to the contrary:

- (1) Air Force Cross
- (2) Air Medal with "V" Device
- (3) Army Commendation Medal with "V" Device
- (4) Bronze Star Medal with "V" Device
- (5) Combat Action Ribbon
- (6) Combat Infantryman Badge
- (7) Combat Medical Badge
- (8) Combat Aircrew Insignia
- (9) Distinguished Service Cross
- (10) Joint Service Commendation Medal with "V" Device

- (11) Medal of Honor
- (12) Navy Commendation Medal with "V" Device

- (13) Navy Cross
- (14) Purple Heart
- (15) Silver Star
- (16) Combat Action Badge
- (17) Any other form of decoration that the Secretary concerned may designate for award exclusively to persons for actions performed while engaged in combat with the enemy.

(Authority: 38 U.S.C. 501(a), 1154(b))

Cross References: § 5.141 (evidence in claims of former prisoners of war); § 5.245(b)(4); § 5.250(b)(2).

§ 5.250 Service connection for posttraumatic stress disorder.

(a) *Elements of a claim for service connection for posttraumatic stress disorder (PTSD).* Service connection for PTSD requires:

(1) Medical evidence diagnosing PTSD in accordance with § 4.125(a) of this chapter;

(2) A link, established by medical evidence, between current signs or symptoms and an in-service stressor; and

(3) Except as provided in paragraphs (c), (d), and (e) of this section, credible supporting evidence that the claimed in-service stressor occurred. For purposes of this section, "credible supporting evidence" means credible evidence from any source, other than the claimant's statement, that corroborates the occurrence of the in-service stressor.

(b) *VA will not deny a claim without trying to verify the claimed stressor.* If the existence of the claimed stressor is not verified by credible evidence, VA will seek verification from the appropriate service department or other entity. The exception to this rule is when, upon VA's request, the claimant fails to provide the information needed by the appropriate service department or other entity to try to verify the claimed stressor.

(c) *Special rule for veterans diagnosed with PTSD during active service.* If the evidence establishes a diagnosis of PTSD during service and the claimed stressor is related to that service, in the absence of clear and convincing evidence to the contrary, and provided that the claimed stressor is consistent with the circumstances, conditions, or hardships of the veteran's active service, the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor.

(d) *Special rules for veterans who engaged in combat with the enemy or who were prisoners of war.* To determine if a stressor occurred during

combat with the enemy or while a prisoner of war, VA will apply the rules in § 5.249 or § 5.141, respectively.

(e)(1) *Stressor confirmed by VA psychiatrist or psychologist.* In the absence of clear and convincing evidence to the contrary, and provided the claimed in-service stressor is consistent with the places, types, and circumstances of the veteran's service, the veteran's lay testimony alone may establish the occurrence of the stressor if:

(i) The stressor is related to the veteran's fear of hostile military or terrorist activity; and

(ii) A VA psychiatrist or psychologist, or a psychiatrist or psychologist with whom VA has contracted, confirms that the stressor is adequate to support a diagnosis of posttraumatic stress disorder and that the veteran's symptoms are related to the claimed stressor.

(2) For purposes of this paragraph, "fear of hostile military or terrorist activity" means:

(i) That a veteran experienced, witnessed, or was confronted with an event or circumstance that involved actual or threatened death or serious injury, or a threat to the physical integrity of the veteran or others, such as:

(A) From an actual or potential improvised explosive device;

(B) Vehicle-imbedded explosive device;

(C) Incoming artillery, rocket, or mortar fire;

(D) Grenade;

(E) Small arms fire, including suspected sniper fire; or

(F) Attack upon friendly military aircraft, and

(ii) The veteran's response to the event or circumstance involved a psychological or psycho-physiological state of fear, helplessness, or horror.

(f) *Special rules for establishing a stressor based on personal assault.* (1) VA will not deny a PTSD claim that is based on in-service personal assault without:

(i) Advising the veteran that evidence from sources other than the veteran's service records, including evidence described in paragraph (c)(2) of this section, may constitute credible supporting evidence of the stressor; and

(ii) Providing the veteran with an opportunity to furnish this type of evidence or advise VA of potential sources of such evidence.

