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Title 38, Part 3

Adjudication

Veterans Benefits Administration

Supplement No. 122

Covering period of *Federal Register* issues
through March 1, 2019

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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. 122

5 March 2019

Covering the period of Federal Register issues
through March 1, 2019

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*.

**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.
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FILING INSTRUCTIONS

**Book B, Supplement No. 122
March 5, 2019**

<i>Remove these <u>old pages</u></i>	<i>Add these <u>new pages</u></i>	<i>Section(s) <u>Affected</u></i>
3.155-3 to 3.156-3	3.155-3 to 3.156-3	§3.156
3.2400-1 to 3.2601-1	3.2400-1 to 3.2601-1	§§3.2400, 3.2500 & 3.2600

**Do not file this supplement until you confirm that
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HIGHLIGHTS

Book B, Supplement No. 122 March 5, 2019

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 15 February 2019, the VA published a correction final rule, effective 19 February 2019, regarding its claims adjudication, appeals, and Rules of Practice of the Board of Veterans' Appeals (Board) regulations. This correction addresses minor technical errors in the published final rule. Changes:

- In §3.156, revised paragraph (a),
- In §3.2400, revised paragraphs (d),
- In §3.2500, revised paragraphs (b), and
- In §3.2600, revised paragraph (c).

(i) *Supplemental claims.* Upon receipt of a communication indicating a belief in entitlement to benefits that is submitted in writing or electronically on a supplemental claim form prescribed by the Secretary that is not complete as defined in §3.160(a) of this section, the Secretary shall notify the claimant and the claimant's representative, if any, of the information necessary to complete the application form prescribed by the Secretary. If VA receives a complete claim within 60 days of notice by VA that an incomplete claim was filed, it will be considered filed as of the date of receipt of the incomplete claim (see §3.2501).

(ii) *For other types of claims.* If VA receives a complete claim within 1 year of the filing of an intent to file a claim that meets the requirements of paragraph (b) of this section, it will be considered filed as of the date of receipt of the intent to file a claim. Only one complete claim for a benefit (e.g., compensation, pension) may be associated with each intent to file a claim for that benefit, though multiple issues may be contained within a complete claim. In the event multiple complete claims for a benefit are filed within 1 year of an intent to file a claim for that benefit, only the first claim filed will be associated with the intent to file a claim. In the event that VA receives both an intent to file a claim and an incomplete application form before the complete claim as defined in §3.160(a) is filed, the complete claim will be considered filed as of the date of receipt of whichever was filed first provided it is perfected within the necessary timeframe, but in no event, will the complete claim be considered filed more than one year prior to the date of receipt of the complete claim.

(2) *Scope of claim.* Once VA receives a complete claim, VA will adjudicate as part of the claim entitlement to any ancillary benefits that arise as a result of the adjudication decision (e.g., entitlement to 38 U.S.C. Chapter 35 Dependents' Educational Assistance benefits, entitlement to special monthly compensation under 38 CFR 3.350, entitlement to adaptive automobile allowance, etc.). The claimant may, but need not, assert entitlement to ancillary benefits at the time the complete claim is filed. VA will also consider all lay and medical evidence of record in order to adjudicate entitlement to benefits for the claimed condition as well as entitlement to any additional benefits for complications of the claimed condition, including those identified by the rating criteria for that condition in 38 CFR Part 4, VA Schedule for Rating Disabilities. VA's decision on an issue within a claim implies that VA has determined that evidence of record does not support entitlement for any other issues that are reasonably within the scope of the issues addressed in that decision. VA's decision that addresses all outstanding issues enumerated in the complete claim implies that VA has determined evidence of record does not support entitlement for any other issues that are reasonably within the scope of the issues enumerated in the complete claim.

[26 FR 1570, Feb. 24, 1961, as amended at 52 FR 27340, July 21, 1987; 79 FR 57695, Sep. 25, 2014; 84 FR 168, Jan. 18, 2019]

Cross references: Complete claim. See § 3.160(a). Effective dates. See § 3.400.

Supplement *Highlights* References: 111(1), 121(1).

§3.156 New evidence.

