

RECENT DEVELOPMENTS

MAKING VETERANS BENEFITS CLEAR: VA’S REGULATION REWRITE PROJECT

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INTRODUCTION

“[T]o care for him who shall have borne the battle and for his widow, and his orphan.”¹ The United States Department of Veterans Affairs (VA)

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implements this eloquently stated mission through a large body of complex regulations. These include the regulations that implement the compensation and pension benefit programs for veterans, their dependents, and their survivors. Through these programs, VA provides more than \$41 billion annually to over 3.7 million veterans and other beneficiaries.² “In 2007, VA processed nearly 825,000 claims for disability benefits and added almost 250,000 new beneficiaries to the compensation and pension rolls.”³ These statistics illustrate the economic significance of the compensation and pension programs and highlight the number of Americans that those programs increasingly affect.

VA has numerous publications describing these programs, many of which are available on its website.⁴ However, many claimants and beneficiaries need more detailed information. Some claimants try to research the relevant regulations but find them difficult to locate and understand.

The regulations governing VA’s compensation and pension programs have evolved over time, some with origins in the 1910s. Many authors have drafted and amended them, each using his or her own particular writing style. As a result, these regulations have become progressively complex, difficult to understand, and sometimes ambiguous, causing uncertainty in the claim process and costly litigation.

For example, a claimant may have a claim with well-established facts but still be uncertain of whether or not his or her claim has merit, thus causing confusion on how best to present and argue the claim. In addition,

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1. U.S. Dep’t of Veterans Affairs, *The Origin of the VA Motto*, <http://www.va.gov/opa/feature/celebrate/vamotto.asp> (last visited Apr. 15, 2009) (describing the impact of Lincoln’s address to VA’s mission); Abraham Lincoln, President of the United States, *Second Inaugural Address*, in *INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES* 142–43 (Bicentennial ed. 1989).

2. U.S. DEP’T OF VETERANS AFFAIRS, *FY 2009 BUDGET REQUEST 27* (2008), available at <http://www.va.gov/budget/summary/2009/Fy2009VaBudgetRolloutPresentation.pps>; U.S. DEP’T OF VETERANS AFFAIRS, *VA INFORMATION PAMPHLET* (2008), available at http://www1.va.gov/vetdata/docs/Pamphlet_2-1-08.pdf [hereinafter *VA INFORMATION PAMPHLET*].

3. *VA INFORMATION PAMPHLET*, *supra* note 2.

4. U.S. Dep’t of Veterans Affairs, *Special Programs*, http://www.va.gov/spec_prog.htm (last visited Apr. 15, 2009).

if a VA employee is uncertain of what a regulation means and how to apply it, then the employee must research the meaning or seek guidance from a coworker or from the VA Central Office. Ambiguity in regulations drains time and money and increases the likelihood of inconsistent outcomes, even among substantially similar claims.⁵

An ambiguous regulation⁶ provoked the recent case of *Haas v. Nicholson (Haas I)*.⁷ In *Haas I*, the appellant asserted that 38 C.F.R. § 3.307(a)(6)(iii)⁸ meant that service in the waters off the Republic of Vietnam triggered the presumption of exposure to herbicides such as Agent Orange.⁹ The U.S. Court of Appeals for Veterans Claims held that the regulation was ambiguous and rejected VA's interpretation of the regulation—that such service did not trigger the presumption—as unreasonable.¹⁰ Although the Federal Circuit ultimately ruled that VA's interpretation was reasonable,¹¹ the case caused years of litigation and uncertainty for veterans, their families, and VA.

This Article will describe the efforts VA is making to reduce the ambiguity and contradictions in its regulations. VA's reforms should reduce the uncertainty and litigation resulting from these deficiencies.