(2) Evidence that may establish a stressor based on in-service personal assault includes, but is not limited to, the following:

(i) Records from law enforcement authorities, rape crisis centers, mental

health counseling centers, hospitals, or physicians;

(ii) Pregnancy tests or tests for sexually transmitted diseases;

(iii) Statements from family members, roommates, fellow servicemembers, or clergy; or

(iv) Evidence of behavioral changes following the claimed assault (which may be shown in any of the following sources), including: A request for a transfer to another military duty assignment; deterioration in work performance; substance abuse; episodes of depression, panic attacks, or anxiety without an identifiable cause; or unexplained economic or social behavior changes.

(3) VA may submit any evidence that it receives to an appropriate medical or mental health professional for an opinion as to whether it indicates that a personal assault occurred.

(Authority: 38 U.S.C. 501(a), 1110, 1131, 1154)

§ 5.251 Current disabilities for which VA cannot grant service connection.

(a) *General rule.* VA will not grant service connection for the following disabilities because they are not the result of an injury or disease for purposes of service connection:

(1) Congenital or developmental defects (such as congenital or developmental refractive error of the eye);

(2) Developmental personality disorders; or

(3) Developmental intellectual disability (mental retardation).

(b) *Distinguishable disabilities.* VA will grant service connection for the following disabilities, which are scientifically distinguishable from those listed in paragraph (a) of this section and actually result from an injury or disease:

(1) Malignant or pernicious myopia;

(2) Personality change (as distinguished from personality disorder) as part of, or proximately caused by, an organic mental disorder or a service-connected general medical condition (such as psychomotor epilepsy), or due to injury. *See* § 5.246, "Secondary service connection—disability that is proximately caused by service-connected disability".

(3) Nondevelopmental intellectual disability as part of, or proximately caused by, a service-connected disability. *See* § 5.246, "Secondary service connection—disability that is proximately caused by service-connected disability."

(c) *Superimposed disabilities.*

Paragraph (a) of this section does not preclude granting service connection for

a disability that is superimposed on a disability listed in paragraph (a).

(d) *Hereditary diseases.* Paragraph (a)(1) of this section does not preclude granting service connection for disability due to an inherited or familial disease (as distinguished from congenital or developmental defects in paragraph (a)(1) of this section). *See* § 5.261(f) regarding presumptions related to certain inherited or familial diseases.

(e) *Diseases of allergic etiology.* Paragraph (a) of this section does not preclude granting service connection for disability due to diseases of allergic etiology, including, but not limited to, bronchial asthma and urticaria.

(Authority: 38 U.S.C. 501, 1110, 1131)

§§ 5.252–5.259 [Reserved]

3. Sections 5.280 through 5.285 and their undesignated center heading are added to subpart E and §§ 5.286 through 5.299 are reserved to read as follows:

Rating Service-Connected Disabilities

Sec.

5.280 General rating principles.

5.281 Multiple 0-percent service-connected disabilities.

5.282 Special consideration for paired organs and extremities.

5.283 Total and permanent total ratings and unemployability.

5.284 Total disability ratings for disability compensation purposes.

5.285 Continuance of total disability ratings.

5.286–5.299 [Reserved]

Rating Service-Connected Disabilities

§ 5.280 General rating principles.

(a) *Use of rating schedule.* VA will use the Schedule for Rating Disabilities in part 4 of this chapter to rate the degree of disabilities in claims for disability compensation and in eligibility determinations. Instructions for using the schedule are in part 4.

(b) *Extra-schedular ratings in unusual cases—(1) Disability compensation.* To accord justice to the exceptional case where the Veterans Service Center (VSC) finds the schedular ratings to be inadequate, the Under Secretary for Benefits or the Director of the Compensation and Pension Service, upon VSC submission, is authorized to approve on the basis of the criteria set forth in this paragraph (b) an extra-schedular rating commensurate with the average impairment of earning capacity due exclusively to the service-connected disability or disabilities. The governing norm in these exceptional cases is a finding that the application of the regular schedular standards is impractical because the case presents an

exceptional or unusual disability picture with such related factors as:

- (i) Marked interference with employment, or
- (ii) Frequent periods of hospitalization.

(2) *Effective date.* The effective date of an extra-schedular rating, either granting or increasing disability compensation, will be in accordance with § 5.311 in original and reopened claims and in accordance with § 5.312 in claims for increased benefits.

(c) *Advisory opinions.* The VSC may submit to the Director of the Compensation and Pension Service for advisory opinion cases in which it does not understand the application of the Schedule for Rating Disabilities in part 4 of this chapter or in which the propriety of an extra-schedular rating is questionable.