(a) *New and material evidence.* For claims to reopen decided prior to the effective date provided in §19.2(a), the following standards apply. A claimant may reopen a finally adjudicated legacy claim by submitting new and material evidence. New evidence is evidence not previously part of the actual record before agency adjudicators. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim. (Authority: 38 U.S.C. 501, 5103A(h), 5108)

(b) *Pending legacy claims not under the modernized review system.* New and material evidence received prior to the expiration of the appeal period, or prior to the appellate decision if a timely appeal has been filed (including evidence received prior to an appellate decision and referred to the agency of original jurisdiction by the Board of Veterans Appeals without consideration in that decision in accordance with the provisions of §20.1304(b)(1) of this chapter), will be considered as having been filed in connection with the claim which was pending at the beginning of the appeal period. (Authority: 38 U.S.C. 501(a))

(c) *Service department records.*

(1) Notwithstanding any other section in this part, at any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim, notwithstanding paragraph (a) of this section. Such records include, but are not limited to:

(i) Service records that are related to a claimed in-service event, injury, or disease, regardless of whether such records mention the veteran by name, as long as the other requirements of paragraph (c) of this section are met;

(ii) Additional service records forwarded by the Department of Defense or the service department to VA any time after VA's original request for service records; and

(iii) Declassified records that could not have been obtained because the records were classified when VA decided the claim.

(2) Paragraph (c)(1) of this section does not apply to records that VA could not have obtained when it decided the claim because the records did not exist when VA decided the claim, or because the claimant failed to provide sufficient information for VA to identify and obtain the records from the respective service department, the Joint Services Records Research Center, or from any other official source.

(3) An award made based all or in part on the records identified by paragraph (c)(1) of this section is effective on the date entitlement arose or the date VA received the

previously decided claim, whichever is later, or such other date as may be authorized by the provisions of this part applicable to the previously decided claim.

(4) A retroactive evaluation of disability resulting from disease or injury subsequently service connected on the basis of the new evidence from the service department must be supported adequately by medical evidence. Where such records clearly support the assignment of a specific rating over a part or the entire period of time involved, a retroactive evaluation will be assigned accordingly, except as it may be affected by the filing date of the original claim. (Authority: 38 U.S.C. 501(a))

(d) *New and relevant evidence.* On or after the effective date provided in §19.2(a), a claimant may file a supplemental claim as prescribed in §3.2501. If new and relevant evidence, as defined in §3.2501(a)(1), is presented or secured with respect to the supplemental claim, the agency of original jurisdiction will readjudicate the claim taking into consideration all of the evidence of record.

[27 FR 11887, Dec. 1, 1962, as amended at 55 FR 20148, May 15, 1990; 55 FR 52275, Dec. 21, 1990; 58 FR 32443, June 10, 1993; 66 FR 45630, Aug. 29, 2001; 71 FR 52457, Sept. 6, 2006; 84 FR 169, Jan. 18, 2019; 84 FR 4336, Feb. 15, 2019]

Cross references: Effective dates—general. See §3.400. Correction of military records. See §3.400(g).

Supplement *Highlights* references: 8(1), 47(1), 73(2), 121(1), 122(1).

Reserved

§3.2400 Applicability of modernized review system.

(a) *Applicability.* The modernized review system defined in 38 CFR 19.2(b) applies to all claims, requests for reopening of finally adjudicated claims, and requests for revision based on clear and unmistakable error:

(1) For which VA issues notice of an initial decision on or after the effective date of the modernized review system as provided in 38 CFR 19.2(a); or

(2) Where a claimant has elected review of a legacy claim under the modernized review system as provided in paragraph (c) of this section.

(b) *Legacy claims.* A legacy claim is a claim, or request for reopening or revision of a finally adjudicated claim, for which VA provided notice of a decision prior to the effective date of the modernized review system and the claimant has not elected to participate in the modernized review system as provided in paragraph (c) of this section.

(c) *Election into the modernized review system.* For claims governed by this part, pursuant to election by a claimant, the modernized review system applies where:

(1) Rapid appeals modernization program election. A claimant with a legacy appeal elects to opt-in to the modernized review system on or after November 1, 2017, as part of a program authorized by the Secretary pursuant to section 4 of Public Law 115-55; or

(2) Election after receiving a statement of the case. A claimant with a legacy appeal elects to opt-in to the modernized review system, following issuance, on or after the effective date of the modernized system, of a VA Statement of the Case or Supplemental Statement of the Case, by filing for a review option under the new system in accordance with §3.2500 on a form prescribed by the Secretary within the time allowed for filing a substantive appeal under 38 CFR 19.52(b) and other applicable provisions in part 19 of this chapter.