I. PROJECT HISTORY

In 2002, VA began the Rewrite Project to clarify the regulations concerning VA's compensation and pension benefit programs.¹² Secretary

5. See VA OFFICE OF INSPECTOR GENERAL, DEP'T OF VETERANS AFFAIRS, REVIEW OF STATE VARIANCES IN VA DISABILITY COMPENSATION PAYMENTS, REPORT NO. 05-00765-137, at 62–63 (2005), available at <http://www.va.gov/oig/52/reports/2005/VAOIG-05-00765-137.pdf> [hereinafter VA INSPECTOR GENERAL REPORT] (noting that over the last few years, VA has struggled to achieve consistency in its decisionmaking).

6. 38 C.F.R. § 3.307(a)(6)(iii) (2003).

7. 20 Vet. App. 257 (2006).

8. The regulation implements a portion of 38 U.S.C. § 1116(a)(1)(B), which provides that one of several specified diseases suffered by a veteran “who, during active military, naval, or air service, served in the Republic of Vietnam” during the specified period “shall be considered to have been incurred in or aggravated by such service.” 38 U.S.C. § 1116(a)(1)(B) (2000). The regulation provides, in pertinent part, as follows:

A veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, shall be presumed to have been exposed during such service to an herbicide agent “Service in the Republic of Vietnam” includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam.

38 C.F.R. § 3.307(a)(6)(iii).

9. *Haas I*, 20 Vet. App. at 279.

10. *Id.* at 270–75.

11. See *Haas v. Peake (Haas II)*, 525 F.3d 1168, 1193 (Fed. Cir. 2008) (stating that it was not arbitrary for VA to draw a line, and noting that the line drawn does not cut off all rights of sea-going veterans).

12. See William A. Moorman & William F. Russo, *Serving Our Veterans Through*

Anthony J. Principi established an independent Office of Regulation Policy and Management to centrally manage and coordinate VA's rulemaking process and to execute the Rewrite Project.¹³

The Rewrite Project has three phases.¹⁴ In the first phase, the project staff researched the history of each of the current regulations and made recommendations on how to rewrite each one.¹⁵ In the second phase, the staff drafted the new regulations and organized them into thirteen subparts.¹⁶ In the now-ongoing final phase, VA is publishing the new regulations, first as notices of proposed rulemaking (NPRMs), then ultimately as one final rule that will be the new Part 5 of Title 38 of the *Code of Federal Regulations*.¹⁷

The Rewrite Project strives to use plain language in writing the regulations so that veterans, their representatives, and VA employees will more easily discern which regulations are relevant to specific claims and how they apply. Plain language alone, however, is not sufficient. It must also be easy to find the regulations pertinent to a particular benefit or procedure. Therefore, the Rewrite Project has reorganized the compensation and pension regulations into logical subparts so that readers can find the provisions that are relevant to them.

II. ORGANIZATION OF PART 5

Title 38 C.F.R. Part 5 will reorganize VA's current regulations into thirteen subparts.¹⁸ Due to each subpart's size, VA published several subparts as two or three separate NPRMs.

The first major subdivision will be "Subpart A—General Provisions." It will include general definitions and policy provisions.¹⁹

"Subpart B—Service Requirements for Veterans" will contain information regarding military service, including what types of service qualify for VA purposes, the minimum service requirement, and periods of war.²⁰

Clearer Rules, 56 ADMIN. L. REV. 207, 209 (2004) (outlining the steps taken to clarify the regulations).

13. *Id.* at 208.

14. *Id.* at 209–17.

15. *Id.* at 209–12.

16. *Id.* at 212–16.

17. *Id.* at 217.

18. See 38 C.F.R. pt. 5 (2008) (listing Part 5 as reserved); *cf. id.* pt. 3 (consisting of four subparts, but with Subpart C listed as reserved).

