

Custom Federal Regulations Service™

**This is supplemental material
for Book B of your set of
Federal Regulations**

Title 38, Part 3

Adjudication

Veterans Benefits Administration

Supplement No. 106

Covering period of *Federal Register* issues
through January 1, 2014

Copyright © 2014 Jonathan Publishing

Need Assistance?

Questions concerning **MISSING SUPPLEMENTS**, need for **ADDITIONAL BOOKS**, and other **DISTRIBUTION LIST** issues for this loose-leaf service should be directed to:

Department of Veterans Affairs
Veterans Benefits Administration
Administration
Mail Code: 20M33
810 Vermont Avenue, N.W.
Washington DC 20420
Telephone: 202/273-7588
Fax: 202/275-5947
E-mail: coarms@vba.va.gov

Questions concerning the **FILING INSTRUCTIONS** for this loose-leaf service,
or the reporting of **SUBSTANTIVE ERRORS** in the text,
may be directed to:

Jonathan Publishing
660 Laurel Street, B-103
Baton Rouge LA 70802
Telephone: 225-205-5873
Fax: 702-993-6003
E-mail: info@jonpub.com

GENERAL INSTRUCTIONS

Custom Federal Regulations Service™

Supplemental Materials for *Book B*

Code of Federal Regulations

Title 38, Part 3

Adjudication

Veterans Benefits Administration

Supplement No. 106

5 January 2014

Covering the period of Federal Register issues
through January 1, 2014

When **Book B** was originally prepared, it was current through final regulations published in the *Federal Register* of 9 August 1991. These supplemental materials are designed to keep your regulations up to date. You should file the attached pages immediately, and record the fact that you did so on the *Supplement Filing Record* which begins on page B-5 of Book B, *Adjudication*.

B-106-3

**To ensure accuracy and timeliness of your materials,
it is important that you follow these simple procedures:**

1. Always file your supplemental materials immediately upon receipt.
2. Before filing, always check the Supplement Filing Record (page B-5) to be sure that all prior supplements have been filed. If you are missing any supplements, contact the Veterans Benefits Administration at the address listed on page B-4.
3. After filing, enter the relevant information on the Supplement Filing Record sheet (page B-5)—the date filed, name/initials of filer, and date through which the *Federal Register* is covered.
4. If as a result of a failure to file, or an undelivered supplement, you have more than one supplement to file at a time, be certain to file them in chronological order, lower number first.
5. Always retain the filing instructions (simply insert them at the back of the book) as a backup record of filing and for reference in case of a filing error.
6. Be certain that you *permanently discard* any pages indicated for removal in the filing instructions in order to avoid confusion later.

To execute the filing instructions, simply remove *and throw away* the pages listed under *Remove These Old Pages*, and replace them in each case with the corresponding pages from this supplement listed under *Add These New Pages*. Occasionally new pages will be added without removal of any old material (reflecting new regulations), and occasionally old pages will be removed without addition of any new material (reflecting rescinded regulations)—in these cases the word *None* will appear in the appropriate column.

FILING INSTRUCTIONS

**Book B, Supplement No. 106
January 5, 2014**

<i>Remove these <u>old pages</u></i>	<i>Add these <u>new pages</u></i>	<i>Section(s) <u>Affected</u></i>
3.310-1 to 3.311-1	3.310-1 to 3.311-1	§3.310
3.809-1 to 3.809-2	3.809-1 to 3.809-2	§3.809

**Do not file this supplement until you confirm that
all prior supplements have been filed**

**Be sure to complete the
Supplement Filing Record (page B-5)
when you have finished filing this material.**

HIGHLIGHTS

Book B, Supplement No. 106 January 5, 2014

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

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

Modifications in this supplement include the following:

1. On 3 December 2013, the VA published an interim final rule effective that same day, amending its adjudication regulation regarding specially adapted housing (SAH). The amendment authorizes automatic issuance of a certificate of eligibility for SAH to all veterans and active service-members with service-connected amyotrophic lateral sclerosis (ALS) rated totally disabling under the VA Schedule for Rating Disabilities. Change:

- Revised §3.809.

2. On 17 December 2013, the VA published a final rule effective 16 January 2014, amending its adjudication regulations concerning service connection. This final rule acts upon a report of the National Academy of Sciences, Institute of Medicine (IOM), Gulf War and Health, Volume 7: Long-Term Consequences of Traumatic Brain Injury, regarding the association between traumatic brain injury (TBI) and five diagnosable illnesses. Change:

- In §3.310, added paragraph (d).