(d) *Effect of election.* Once an eligible claimant elects the modernized review system with respect to a particular claim, the provisions of 38 CFR parts 3, 19, and 20 applicable only to legacy claims and appeals no longer apply to that claim.

[84 FR 171, Jan. 18, 2019; as amended at 84 FR 4336, Feb. 15, 2019]

Supplement *Highlights* references: 121(1), 122(1).

§3.2500 Review of decisions.*(a) Reviews available.*

(1) Within one year from the date on which the agency of original jurisdiction issues a notice of a decision on a claim or issue as defined in §3.151(c), except as otherwise provided in paragraphs (c), (e), and (f) of this section, a claimant may elect one of the following administrative review options by timely filing the appropriate form prescribed by the Secretary:

- (i) A request for higher-level review under §3.2601 or
- (ii) An appeal to the Board under §20.202 of this chapter.

(2) At any time after VA issues notice of a decision on an issue within a claim, a claimant may file a supplemental claim under §3.2501.

(b) Concurrent election prohibited. With regard to the adjudication of a claim or an issue as defined in §3.151(c), a claimant who has filed for review under one of the options available under paragraph (a) of this section may not, while that review is pending final adjudication, file for review under a different available option. While the adjudication of a specific benefit is pending on appeal before a federal court, a claimant may not file for administrative review of the claim under any of options listed in paragraph (a) of this section.

(c) Continuously pursued issues. A claimant may continuously pursue a claim or an issue by timely and properly filing one of the following administrative review options, as specified (except as otherwise provided in paragraphs (c), (e), and (f) of this section), after any decision by the agency of original jurisdiction, Board of Veterans' Appeals, or entry of judgment by the U.S. Court of Appeals for Veterans Claims, provided that any appeal to the U.S. Court of Appeals for Veterans Claims is timely filed as determined by the court:

(1) Following notice of a decision on an initial claim or a supplemental claim, the claimant may file a supplemental claim, request a higher-level review, or appeal to the Board of Veterans' Appeals.

(2) Following notice of a decision on a higher-level review, the claimant may file a supplemental claim or appeal to the Board of Veterans' Appeals. (See appeal to the Board, 38 CFR 20.202).

(3) Following notice of a decision on an appeal to the Board of Veterans' Appeals, the claimant may file a supplemental claim or file a notice of appeal to the Court of Appeals for Veterans Claims.

(4) Following a decision on an appeal to the Court of Appeals for Veterans Claims, the claimant may file a supplemental claim.

(d) *Voluntary withdrawal.* A claimant may withdraw a supplemental claim or a request for a higher-level review at any time before VA renders a decision on the issue. A claimant must submit in writing or through electronic submission in a manner prescribed by the Secretary any notice of withdrawal of an issue under the selected review option to the agency of original jurisdiction. The withdrawal will be effective the date VA receives it. A claimant may withdraw an appeal to the Board of Veteran's Appeals as prescribed in §20.205.

(e) *Changing review options while a review is pending adjudication—*

(1) Within one year of prior decision notice. A claimant may change the review option selected by withdrawing the request as prescribed in §3.2500(d) and filing the appropriate application for the requested review option within one year from the date on which VA issued notice of a decision on an issue.

(2) More than one year after notice of a decision. A claimant may change the review option selected to a supplemental claim after expiration of one-year following the date on which VA issued a notice of decision on an issue by following the procedure specified in paragraph (e)(1) of this section. Where VA receives the supplemental claim application after expiration of the one-year period, continuous pursuit of the claim will be broken and VA will apply the effective date provisions under paragraph (h)(2) of this section, unless VA grants an extension of the one-year period for good cause shown under §3.109(b) and the supplemental claim application is received within the extension period allowed.

(f) *Applicability.* This section applies to claims and requests under the modernized review system as set forth in §3.2400, with the exception that a supplemental claim may not be filed in connection with a denial of a request to revise a final decision of the agency of original jurisdiction based on clear and unmistakable error.