19. General Provisions, 71 Fed. Reg. 16,464 (Mar. 31, 2006) (to be codified at 38 C.F.R. pt. 5).

20. Service Requirements for Veterans, 69 Fed. Reg. 4820 (Jan. 30, 2004) (to be codified at 38 C.F.R. pt. 5).

“Subpart C—Adjudicative Process, General” will inform readers about VA claims procedures. The first portion of Subpart C will concern rules on filing VA benefits claims.²¹ The second portion will include rules regarding the duties of VA and the rights and responsibilities of claimants and beneficiaries.²² The third portion will concern general evidence requirements, general effective dates for rewards, revision of decisions, and protection of VA ratings.²³

“Subpart D—Dependents and Survivors” will inform readers how VA determines whether an individual is a dependent or a survivor for purposes of eligibility for VA benefits. It will also provide the evidence requirements for these determinations.²⁴

“Subpart E—Claims for Service Connection and Disability Compensation” will inform readers how VA determines service connection and entitlement to disability compensation. The first portion of Subpart E will concern service-connected and other disability compensation.²⁵ The second portion will address presumptions related to service connection.²⁶ The third portion will list special ratings for severely injured veterans.²⁷

“Subpart F—Nonservice-Connected Disability Pensions and Death Pensions” will include information on the three types of VA nonservice-connected pensions. One portion of Subpart F will concern Old-Law Pension and Section 306 Pension,²⁸ while the other will outline VA's largest program: Improved Pension.²⁹

“Subpart G—Dependency and Indemnity Compensation, Accrued Benefits, and Special Rules Applicable upon Death of a Beneficiary” will contain regulations governing claims for VA death benefits. One portion

21. VA Benefit Claims, 73 Fed. Reg. 20,136 (Apr. 14, 2008) (to be codified at 38 C.F.R. pt. 5).

22. Duties of VA; Rights and Responsibilities of Claimants and Beneficiaries, 70 Fed. Reg. 24,680 (May 10, 2005) (to be codified at 38 C.F.R. pt. 5).

23. General Evidence Requirements, Effective Dates, Revision of Decisions, and Protection of Existing Ratings, 72 Fed. Reg. 28,770 (May 22, 2007) (to be codified at 38 C.F.R. pt. 5).

24. Dependents and Survivors, 71 Fed. Reg. 55,052 (Sept. 20, 2006) (to be codified at 38 C.F.R. pt. 5).

25. See Unified Agenda of Federal Regulatory and Deregulatory Actions, 72 Fed. Reg. 23,112 (Apr. 30, 2007) (to be codified at 38 C.F.R. ch. 1) (stating that regulations regarding service-connected and other disability compensation are in the proposed-rule stage and will be published in the *Federal Register* at a later date).

26. Presumptions of Service Connection for Certain Disabilities, and Related Matters, 69 Fed. Reg. 44,614 (July 27, 2004) (to be codified at 38 C.F.R. pts. 3 & 5).

27. Special Ratings, 73 Fed. Reg. 62,004 (Oct. 17, 2008) (to be codified at 38 C.F.R. pt. 5).

28. Elections of Improved Pension; Old-Law and Section 306 Pension, 69 Fed. Reg. 77,578 (Dec. 27, 2004) (to be codified at 38 C.F.R. pt. 5).

29. Improved Pension, 72 Fed. Reg. 54,776 (Sept. 26, 2007) (to be codified at 38 C.F.R. pt. 5).

of Subpart G will deal with dependency and indemnity compensation benefits and provisions on proof of death and service-connected cause of death.³⁰ The other portion contains rules that apply to the disposition of VA benefits when a claimant dies.³¹

“Subpart H—Special and Ancillary Benefits for Veterans, Dependents, and Survivors” will pertain to special and ancillary benefits, including benefits for children with various birth defects.³²

“Subpart I—Benefits for Certain Filipino Veterans and Survivors” will pertain to the various benefits available to Filipino veterans and their survivors.³³

“Subpart J—Burial Benefits” will pertain to burial allowances.³⁴

“Subpart K—Matters Affecting the Receipt of Benefits” will contain provisions regarding bars to benefits, forfeiture of benefits, and renouncement of benefits.³⁵

“Subpart L—Payments and Adjustments to Payments” will include general rate-setting rules, several adjustment and resumption regulations, and election-of-benefit rules. One portion of Subpart L will concern payments and adjustments to payments,³⁶ and the other will address payments to beneficiaries who are eligible for more than one benefit.³⁷

The final subpart, “Subpart M—Apportionments to Dependents and Payments to Fiduciaries and Incarcerated Beneficiaries,” will include regulations governing those categories of beneficiaries.³⁸

30. Dependency and Indemnity Compensation Benefits, 70 Fed. Reg. 61,326 (Oct. 21, 2005) (to be codified at 38 C.F.R. pt. 5).