(Authority: 38 U.S.C. 501, 1155)

§ 5.281 Multiple 0-percent service-connected disabilities.

VA may assign a 10-percent combined rating to a veteran with two or more permanent service-connected disabilities that are each rated as 0-percent disabling under the Schedule for Rating Disabilities in part 4 of this chapter, if the combined effect of such disabilities interferes with normal employability. VA cannot assign this 10-percent rating if the veteran has any other compensable rating.

(Authority: 38 U.S.C. 501, 1155)

§ 5.282 Special consideration for paired organs and extremities.

(a) *General rule.* VA will pay disability compensation for the combination of service-connected and nonservice-connected disabilities involving paired organs and extremities described in paragraph (b) of this section as if the nonservice-connected disability were service connected, but VA will not pay compensation for the nonservice-connected disability if the veteran's willful misconduct proximately caused it.

(b) *Qualifying combination of disabilities.* Disability compensation under paragraph (a) of this section is payable for the following disability combinations:

(1) Service-connected impairment of vision in one eye and nonservice-connected impairment of vision in the other eye if:

- (i) The impairment of vision in each eye is rated at a visual acuity of 20/200 or less; or
- (ii) The peripheral field of vision for each eye is 20 degrees or less.

(2) Service-connected anatomical loss or loss of use of one kidney and

nonservice-connected involvement of the other kidney.

(3) Service-connected hearing impairment in one ear compensable to a degree of 10 percent or more and nonservice-connected hearing impairment in the other ear that meets the provisions of § 5.366 of this chapter, "Disability due to impaired hearing."

(4) Service-connected anatomical loss or loss of use of one hand or foot and nonservice-connected anatomical loss or loss of use of the other hand or foot.

(5) Permanent service-connected disability of one lung rated as 50 percent or more disabling and nonservice-connected disability of the other lung.

(c) *Offset of judgment, settlement, or compromise—(1) Required offset.* If a veteran receives money or property of value in a judgment, settlement, or compromise from a cause of action for a qualifying nonservice-connected disability involving an organ or extremity described in paragraph (b) of this section, VA will offset the value of such judgment, settlement, or compromise against the increased disability compensation payable under this section.

(2) *Offset procedure.* Beginning the first of the month after the veteran receives the money or property as damages, VA will not pay the increased disability compensation payable under this section until the total amount of such increased compensation that would otherwise have been payable equals the total amount of any money received as damages and the fair market value of any property received as damages. VA will not withhold the increased disability compensation payable before the end of the month in which the money or property was received.

(3) *Exception for Social Security or workers' compensation benefits.* Benefits received for the qualifying nonservice-connected disability under Social Security or workers' compensation laws are not subject to the offset described in paragraph (c)(1) of this section, even if the benefits are awarded in a judicial proceeding.

(4) *Duty to report receipt of judgment, settlement, or compromise.* A veteran entitled to receive increased disability compensation under this section must report to VA the total amount of any money and the fair market value of any property received as damages described in paragraph (c)(1) of this section. Expenses related to the cause of action, such as attorneys' fees, cannot be deducted from the total amount to be reported.

(Authority: 38 U.S.C. 1160)

§ 5.283 Total and permanent total ratings and unemployability.

(a) *Total disability ratings—(1) General.* VA will consider total disability to exist when any impairment of mind or body renders it impossible for the average person to follow a substantially gainful occupation. VA generally will not assign total ratings for temporary exacerbations or acute infectious diseases except where the Schedule for Rating Disabilities in part 4 of this chapter (the Schedule) specifically prescribes total ratings for temporary exacerbations or acute infectious diseases. For compensation purposes, a total disability rating may be granted without regard to whether the impairment is shown to be permanent.

(2) *Schedular rating or total disability rating based on individual unemployability.* VA may assign a total rating for any disability or combination of disabilities in the following cases:

- (i) The Schedule prescribes a 100-percent rating, or
- (ii) in a case in which VA assigns a rating of less than 100 percent, if the veteran meets the requirements of § 4.16 of this chapter or, in pension cases, the requirements of § 4.17 of this chapter.