(g) *Review of simultaneously contested claims.* Notwithstanding other provisions of this part, a party to a simultaneously contested claim may only seek administrative review of a decision by the agency of original jurisdiction on such claim by filing an appeal to the Board as prescribed in §20.402 of this chapter within 60 days of the date VA issues notice of the decision on the claim. (See contested claims, 38 CFR 20.402).

(h) *Effective dates—*

(1) *Continuously pursued claims.* Except as otherwise provided by other provisions of this part, including §3.400, the effective date will be fixed in accordance with the date of receipt of the initial claim or date entitlement arose, whichever is later, if a claimant continuously pursues an issue by timely filing in succession any of the available review options as specified in paragraph (c) of this section within one year of the issuance of the decision (or the time period specified in paragraph (f) of this section, as applicable to simultaneously contested claims), provided that any appeal to the U.S. Court of Appeals for Veterans Claims must be accepted as timely by that court.

(2) *Supplemental claims received more than one year after notice of decision.*

Except as otherwise provided in this section, for supplemental claims received more than one year after the date on which the agency of original jurisdiction issues notice of a decision or the Board of Veterans' Appeals issued notice of a decision, the effective date will be fixed in accordance with the date entitlement arose, but will not be earlier than the date of receipt of the supplemental claim.

[84 FR 171, Jan. 18, 2019; as amended at 84 FR 4336, Feb. 15, 2019]

Supplement *Highlights* references: 121(1), 122(1).

§3.2501 Supplemental claims.

Except as otherwise provided, a claimant or his or her authorized representative, if any, who disagrees with a prior VA decision may file a supplemental claim (see §3.1(p)(2)) by submitting in writing or electronically a complete application (see §3.160(a)) on a form prescribed by the Secretary any time after the agency of original jurisdiction issues notice of a decision, regardless of whether the claim is pending (see §3.160(c)) or has become finally adjudicated (see §3.160(d)). If new and relevant evidence is presented or secured with respect to the supplemental claim, the agency of original jurisdiction will readjudicate the claim taking into consideration all of the evidence of record. If new and relevant evidence is not presented or secured, the agency of original jurisdiction will issue a decision finding that there was insufficient evidence to readjudicate the claim. In determining whether new and relevant evidence is presented or secured, VA will consider any VA treatment records reasonably identified by the claimant and any evidence received by VA after VA issued notice of a decision on the claim and while the evidentiary record was closed (see 3.103(c)).

(a) *New and relevant evidence.* The new and relevant standard will not impose a higher evidentiary threshold than the previous new and material evidence standard under §3.156(a).

(1) *Definition.* New evidence is evidence not previously part of the actual record before agency adjudicators. Relevant evidence is information that tends to prove or disprove a matter at issue in a claim. Relevant evidence includes evidence that raises a theory of entitlement that was not previously addressed.

(2) *Receipt prior to notice of a decision.* New and relevant evidence received before VA issues its decision on a supplemental claim will be considered as having been filed in connection with the claim.

(b) *Evidentiary record.* The evidentiary record for a supplemental claim includes all evidence received by VA before VA issues notice of a decision on the supplemental claim. For VA to readjudicate the claim, the evidentiary record must include new and relevant evidence that was not of record as of the date of notice of the prior decision.

(c) *Duty to assist.* Upon receipt of a substantially complete supplemental claim, VA's duty to assist in the gathering of evidence under §3.159 of this part is triggered and includes any such assistance that may help secure new and relevant evidence as defined in paragraph (a) of this section to complete the supplemental claim application.

(d) *Date of filing.* The filing date of a supplemental claim is determined according to §3.155, with the exception of the intent to file rule found in §3.155(b) which applies to initial claims. (Authority: 38 U.S.C. 501, 5103A(h), 5108)

[84 FR 171, Jan. 18, 2019]

Supplement *Highlights* references: 121(1).

§3.2502 Return by higher-level adjudicator or remand by the Board of Veterans' Appeals.

Upon receipt of a returned claim from a higher-level adjudicator or remand by the Board of Veterans' Appeals, the agency of original jurisdiction will expeditiously readjudicate the claim in accordance with 38 U.S.C. 5109B. The agency of original jurisdiction retains jurisdiction of the claim. In readjudicating the claim, the agency of original jurisdiction will correct all identified duty to assist errors, complete a new decision and issue notice to the claimant and or his or her legal representative in accordance with 3.103(f). The effective date of any evaluation and award of pension, compensation or dependency and indemnity compensation will be determined in accordance with the date of receipt of the initial claim as prescribed under §3.2500(g).