31. Accrued Benefits, Death Compensation, and Special Rules Applicable upon Death of a Beneficiary, 69 Fed. Reg. 59,072 (Oct. 1, 2004) (to be codified at 38 C.F.R. pt. 5).

32. Special and Ancillary Benefits for Veterans, Dependents, and Survivors, 72 Fed. Reg. 10,860 (Mar. 9, 2007) (to be codified at 38 C.F.R. pt. 5).

33. Benefits for Certain Filipino Veterans and Survivors, 71 Fed. Reg. 37,790 (June 30, 2006) (to be codified at 38 C.F.R. pt. 5).

34. Burial Benefits, 73 Fed. Reg. 19,021 (Apr. 8, 2008) (to be codified at 38 C.F.R. pt. 5).

35. Matters Affecting the Receipt of Benefits, 71 Fed. Reg. 31,056 (May 31, 2006) (to be codified at 38 C.F.R. pt. 5).

36. Payments and Adjustments to Payments, 73 Fed. Reg. 65,212 (Oct. 31, 2008) (to be codified at 38 C.F.R. pt. 5).

37. Payments to Beneficiaries Who Are Eligible for More than One Benefit, 72 Fed. Reg. 56,136 (Oct. 2, 2007) (to be codified at 38 C.F.R. pt. 5).

38. RegInfo.gov, Apportionments to Dependents and Payments to Fiduciaries and Incarcerated Beneficiaries, Regulation Identification Number Data for RIN 2900-AL74 (2008), <http://www.reginfo.gov/public/do/eAgendaViewRule?ruleID=293493> (last visited Apr. 18, 2009) (to be codified at 38 C.F.R. pt. 5).

III. REWRITE PROJECT METHODS

A. *Project Staffing*

The Rewrite Project is based in the Office of Regulation Policy and Management in VA's Office of General Counsel. One of the keys to its progress thus far is having detailees from different divisions within VA assigned to the project. There are staff members from VA Regional Offices whose experience adjudicating or processing claims brings invaluable perspective to how VA actually conducts a procedural transaction where a current Part 3 regulation may be unclear. These staff members also advise, based on their experiences, on whether they believe the VA Regional Office staff will understand the new regulatory language. Staff from the Board of Veterans' Appeals (Board) advises on which Part 3 regulations Regional Offices often misapply and consequently become the subject of administrative appeals. General Counsel litigation attorneys identify drafting errors that might provoke litigation and provide advice on how to avoid such errors.

B. *Shooting at a Moving Target: Changes in Law During the Regulation Rewrite Project*

One of the main challenges of the Rewrite Project is that VA is rewriting a dynamic body of law. To keep it current, VA has amended 38 C.F.R. Part 3 dozens of times since the project began in February 2002. Most of these amendments have been the result of legislation,³⁹ while others have resulted from litigation.⁴⁰ The Rewrite Project has incorporated each of these amendments into Part 5.

C. *Global Issues List*

Regulations use terms with precise legal meanings, known as "terms of art," which derive from statutes and other regulations. A regulation drafter

39. See, e.g., Filipino Veterans' Benefits Improvements, 72 Fed. Reg. 8 (Jan. 3, 2007) (to be codified at 38 C.F.R. pt. 3); Accrued Benefits, 71 Fed. Reg. 78,368 (Dec. 29, 2006) (to be codified at 38 C.F.R. pt. 3); Additional Disability or Death Due to Hospital Care, Medical or Surgical Treatment, Examination, Training and Rehabilitation Services, or Compensated Work Therapy Program, 69 Fed. Reg. 46,426 (Aug. 3, 2004) (to be codified at 38 C.F.R. pt. 3).