(3) *Ratings of total disability based on history.* In the case of a disability that has undergone some recent improvement, VA may nonetheless assign a rating of total disability, provided:

- (i) That the disability was severe enough in the past to warrant a total disability rating;
- (ii) That the disability:
 - (A) Required extended, continuous, or intermittent hospitalization;
 - (B) Produced total industrial incapacity for at least 1 year; or
 - (C) Results in recurring, severe, frequent, or prolonged exacerbations; and

(iii) That it is the opinion of the agency of original jurisdiction (AOJ) that, despite the recent improvement of the physical condition, the veteran will be unable to adjust into a substantially gainful occupation. The AOJ will consider the frequency and duration of totally incapacitating exacerbations since incurrence of the original injury or disease and the periods of hospitalization for treatment in determining whether the average person could reestablish himself or herself in a substantially gainful occupation.

(b) *Permanent total disability.* VA will consider a total disability to be permanent when an impairment of mind or body that makes it impossible for the average person to follow a substantially gainful occupation is reasonably certain to continue

throughout the life of the disabled person.

(1) VA will consider the following disabilities or conditions as constituting a permanent total disability: The permanent anatomical loss or loss of use of both hands, or of both feet, or of one hand and one foot; the anatomical loss or loss of sight of both eyes; being permanently so significantly disabled as to need regular aid and attendance; or being permanently bedridden.

(2) VA will consider an injury or disease of long-standing that is actually totally incapacitating as a permanent total disability, if the probability of permanent improvement under treatment is remote.

(3) VA may not assign a permanent total disability rating as a result of any incapacity from acute infectious disease, accident, or injury, unless there is present the permanent anatomical loss or loss of use of extremities or the permanent anatomical loss or loss of sight of both eyes, as described in paragraph (b)(1) of this section, or the person is permanently so significantly disabled as to need regular aid and attendance or permanently bedridden, or when it is reasonably certain that a subsidence of the acute or temporary symptoms will be followed by irreducible totality of disability by way of residuals.

(4) VA may consider the age of the disabled person in determining whether a total disability is permanent.

(c) *Insurance ratings.* A rating of permanent and total disability for insurance purposes will have no effect on a rating for compensation or pension. (Authority: 38 U.S.C. 501(a), 1155)

§ 5.284 Total disability ratings for disability compensation purposes.

(a) *General.* Subject to the limitation in paragraph (b) of this section, total disability compensation ratings may be assigned under the provisions of § 5.283.

(Authority: 38 U.S.C. 1155)

(b) *Incarcerated veterans.* VA will not assign a total disability rating based on individual unemployability for compensation purposes while a veteran is incarcerated in a Federal, State, or local penal institution for conviction of a felony if the rating would first become effective during such period of incarceration. However, VA will reconsider the case to determine if continued eligibility for such rating exists if a total disability rating based on individual unemployability existed prior to incarceration for the felony and routine review was required.

(Authority: 38 U.S.C. 5313(c))

(c) *Program for vocational rehabilitation.* Each time VA assigns a total disability rating based on individual unemployability, the agency of original jurisdiction will inform the Vocational Rehabilitation and Employment Service of the rating so the Vocational Rehabilitation and Employment Service may offer to evaluate whether it is reasonably feasible for the veteran to achieve a vocational goal.

(Authority: 38 U.S.C. 1163)

§ 5.285 Continuance of total disability ratings.

(a) *General.* VA will not reduce a total disability rating that was based on the severity of a person's disability or disabilities without examination showing material improvement in physical or mental condition. VA may reduce a total disability rating that was based on the severity of a person's disability or disabilities without examination if the rating was based on clear error.

(1) VA will consider examination reports showing material improvement in conjunction with all the facts of record, including whether:

(i) The veteran improved under the ordinary conditions of life, i.e., while working or actively seeking work; or

(ii) The symptoms have been brought under control by prolonged rest or by following a regimen which precludes work.

(2) If either circumstance in paragraph (a)(1)(ii) of this section applies, VA will not reduce a total disability rating until VA has reexamined the person after a period of 3 to 6 months of employment.

(3) Paragraphs (a), (a)(1), and (a)(2) of this section do not apply to a total rating that was purely based on hospital, surgical, or residence treatment, or individual unemployability.

(b) *Individual unemployability.* (1) VA may reduce a service-connected total disability rating based on individual unemployability upon a showing of clear and convincing evidence of actual employability.