[84 FR 172, Jan. 18, 2019]

Supplement *Highlights* references: 121(1).

[Reserved]

Revisions

§3.2600 Legacy review of benefit claims decisions.

This section applies only to legacy claims as defined in §3.2400 in which a Notice of Disagreement is timely filed on or after June 1, 2001, under regulations applicable at the time of filing.

(a) A claimant who has filed a Notice of Disagreement submitted in accordance with the provisions of §20.201 of this chapter, and either §20.302(a) or §20.501(a) of this chapter, as applicable, with a decision of an agency of original jurisdiction on a benefit claim has a right to a review of that decision under this section. The review will be conducted by a Veterans Service Center Manager, Pension Management Center Manager, or Decision Review Officer, at VA's discretion. An individual who did not participate in the decision being reviewed will conduct this review. Only a decision that has not yet become final (by appellate decision or failure to timely appeal) may be reviewed. Review under this section will encompass only decisions with which the claimant has expressed disagreement in the Notice of Disagreement. The reviewer will consider all evidence of record and applicable law, and will give no deference to the decision being reviewed.

(b) Unless the claimant has requested review under this section with his or her Notice of Disagreement, VA will, upon receipt of the Notice of Disagreement, notify the claimant in writing of his or her right to a review under this section. To obtain such a review, the claimant must request it not later than 60 days after the date VA mails the notice. This 60-day time limit may not be extended. If the claimant fails to request review under this section not later than 60 days after the date VA mails the notice, VA will proceed with the traditional appellate process by issuing a Statement of the Case. A claimant may not have more than one review under this section of the same decision.

(c) The reviewer may conduct whatever development he or she considers necessary to resolve any disagreements in the Notice of Disagreement, consistent with applicable law. This may include an attempt to obtain additional evidence or the holding of an informal conference with the claimant. Upon the request of the claimant, the reviewer will conduct a hearing under the version of Sec. 3.103(c) of this chapter predating Public Law 115-55.

(d) The reviewer may grant a benefit sought in the claim notwithstanding §3.105(b), but, except as provided in paragraph (e) of this section, may not revise the decision in a manner that is less advantageous to the claimant than the decision under review. A review decision made under this section will include a summary of the evidence, a citation to pertinent laws, a discussion of how those laws affect the decision, and a summary of the reasons for the decision.

(e) Notwithstanding any other provisions of this section, the reviewer may reverse or revise (even if disadvantageous to the claimant) prior decisions of an agency of original jurisdiction (including the decision being reviewed or any prior decision that has become final due to failure to timely appeal) on the grounds of clear and unmistakable error (see §3.105(a)).

(f) Review under this section does not limit the appeal rights of a claimant. Unless a claimant withdraws his or her Notice of Disagreement as a result of this review process, VA will proceed with the traditional appellate process by issuing a Statement of the Case.

[66 FR 21874, May 2, 2001, as amended at 67 FR 46868, July 17, 2002; 74 FR 26959, June 5, 2009; 79 FR 57697, Sep. 25, 2014; 84 FR 172, Jan. 18, 2019; 84 FR 4336, Feb. 15, 2019]

Supplement *Highlights* references: 87(2), 111(1), 121(1), 122(1).

§3.2601 Higher-level review.

(a) *Applicability.* This section applies to all claims under the modernized review system, with the exception of simultaneously contested claims.

(b) *Requirements for election.* A claimant who is dissatisfied with a decision by the agency of original jurisdiction may file a request for higher-level review in accordance with §3.2500, by submitting a complete request for review on a form prescribed by the Secretary.

(c) *Complete request.* A complete request for higher-level review is a submission of a request on a form prescribed by the Secretary, whether paper or electronic, that meets the following requirements:

(1) A complete request must provide the name of the claimant and the relationship to the veteran, if applicable;

(2) A complete request must be signed by the claimant or a person legally authorized to sign for the claimant; and

(3) A complete request must specify the date of the underlying decision for which review is requested and specify the issues for which review is requested.