40. See, e.g., Home Schooling and Educational Institution, 72 Fed. Reg. 6958 (Feb. 14, 2007) (to be codified at 38 C.F.R. pt. 3) (implementing *Theiss v. Principi*, 18 Vet. App. 204 (2004)); Claims Based on Aggravation of a Nonservice-Connected Disability, 71 Fed. Reg. 52,744 (Sept. 7, 2006) (to be codified at 38 C.F.R. pt. 3) (implementing *Allen v. Brown*, 7 Vet. App. 439 (1995)); Definition of Service in the Republic of Vietnam, 73 Fed. Reg. 20,566 (Apr. 16, 2008) (to be codified at 38 C.F.R. pt. 3) (implementing *Haas II*, 525 F.3d 1168 (Fed. Cir. 2008), and *Haas I*, 20 Vet. App. 257 (2006)).

must use terms of art consistently to prevent ambiguity in the regulations and confusion for the person using the regulations. The current Part 3 contains many inconsistent uses of terms, which the Rewrite Project has focused on addressing. For example, Part 3 uses *terminate* and *discontinue* interchangeably, without intending any different meaning. Part 3 also uses *claimant*, *beneficiary*, *veteran*, and *individual* interchangeably, even though these terms have substantive differences. VA intends to avoid repeating this problem in Part 5. To achieve consistency, our office created a “Global Issues List,” which prescribes the consistent use of multiple terms to ensure that they are used uniformly in Part 5. The editors of the new regulations use this list to review the regulations before publication.⁴¹

D. Distribution and Derivation Tables

Part 5 restates virtually the entire substance of current Part 3 in a more organized fashion; our office rearranged thousands of Part 3’s provisions. We made a distribution table showing where each provision of Part 3 will be in Part 5 as a reference tool for the public. The distribution table is organized with a fine level of detail to ensure that we do not leave any Part 3 provision out of Part 5 inadvertently. For example, the table indicates that the fourth through sixth sentences of § 3.102 will be located in § 5.3(b)(2). We also made a derivation table listing the Part 5 provisions and the Part 3 provisions from which they derive. VA will publish these tables as appendices to Part 5 to serve as a helpful reference tool for the public.

IV. IMPLEMENTATION OF THE NEW PART 5 REGULATIONS

On April 14, 2008, the Rewrite Project published the sixteenth of twenty NPRMs.⁴² All of the NPRMs are scheduled to be published by the end of Fiscal Year 2009 and the Final Rules by the end of Fiscal Year 2010. Replacing one body of law with another creates challenges for any adjudicative body, and VA is no exception. VA will need to update its information technology tools and its internal operating procedures to account for the new regulations. In addition, VA must train its employees thoroughly in the new regulations, including the organizational structure of Part 5 and the substantive changes made from Part 3 to Part 5.

41. Regulations must be clear, but the need for consistent use of terms of art can strain the syntax of plain language. The challenge is to maintain the consistent, precise use of a term of art while permitting the variations in the syntax of a sentence that facilitate plain language.

42. VA Benefit Claims, 73 Fed. Reg. 20,136 (Apr. 14, 2008) (to be codified at 38 C.F.R. pt. 5).

To make the transition smoother for VA staff and other regulation users, VA plans to promulgate Part 5 with an applicability date. For claims pending with VA before that date, Part 3 would continue to apply. Part 5 would only affect claims filed on or after the applicability date. Clearly delineating the claims VA will administer under Part 3 from the claims it will administer under Part 5 should avoid confusion or litigation regarding any possible retroactive effect of Part 5.⁴³

V. WHY PART 5 IS BETTER THAN PART 3

A. *Organizational Structure of Individual Regulations*

Current Part 3 has several weaknesses: First, the poor organization of some Part 3 regulations obscures their intended meaning. For example, paragraph (a) of 38 C.F.R. § 3.344, “Stabilization of Disability Evaluations,” consists of ten long sentences that relate to whether, how, and when VA reduces disability ratings that have been in effect for more than five years.⁴⁴ These sentences are in no particular order, causing potential confusion as to the relationship among them. Part 5 will organize this material in small, discrete, clearly labeled paragraphs ordered in a logical sequence.⁴⁵