(2) When a veteran with a total disability rating based on individual unemployability is undergoing vocational rehabilitation, education, or training, VA will not reduce the rating because of that rehabilitation, education, or training unless the AOJ receives:

(i) Evidence of marked improvement or recovery in physical or mental conditions that demonstrates affirmatively the veteran's capacity to pursue the vocation or occupation for which the training is intended to qualify him or her;

(ii) Evidence of employment progress, income earned, and prospects of economic rehabilitation that demonstrates affirmatively the veteran's capacity to pursue the vocation or occupation for which the training is intended to qualify him or her; or

(iii) Evidence that the physical or mental demands of the course are obviously incompatible with total disability.

(3) Neither participation in, nor the receipt of remuneration as a result of participation in, a therapeutic or rehabilitation activity under 38 U.S.C. 1718 will be considered evidence of employability.

(4) If a veteran with a total disability rating based on individual unemployability begins a substantially gainful occupation, VA may not reduce the veteran's rating solely on the basis of having secured and followed such substantially gainful occupation unless the veteran maintains the occupation for a period of 12 consecutive months. For purposes of this subparagraph, VA will not consider brief interruptions in employment to be breaks in otherwise continuous employment.

(Authority: 38 U.S.C. 501(a), 1155, 1163(a))

Cross References: § 5.170 (Calculation of 5-year, 10-year, and 20-year protection periods); § 5.172 (Protection of continuous 20-year ratings).

§§ 5.286–5.299 [Reserved]

4. Sections 5.300, 5.302, 5.303, and 5.304 and their undesignated center heading are added to subpart E and §§ 5.301 and 5.305 through 5.310 are reserved to read as follows:

Additional Disability Compensation Based on a Dependent Parent

- 5.300 Establishing dependency of a parent.
- 5.301 [Reserved]
- 5.302 General income rules—parent's dependency.
- 5.303 Deductions from income—parent's dependency.
- 5.304 Exclusions from income—parent's dependency.
- 5.305–5.310 [Reserved]

Additional Disability Compensation Based on a Dependent Parent

Note: Sections 5.300 and 5.302 through 5.304 of this part concern income rules for purposes of calculating benefits for a veteran receiving disability compensation under § 5.240(b). For establishing dependency for purposes of additional dependency and indemnity compensation, see subpart D of this part. For income rules relating to pension benefits, see subpart F of this part.

§ 5.300 Establishing dependency of a parent.

(a) *Conclusive dependency.* (1) VA will find that a veteran's parent is dependent if the parent is not residing in a foreign country and the parent's monthly income, as counted in accordance with §§ 5.302 through 5.304, does not exceed the following amounts:

(i) \$400 for a mother or father, or a remarried parent and parent's spouse, not living together, or \$660 for a mother and father, or a remarried parent and parent's spouse, living together; and

(ii) \$185 for each additional family member, as defined by paragraph (c) of this section.

(2) If a parent meets the requirements of paragraph (a)(1) of this section, VA will not consider net worth.

Note to paragraph (a): Sections 5.300 and 5.302 through 5.304 of this part concern income rules for purposes of calculating benefits for a veteran receiving disability compensation under § 5.240(b). For establishing dependency for purposes of additional dependency and indemnity compensation, see subpart D of this part. For income rules relating to pension benefits, see subpart F of this part.

(b) *Factual dependency.* If a parent does not meet the requirements of paragraph (a)(1) of this section, the veteran must establish dependency of the parent based on the following rules:

(1) *Income requirement.* VA will find dependency if the parent does not have sufficient income to provide reasonable maintenance for the parent, a parent's spouse living together with the parent, and any additional family members, as defined in paragraph (c) of this section.

(i) Reasonable maintenance includes not just basic necessities such as housing, food, clothing, and medical care, but also other items generally necessary to provide those conveniences and comforts of living consistent with the parent's reasonable style of life.

(ii) A finding that the parent's income includes financial contributions from the veteran does not establish that the parent is the veteran's dependent. VA will consider such contributions in connection with all of the other evidence when deciding factual dependency.

(2) *Net worth considered.* (i) VA will not find that dependency of a parent exists when some part of the parent's net worth should reasonably be used for that parent's maintenance. See § 5.414, "Net worth determinations for Improved Pension," for the factors used to determine whether net worth should reasonably be used for maintenance.

(ii) Net worth of a minor family member will be considered income of the parent only if it is actually available

to the veteran's parent for the minor's support.

(c) *Definition of family member.* For purposes of this section, the term "family member" means a relative who lives with the parent, other than a spouse, whom the parent is under a moral or legal obligation to support. This includes, but is not limited to, a relative under the legal age in the state where the parent resides, a relative of any age who is dependent on the parent because of physical or mental incapacity, and a relative who is physically absent from the household for a temporary purpose or for reasons beyond the relative's control.

