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for Book B of your set of
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Title 38, Part 3

Adjudication

Veterans Benefits Administration

Supplement No. 123

Covering period of *Federal Register* issues
through November 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. 123

5 November 2019

Covering the period of Federal Register issues
through November 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.
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. 123
November 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>
3.2400-1 to 3.2500-3	3.2400-1 to 3.2500-3	§3.2500

**Do not file this supplement until you confirm that
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Supplement Filing Record (page B-5)
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HIGHLIGHTS

Book B, Supplement No. 123 November 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 9 October 2019, the VA published a correcting amendment, effective that same day, regarding its claims adjudication, appeals, and Rules of Practice of the Board of Veterans' Appeals (Board) regulation. This correction addresses a minor technical error in the published final rule. Changes:

- In §3.2500, revised paragraph (c).

§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 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; 84 FR 54033, Oct. 9, 2019]

Supplement *Highlights* references: 121(1), 122(1), 123(1).