Another example of a poorly organized regulation is 38 C.F.R. § 3.350.⁴⁶ Two paragraphs of the regulation implement part of a statute that authorizes VA to pay compensation to a veteran who “has suffered blindness in both eyes, rendering such veteran so significantly disabled as to be in need of regular aid and attendance.”⁴⁷ Paragraph (c)(1)(v) essentially restates the statute.⁴⁸ Two paragraphs later, paragraph (c)(3) limits paragraph (c)(1)(v) by stating, in effect, that a veteran with vision as specified in paragraph (c)(3) does not meet the requirements of paragraph (c)(1)(v) unless VA finds an actual need for regular aid and attendance.⁴⁹

43. See *Kuzma v. Principi*, 341 F.3d 1327, 1329 (Fed. Cir. 2003) (holding that the Veterans Claims Assistance Act provision in question was not retroactively applicable); *Karnas v. Derwinski*, 1 Vet. App. 308, 314 (1991) (reversing and remanding the Board’s decision to deny restoration of claimant’s 100% service-connected disability rating for schizophrenia).

44. 38 C.F.R. § 3.344(a) (2008).

45. General Evidence Requirements, Effective Dates, Revision of Decisions, and Protection of Existing Ratings: Protection of 5-Year Stabilized Ratings, 72 Fed. Reg. 28,770, 28,791–92 (May 22, 2007) (to be codified at 38 C.F.R. § 5.171).

46. 38 C.F.R. § 3.350 (2008).

47. 38 U.S.C. § 1114(m) (2000).

48. See 38 C.F.R. § 3.350(c)(1)(v) (listing “[b]lindness in both eyes leaving the veteran so helpless as to be in need of regular aid and attendance” as a condition meriting “special monthly compensation”).

49. See *id.* § 3.350(c)(3) (providing that the determination of actual need will be made

By separating these two paragraphs with another paragraph, Part 3 makes the relationship between them unclear. The separation can even mislead the reader to interpret the vision criteria as a basis to allow the benefit rather than as a trigger for additional process.

Part 5 will clarify this point by juxtaposing the general rule and its limitation. Section 5.326(i) will provide as follows:

Blindness in both eyes leaving the veteran so significantly disabled as to need regular aid and attendance. If the veteran has visual acuity of 5/200 or less in both eyes or concentric contraction of the visual field to 5 degrees or less in both eyes, then entitlement to compensation at the section 1114(m) rate will be determined on the facts in the individual case.⁵⁰

Thus, Part 5 will significantly clarify our rules by organizing them more logically.

B. Clear Writing

A second weakness in VA's current regulations is the convoluted expression of simple concepts in current Part 3, which makes VA's already technical regulations difficult to understand and apply. For example, the rules for entitlement to one benefit include the circumlocution "in the absence of the provision of" a certain condition of entitlement to the benefit.⁵¹ Part 5 will simplify this by replacing "in the absence of the provision of" with, simply, "without."⁵²

Part 3 has many regulations that act as guidance to VA staff for applying the substantive rules but is unclear in many cases. Much of this guidance assumes that the reader has extensive knowledge of the benefit program to which it pertains and thus confuses those who do not. For example, one VA regulation provides, in pertinent part, that "[t]he special monthly compensation provided by 38 U.S.C. § 1114(o) is payable for any of the following conditions: . . . (ii) [c]onditions entitling to two or more of the rates (no condition being considered twice) provided in 38 U.S.C. § 1114(l) through (n)."⁵³

As guidance to the VA adjudicator, a subsequent paragraph of the regulation provides that "[p]aralysis of both lower extremities together with loss of anal and bladder sphincter control will entitle to the maximum rate under 38 U.S.C. 1114(o), through the combination of loss of use of both

on the facts of a particular case).