(d) *Duty to report change in dependency status.* If a veteran is receiving additional disability compensation because of a parent's dependency and the parent's income exceeds the applicable amount specified in paragraph (a)(1) of this section, the veteran must report an increase in the parent's income or net worth to VA when the veteran acquires knowledge of the increase. Failure to report such an increase may create an overpayment subject to recovery by VA.

(e) *Remarriage of a parent.* Dependency will not be discontinued solely because a parent has married or remarried after VA has granted additional disability compensation for a dependent parent. Additional disability compensation for a parent's dependency will be continued if evidence is submitted showing that the parent continues to meet the requirement for a finding of conclusive dependency or factual dependency under this section.

(Authority: 38 U.S.C. 102, 1115, 1135)

§ 5.301 [Reserved]**§ 5.302 General income rules—parent's dependency.**

(a) *All payments included in income.* VA will count all payments of any kind from any source in determining the income of a veteran's parent, except as provided in § 5.304, "Exclusions from income—parent's dependency." For the definition of "payments", see § 5.370(h).

(b) *Spousal income combined.* The dependent parent's income includes the income of the parent and the parent's spouse, unless the marriage has been terminated or the parent is separated from his or her spouse. Income is combined whether the parent's spouse is the veteran's other parent or the veteran's stepparent. The income of the parent's spouse will be subject to the same rules that are applicable to determining the income of the veteran's parent.

(c) *Income of family members under 21 years of age.* VA will count income earned by a family member who is under 21 years of age but will consider income from a business or property (including trusts) of such a family member only if that income is actually available to the veteran's parent for the support of that family member. For purposes of this section, "family member" is defined in § 5.300(c).

(d) *Income-producing property.* VA will count income from all property, real or personal, in which a veteran's parent has an interest. See § 5.410(f), "Income-producing property," for how VA determines ownership of property.

(e) *Calculation of income from profit on the sale of property.* The following rules apply when determining the amount of income a parent receives from net profit on the sale of business or non-business real or personal property, except for net profit on the sale of a parent's principal residence, which is governed by § 5.304(h).

(1) *Value deducted from sales price.*

(i) If the parent purchased the property after VA established the veteran's entitlement to additional disability compensation based on the parent's dependency, VA will deduct the purchase price, including the cost of improvements, from the selling price to determine net profit.

(ii) If the parent purchased the property before VA established the veteran's entitlement to additional disability compensation based on the parent's dependency, VA will deduct the value of the property on the date of entitlement from the selling price to determine net profit.

(2) *Installment sales.* If the parent receives payments from the sale of the property in installments, such payments will not be considered income until the total amount received is equal to the purchase price of the property (including cost of improvements), or, where paragraph (e)(1)(ii) of this section applies, until the total amount received is equal to the value of the property on the date VA established the veteran's entitlement to additional disability compensation based on the parent's dependency. Principal and interest received with each payment will not be counted separately.

(Authority: 38 U.S.C. 102)

§ 5.303 Deductions from income—parent's dependency.

(a) *Expenses of a business or profession.* VA will deduct from a parent's income necessary operating expenses of a business, farm, or profession. See § 5.413 for how to calculate these expenses.

(b) *Expenses associated with recoveries for death or disability.* VA will deduct from a parent's income medical, legal, or other expenses incident to injury or death from recoveries for such injury or death. For purposes of this paragraph, the recovery may be from any of the following sources:

(1) Commercial disability, accident, life, or health insurance;

(2) The Office of Workers' Compensation Programs of the U.S. Department of Labor;

(3) The Social Security Administration;

(4) The Railroad Retirement Board;

(5) Any workmen's compensation or employer's liability statute; or

(6) Legal damages collected for personal injury or death.

(c) *Certain salary deductions not deductible.* For the purpose of calculating a parent's income, a salary may not be reduced by the amount of deductions made under a retirement act or plan or for income tax withholding.

(Authority: 38 U.S.C. 102)

§ 5.304 Exclusions from income—parent's dependency.

The following is a list of exclusions that VA will not count as income when calculating income for the purpose of establishing a parent's dependency.

(a) *Property rental value.* The rental value of a residence a parent owns and lives in.