§3.310 Disabilities that are proximately due to, or aggravated by, service-connected disease or injury.

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

(b) *Aggravation of nonservice-connected disabilities.* Any increase in severity of a nonservice-connected disease or injury that is proximately due to or the result of a service-connected disease or injury, and not due to the natural progress of the nonservice-connected disease, will be service connected. However, VA will not concede that a nonservice-connected disease or injury was aggravated by a service-connected disease or injury unless the baseline level of severity of the nonservice-connected disease or injury is established by medical evidence created before the onset of aggravation or by the earliest medical evidence created at any time between the onset of aggravation and the receipt of medical evidence establishing the current level of severity of the nonservice-connected disease or injury. The rating activity will determine the baseline and current levels of severity under the Schedule for Rating Disabilities (38 CFR part 4) and determine the extent of aggravation by deducting the baseline level of severity, as well as any increase in severity due to the natural progress of the disease, from the current level. (Authority: 38 U.S.C. 1110 and 1131)

(c) *Cardiovascular disease.* Ischemic heart disease or other cardiovascular disease developing in a veteran who 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, shall be held to be the proximate result of the service-connected amputation or amputations.

(d) *Traumatic brain injury.*

(1) In a veteran who has a service-connected traumatic brain injury, the following shall be held to be the proximate result of the service-connected traumatic brain injury (TBI), in the absence of clear evidence to the contrary:

(i) Parkinsonism, including Parkinson's disease, following moderate or severe TBI;

(ii) Unprovoked seizures following moderate or severe TBI;

(iii) Dementias of the following types: presenile dementia of the Alzheimer type, frontotemporal dementia, and dementia with Lewy bodies, if manifest within 15 years following moderate or severe TBI;

(iv) Depression if manifest within 3 years of moderate or severe TBI, or within 12 months of mild TBI; or

(v) Diseases of hormone deficiency that result from hypothalamo-pituitary changes if manifest within 12 months of moderate or severe TBI.

(2) Neither the severity levels nor the time limits in paragraph (d)(1) of this section preclude a finding of service connection for conditions shown by evidence to be proximately due to service-connected TBI. If a claim does not meet the requirements of paragraph (d)(1) with respect to the time of manifestation or the severity of the TBI, or both, VA will develop and decide the claim under generally applicable principles of service connection without regard to paragraph (d)(1).

(3) (i) For purposes of this section VA will use the following table for determining the severity of a TBI:

Mild	Moderate	Severe
Normal structural imaging	Normal or abnormal structural imaging	Normal or abnormal structural imaging
LOC = 0–30 min	LOC > 30 min and < 24 hours	LOC > 24 hrs
AOC = a moment up to 24 hrs	AOC > 24 hours. Severity based on other criteria	
PTA = 0–1 day	PTA > 1 and < 7 days	PTA > 7 days
GCS = 13–15	GCS = 9–12	GCS = 3–8

Note: The factors considered are:
 Structural imaging of the brain.
 LOC—Loss of consciousness.
 AOC—Alteration of consciousness/mental state.
 PTA—Post-traumatic amnesia.
 GCS—Glasgow Coma Scale. (For purposes of injury stratification, the Glasgow Coma Scale is measured at or after 24 hours.)

(ii) The determination of the severity level under this paragraph is based on the TBI symptoms at the time of injury or shortly thereafter, rather than the current level of functioning. VA will not require that the TBI meet all the criteria listed under a certain severity level in order to classify the TBI at that severity level. If a TBI meets the criteria in more than one category of severity, then VA will rank the TBI at the highest level in which a criterion is met, except where the qualifying criterion is the same at both levels. (Authority: 38 U.S.C. 501, 1110 and 1131)

[44 FR 50340, Aug. 28, 1979, as amended at 66 FR 18198, Apr. 6, 2001; 71 FR 52747, Sept. 7, 2006; 78 FR 76208, Dec. 17, 2013]

Supplement *Highlights* references: 45(2), 73(3), 106(2).