50. Special Ratings, 73 Fed. Reg. 62,004, 62,022 (Oct. 17, 2008) (to be codified at 38 C.F.R. § 5.326).

51. 38 C.F.R. § 3.352(b)(1)(iii) (2008).

52. Special Ratings, 73 Fed. Reg. at 62,024.

53. 38 C.F.R. § 3.350(e)(1)(ii).

legs and helplessness.”⁵⁴ This regulation means that paralysis of both lower extremities counts as one of the two or more sets of disabilities for which the veteran is entitled to compensation under § 1114(l)–(n); loss of control of the sphincter of the bladder together with loss of control of the sphincter of the anus counts as the other.

The clause “through the combination of loss of use of both legs and helplessness” explains how the clause works before it satisfies the requirements for the maximum rate under § 1114(o).⁵⁵ To understand this guidance, the reader must infer that paralysis comprises one of the two or more rates under 38 U.S.C. § 1114(l)–(n). The reader must also presume that incontinence invariably renders one in need of regular aid and attendance. Finally, the reader must know that the need for regular aid and attendance comprises one of the two or more rates under 38 U.S.C. § 1114(l)–(n). It is not clear that 38 C.F.R. § 3.350(e)(2) relates to paragraph (e)(1)(ii) without considerable study of the entire section or prior expertise in entitlements under 38 U.S.C. § 1114(o).

Inclusion of guidance that requires great expertise to understand compels the less experienced reader to struggle to figure out whether the guidance substantively modifies the sentence before it. In 38 C.F.R. § 3.350(e), the inclusion of guidance does not substantively modify the preceding sentence and is therefore unnecessary. By removing confusing, nonsubstantive guidance, Part 5 will state the criteria for the benefit much more simply: “VA will pay special monthly compensation (SMC) under 38 U.S.C. 1114(o) for any of the following combinations of disabilities: . . . (d) Loss of use of both lower extremities together with loss of anal and bladder sphincter control.”⁵⁶

C. Incorporating Judicial Precedents

Some judicial precedents have stated essential principles of veterans law so aptly that they have become bywords or established formulas for those principles. Others have proscribed VA practices in adjudicating certain types of claims, some of which have never been codified into VA's regulations. Part 5 includes many of these judicial precedents in VA's regulations.

Among the most significant judicial precedents is *Caluza v. Brown*, which sets out the basic requirements for proving service connection in VA claims: (1) a current disability, (2) “incurrence or aggravation of a disease

54. *Id.* § 3.350(e)(2) (emphasis added).

55. *Id.*

56. Special Ratings, 73 Fed. Reg. 62,004, 62,022–23 (Oct. 17, 2008) (to be codified at 38 C.F.R. § 5.330).

or injury in service,” and (3) a link between the two.⁵⁷ To aid readers, VA will include this concise statement of the law of establishing service connection in Part 5.⁵⁸

Another example is the current Part 3 regulation, which provides that “medical judgment will be exercised in making determinations relative to the effect of intercurrent injury or disease.”⁵⁹ The regulation, however, is not explicit about whose medical judgment to use.⁶⁰ In *Colvin v. Derwinski*, the court held that the Board of Veterans’ Appeals must consider only independent medical evidence to support findings rather than provide its own medical judgment to decide the claim.⁶¹ VA has since construed this holding as applying to VA claims adjudicators generally. To implement the court’s holding in *Colvin*, Part 5 will not repeat the “medical judgment” language of 38 C.F.R. § 3.307(d) in the counterpart regulation.⁶² This will ensure that VA adjudicators consider only evidence of record in a claim and that they not perceive a conflict between a regulation that appears to instruct the adjudicator to exercise medical judgment and the rule in *Colvin* proscribing precisely that practice.