(b) *Certain waived retirement benefits.* Retirement benefits from any of the following sources, if the benefits have been waived pursuant to Federal statute:

(1) Civil Service Retirement and Disability Fund;

(2) Railroad Retirement Board;

(3) District of Columbia (paid to firemen, policemen, or public school teachers); or

(4) Former United States Lighthouse Service.

(c) *Death gratuity.* Death gratuity payments by the Secretary concerned under 10 U.S.C. 1475 through 1480. This includes death gratuity payments in lieu of payments under 10 U.S.C. 1478 made to certain survivors of Persian Gulf conflict veterans authorized by sec. 307, Public Law 102-25, 105 Stat. 82.

(d) *Certain VA benefit payments.* The following VA benefit payments:

(1) Payments under 38 U.S.C. chapter 11, "Compensation for Service-Connected Disability or Death";

(2) Payments under 38 U.S.C. chapter 13, "Dependency and Indemnity Compensation for Service-Connected Death";

(3) Nonservice-connected VA disability and death pension payments;

(4) Payments under 38 U.S.C. 5121, "Payment of certain accrued benefits upon death of a beneficiary";

(5) Payments under 38 U.S.C. 2302, "Funeral expenses"; and

(6) The veteran's month-of-death rate paid to a surviving spouse under § 5.695.

(e) *Certain life insurance payments.* Payments under policies of Servicemembers' Group Life Insurance, United States Government Life Insurance, National Service Life Insurance, or Veterans' Group Life Insurance.

(f) *State service bonuses.* Payments of a bonus or similar cash gratuity by any State based upon service in the Armed Forces.

(g) *Fire loss reimbursement.* Proceeds from fire insurance.

(h) *Profit from sale of principal residence.* Net profit from the sale of the parent's principal residence.

(1) *Extent of exclusion.* VA will not count net profit realized from the sale of the parent's principal residence to the extent that it is applied within the calendar year of the sale, or the following calendar year, to the purchase price of another residence as the parent's principal residence.

(2) *Limitation on date of purchase of replacement residence.* This exclusion does not apply if the parent applied the net profit from the sale to the price of a residence purchased earlier than the calendar year preceding the calendar year of sale of the old residence.

(3) *Time limit for reporting application of profit to purchase of replacement residence.* To qualify for this exclusion, the veteran must report the application of the net profit from the sale of the old residence to the purchase of the replacement residence within 1 year after the date it was so applied.

(i) *Payment for civic obligations.* Payments received for discharge of jury duty or other obligatory civic duties.

(j) *Increased inventory value of a business.* The value of an increase of stock inventory of a business.

(k) *Employer contributions.* An employer's contributions to health and hospitalization plans for either an active or retired employee.

(l) Payments listed in § 5.706.

(Authority: 38 U.S.C. 102)

§ 5.305–5.310 [Reserved]

5. Sections 5.311 through 5.315 and their undesignated center heading are added to subpart E and §§ 5.316 through 5.319 are reserved to read as follows:

Disability Compensation Effective Dates

Sec.

5.311 Effective dates—award of disability compensation.

5.312 Effective dates—increased disability compensation.

5.313 Effective dates—discontinuance of a total disability rating based on individual unemployability.

5.314 Effective dates—discontinuance of additional disability compensation based on parental dependency.

5.315 Effective dates—additional disability compensation based on decrease in the net worth of a dependent parent.

5.316–5.319 [Reserved]

Disability Compensation Effective Dates

§ 5.311 Effective dates—award of disability compensation.

(a) *Claim received within 1 year after discharge or release from active military service.* If VA grants disability compensation based on a claim VA received within 1 year after the date the veteran was discharged or released from a continuous period of active military service during which the veteran incurred the injury or disease, the effective date of the award is the later of:

(1) The day after such discharge or release from active military service; or

(2) The date entitlement arose.

(b) *Claim received more than 1 year after discharge or release from active military service.* If VA grants disability compensation based on a claim VA received more than 1 year after the date the veteran was discharged or released from a continuous period of active military service during which the veteran incurred the injury or disease, the effective date of the award is the date established by § 5.150(a).

(Authority: 38 U.S.C. 5110(a), (b)(1))

§ 5.312 Effective dates—increased disability compensation.

(a) *Applicability.* This section establishes the effective date of an award of increased disability compensation based on:

(1) A higher disability rating under subpart B of the Schedule for Rating Disabilities in part 4 of this chapter.

(2) A higher disability rating under the extra-schedular provision in § 5.280(b).