(d) *Filing period.* A complete request for higher-level review must be received by VA within one year of the date of VA's issuance of the notice of the decision. If VA receives an incomplete request form, VA will notify the claimant and the claimant's representative, if any, of the information necessary to complete the request form prescribed by the Secretary. If a complete request is submitted within 60 days of the date of the VA notification of such incomplete request or prior to the expiration of the one-year filing period, VA will consider it filed as of the date VA received the incomplete application form that did not meet the standards of a complete request.

(e) *Who may conduct a higher-level review.* Higher-level review will be conducted by an experienced adjudicator who did not participate in the prior decision. Selection of a higher-level adjudicator to conduct a higher-level review is at VA's discretion. As a general rule, an adjudicator in an office other than the office that rendered the prior decision will conduct the higher-level review. An exception to this rule applies for claims requiring specialized processing, such as where there is only one office that handles adjudication of a particular type of entitlement. A claimant may request that the office that rendered the prior decision conduct the higher-level review, and VA will grant the request in the absence of good cause to deny such as when processing is centralized at one office within the agency of original jurisdiction or when the office that rendered the prior decision does not have higher-level review personnel available to conduct the review.

(f) *Evidentiary record.* The evidentiary record in a higher-level review is limited to the evidence of record as of the date the agency of original jurisdiction issued notice of the prior decision under review and the higher-level adjudicator may not consider additional evidence. The higher-level adjudicator may not order development of additional evidence that may be relevant to the claim under review, except as provided in paragraph (g) of this section.

(g) *Duty to assist errors.* The higher-level adjudicator will ensure that VA complied with its statutory duty to assist (see §3.159) in gathering evidence applicable prior to issuance of the decision being reviewed. If the higher-level adjudicator both identifies a duty to assist error that existed at the time of VA's decision on the claim under review and cannot grant the maximum benefit for the claim, the higher-level adjudicator must return the claim for correction of the error and readjudication. Upon receipt, the agency of jurisdiction will expeditiously readjudicate the claim in accordance with 38 U.S.C. 5109B.

(1) For disability evaluations, the maximum benefit means the highest schedular evaluation allowed by law and regulation for the issue under review.

(2) For ancillary benefits, the maximum benefit means the granting of the benefit sought.

(3) For pension benefits or dependents indemnity compensation, the maximum benefit means granting the highest benefit payable.

(h) *Informal conferences.* A claimant or his or her representative may include a request for an informal conference with a request for higher-level review. For purposes of this section, informal conference means contact with a claimant's representative or, if not represented, with the claimant, telephonically, or as otherwise determined by VA, for the sole purpose of allowing the claimant or representative to identify any errors of law or fact in a prior decision based on the record at the time the decision was issued. If requested, VA will make reasonable efforts to contact the claimant and/or the authorized representative to conduct one informal conference during a higher-level review, but if such reasonable efforts are not successful, a decision may be issued in the absence of an informal conference. The higher-level adjudicator with determinative authority over the issue will conduct the informal conference, absent exceptional circumstances. VA will not receive any new evidence or introduction of facts not present at the time of the prior decision or apart of the evidentiary record in support of the higher-level review during the informal conference in accordance with paragraph (d) of this section. Any expenses incurred by the claimant in connection with the informal conference are the responsibility of the claimant.

(i) *De novo review.* The higher-level adjudicator will consider only those decisions and claims for which the claimant has requested higher-level review, and will conduct a de novo review giving no deference to the prior decision, except as provided in §3.104(c).

(j) *Difference of opinion.* The higher-level adjudicator may grant a benefit sought in the claim under review based on a difference of opinion (see §3.105(b)). However, any finding favorable to the claimant is binding except as provided in §3.104(c) of this part. In addition, the higher-level adjudicator will not revise the outcome in a manner that is less advantageous to the claimant based solely on a difference of opinion. The higher-level adjudicator may reverse or revise (even if disadvantageous to the claimant) prior decisions by VA (including the decision being reviewed or any prior decision) on the grounds of clear and unmistakable error under §3.105(a)(1) or (a)(2), as applicable, depending on whether the prior decision is finally adjudicated.

(k) *Notice requirements.* Notice of a decision made under this section will include all of the elements described in §3.103(f), a general statement indicating whether evidence submitted while the record was closed was not considered, and notice of the options available to have such evidence considered.

(Authority: 38 U.S.C. 5109A and 7105(d))

[84 FR 171, Jan. 18, 2019]

Supplement *Highlights* references: 121(1).

End of Subpart D

End of Book B