3.310-3

§3.310—Disabilities that are proximately due to, or aggravated by,
service-connected disease or injury

3.310-3

Reserved

§3.311 Claims based on exposure to ionizing radiation.*(a) Determinations of exposure and dose:*

(1) *Dose assessment.* In all claims in which it is established that a radiogenic disease first became manifest after service and was not manifest to a compensable degree within any applicable presumptive period as specified in §3.307 or §3.309, and it is contended the disease is a result of exposure to ionizing radiation in service, an assessment will be made as to the size and nature of the radiation dose or doses. When dose estimates provided pursuant to paragraph (a)(2) of this section are reported as a range of doses to which a veteran may have been exposed, exposure at the highest level of the dose range reported will be presumed. (Authority: 38 U.S.C. 501(a))

(2) *Request for dose information.* Where necessary pursuant to paragraph (a)(1) of this section, dose information will be requested as follows:

(i) *Atmospheric nuclear weapons test participation claims.* In claims based upon participation in atmospheric nuclear testing, dose data will in all cases be requested from the appropriate office of the Department of Defense.

(ii) *Hiroshima and Nagasaki occupation claims.* In all claims based on participation in the American occupation of Hiroshima or Nagasaki, Japan, prior to July 1, 1946, dose data will be requested from the Department of Defense.

(iii) *Other exposure claims.* In all other claims involving radiation exposure, a request will be made for any available records concerning the veteran's exposure to radiation. These records normally include but may not be limited to the veteran's Record of Occupational Exposure to Ionizing Radiation (DD Form 1141), if maintained, service medical records, and other records which may contain information pertaining to the veteran's radiation dose in service. All such records will be forwarded to the Under Secretary for Health, who will be responsible for preparation of a dose estimate, to the extent feasible, based on available methodologies.

(3) *Referral to independent expert.* When necessary to reconcile a material difference between an estimate of dose, from a credible source, submitted by or on behalf of a claimant, and dose data derived from official military records, the estimates and supporting documentation shall be referred to an independent expert, selected by the Director of the National Institutes of Health, who shall prepare a separate radiation dose estimate for consideration in adjudication of the claim. For purposes of this paragraph:

(i) The difference between the claimant's estimate and dose data derived from official military records shall ordinarily be considered material if one estimate is at least double the other estimate.

(ii) A dose estimate shall be considered from a "credible source" if prepared by a person or persons certified by an appropriate professional body in the field of

§3.809 Specially adapted housing under 38 U.S.C. 2101(a).

In order for a certificate of eligibility for assistance in acquiring specially adapted housing under 38 U.S.C. 2101(a)(2)(A)(i) or 2101A(a) to be extended to a veteran or a member of the Armed Forces serving on active duty, the following requirements must be met:

(a) *General.* A member of the Armed Forces serving on active duty must have a disability rated as permanent and total that was incurred or aggravated in line of duty in active military, naval, or air service. A veteran must be entitled to compensation under chapter 11 of title 38, United States Code, for a disability rated as permanent and total.

(b) *Disability.* The disability must be due to:

(1) The loss or loss of use of both lower extremities, such as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair,

(2) Blindness in both eyes, having only light perception, plus the anatomical loss or loss of use of one lower extremity,

(3) The loss or loss of use of one lower extremity together with residuals of organic disease or injury which so affect the functions of balance or propulsion as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair,

(4) The loss or loss of use of one lower extremity together with the loss or loss of use of one upper extremity which so affect the functions of balance or propulsion as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair,

(5) The loss or loss of use of both upper extremities such as to preclude use of the arms at or above the elbow, or

(6) Full thickness or subdermal burns that have resulted in contractures with limitation of motion of two or more extremities or of at least one extremity and the trunk.

(c) *Preclude locomotion.* This term means the necessity for regular and constant use of a wheelchair, braces, crutches or canes as a normal mode of locomotion although occasional locomotion by other methods may be possible.

(d) *Amyotrophic lateral sclerosis*. VA considers § 3.809(b) satisfied if the veteran or member of the Armed Forces serving on active duty has service-connected amyotrophic lateral sclerosis rated 100 percent disabling under 38 CFR 4.124a, diagnostic code 8017. (Authority: 38 U.S.C. 501(a), 1151(c)(1), 2101, 2101A)

Cross Reference: Assistance to certain disabled veterans in acquiring specially adapted housing. See §§ 36.4400 through 36.4410 of this chapter.

[26 FR 1606, Feb. 24, 1961, as amended at 34 FR 9560, June 18, 1969; 43 FR 14018, Apr. 4, 1978; 46 FR 47543, Sept. 29, 1981; 75 FR 57861, Sept. 23, 2010; 78 FR 72576, Dec. 3, 2013]

Supplement *Highlights* references: 93(1), 106(1).

Next Section is §3.809a