(3) A higher disability rating under § 4.16 of this chapter, "Total disability ratings for compensation based on unemployability of the individual."

(4) An award or a higher rate of special monthly compensation.

Note 1 to paragraph (a): This section does not establish the effective date of an award of secondary service connection under § 5.246 or § 5.247, which is governed by § 5.311.

Note 2 to paragraph (a): For effective dates for awards and discontinuances of temporary total disability ratings based upon

hospitalization for treatment or observation of a service-connected disability and for convalescence following treatment for a service-connected disability, see §§ 4.29 and 4.30 of this chapter.

(b) *Effective date of increase*—(1) *Claim received within 1 year after increase.* An award of increased disability compensation will be effective on the date that the evidence warrants a higher disability rating, or an award or higher rate of special monthly compensation, if VA received a claim for increased disability compensation within 1 year after that date.

(2) *Claim received more than 1 year after increase.* An award of increased disability compensation will be effective on the date established by § 5.150(a) if VA received a claim for increased disability compensation more than 1 year after the date that the evidence warrants a higher disability rating, or an award or higher rate of special monthly compensation.

(Authority: 38 U.S.C. 5110(a) and (b)(2))

§ 5.313 Effective dates—discontinuance of a total disability rating based on individual unemployability.

(a) *Scope.* This section applies to discontinuance of a veteran's total disability rating based on individual unemployability (TDIU) after employability is regained or based on failure to return an employment questionnaire to VA.

(b) *Discontinuance on regaining employability.* If VA determines that a veteran has regained employability, VA will discontinue the TDIU rating and assign the existing schedular rating. Assignment of the existing schedular rating and the reduction in disability compensation will be effective in accordance with § 5.177(f).

(c) *Failure to return employment questionnaire.* If a veteran fails to return an employment questionnaire to VA

within the time specified in VA Form 21-4140, VA will discontinue the TDIU rating and assign the existing schedular rating. Assignment of the existing schedular rating and the reduction in disability compensation will be effective beginning the first day of the month after the month VA last paid TDIU benefits.

(Authority: 38 U.S.C. 5112(a) and (b)(6))

§ 5.314 Effective dates—discontinuance of additional disability compensation based on parental dependency.

(a) *Scope.* This section applies to discontinuance of additional disability compensation paid to a veteran for a dependent parent if that parent is no longer dependent.

(b) *Discontinuance based on a change in a parent's economic status.* If VA determines that a veteran's parent is no longer dependent due to an improvement in economic status, the additional disability compensation paid due to parental dependency will be discontinued as follows:

(1) *Increase in income.* If dependency ends based on an increase in income, VA will discontinue paying the additional disability compensation on the first day of the month after the month in which the income increased.

(2) *Increase in net worth.* If dependency ends based on an increase in net worth, VA will discontinue paying the additional disability compensation on the first day of the calendar year after the year in which the net worth increased.

(c) *Discontinuance based on a change in a parent's marital status.* If VA determines that the marriage, remarriage, annulment of a marriage, or divorce of a dependent parent resulted in the end of dependency of that parent, VA will discontinue paying the additional disability compensation effective the first day of the month after

the date the change in marital status occurred.

(d) *Discontinuance based on a parent's death.* If a dependent parent dies, VA will discontinue paying the additional disability compensation on the first day of the month after the month of death.

(Authority: 38 U.S.C. 5112(b)(2) and (4))

§ 5.315 Effective dates—additional disability compensation based on decrease in the net worth of a dependent parent.

(a) *Scope.* This rule applies under the following circumstances:

(1) VA previously denied a claim or discontinued payments of additional disability compensation based upon parental dependency because of a parent's net worth;

(2) The denial or discontinuation became final; and

(3) Entitlement to additional disability compensation based upon parental dependency was subsequently established, or reestablished, because of a decrease in the parent's net worth.

(b) *Payment of additional compensation.* If a parent's net worth decreases so that additional disability compensation based on parental dependency is warranted, VA will pay additional disability compensation as follows:

(1) For claims filed before the actual decrease in net worth, effective the first day of the month after the month of the decrease; or

(2) For claims filed after the actual decrease in net worth, effective the first day of the month after the receipt of a new claim for additional disability compensation.

(Authority: 38 U.S.C. 501(a), 5110)

§§ 5.316–5.319 [Reserved]

[FR Doc. 2010-21019 Filed 8-31-10; 8:45 am]

BILLING CODE 8320-01-P