Part 5 will also incorporate (in § 5.260)⁶³ the holding from *Routen v. West*, where the court stated the purpose of presumptions of service connection: “The presumption affords a party, for whose benefit the presumption runs, the luxury of not having to produce specific evidence to establish the point at issue. When the predicate evidence is established that triggers the presumption, the further evidentiary gap is filled by the presumption.”⁶⁴ Another example will be the new 38 C.F.R. § 5.261(d),⁶⁵ which will codify *Splane v. West*,⁶⁶ where the Federal Circuit ruled that the presumption of service connection found in 38 U.S.C. § 1112(a)⁶⁷ applies not only to diseases incurred in service, but also to diseases that existed prior to and were aggravated by service.⁶⁸

57. 7 Vet. App. 498, 506 (1995).

58. See Unified Agenda of Federal Regulatory and Deregulatory Actions, 72 Fed. Reg. 23,112 (Apr. 30, 2007) (to be codified at 38 C.F.R. § 5.243) (announcing the proposed rule stage for service-connected disability compensation).

59. 38 C.F.R. § 3.307(d) (2008).

60. *Id.*

61. 1 Vet. App. 171, 175 (1991), *vacated*, Hodge v. West, 155 F.3d 1356, 1360 (Fed. Cir. 1998).

62. Presumptions of Service Connection for Certain Disabilities, and Related Matters, 69 Fed. Reg. 44,614, 44,624 (July 27, 2004) (to be codified at 38 C.F.R. § 5.260).

63. *Id.*

64. 142 F.3d 1434, 1440 (Fed. Cir. 1998).

65. Presumptions of Service Connection for Certain Disabilities and Related Matters, 69 Fed. Reg. at 44,624–25 (to be codified at 38 C.F.R. § 5.261(d)).

66. 216 F.3d 1058 (Fed. Cir. 2000).

67. 38 U.S.C. § 1112(a) (2000).

68. See *Splane*, 216 F.3d at 1068 (stating that “the most logical reading of [§] 1112(a) indicates that Congress intended to include preexisting conditions in the presumption of in-

D. Incorporating VA General Counsel Precedent Opinions

VA General Counsel occasionally issues “precedent opinions” which are binding on VA.⁶⁹ Some of these precedent opinions have never been codified into VA’s regulations. Part 5 will codify the holdings of precedent opinions pertaining to compensation and pension regulations so that users of the regulations can find all relevant law in one place, rather than having to scour the various sources.

One example is VA General Counsel Precedent Opinion 3-97.⁷⁰ In some programs, the law requires VA to offset certain benefits by a beneficiary’s income,⁷¹ and judicial opinion has revealed the need for regulatory guidance on how to calculate such offsets.⁷² In 1997, the General Counsel held that

Section 1318(d) of title 38, United States Code, requires offset against survivors’ benefits payable under section 1318 of amounts received by the beneficiary pursuant to an award, settlement, or compromise based on a claim for damages resulting from the death of a veteran, i.e., the types of damages typically recoverable under state wrongful death statutes, but does not require offset of amounts received pursuant to a survival action as compensation for injuries suffered by the veteran prior to his or her death.⁷³

Part 5 will incorporate this General Counsel Precedent Opinion in 38 C.F.R. § 5.522: “Dependency and indemnity compensation benefits for survivors of certain veterans rated totally disabled at time of death—offset of wrongful death damages.”⁷⁴ VA pays dependency and indemnity

service occurrence”).

69. See 38 C.F.R. § 14.507 (2008) (providing that precedent opinions are binding “unless there has been a material change in [the] controlling statute or regulation[s]” or until overruled by a subsequent opinion or judicial decision).

70. General Counsel Precedent Opinion, Offset of Benefits Under 38 U.S.C. § 1318, VAOPGCPREC 3-97 (Jan. 16, 1997) [hereinafter Precedent Opinion 3-97].

71. See 38 U.S.C. § 1315(b) (2000) (requiring that when there is only one parent, dependency and indemnity compensation to the parent be reduced by the amount of the parent’s annual income); 38 U.S.C. § 1503 (2000) (defining the method for calculating annual income); 38 U.S.C. § 1521 (2000) (providing that unmarried veterans of war not supporting any children may have their pensions reduced by the amount of the veteran’s income).

72. See *Bryan v. West*, 13 Vet. App. 482, 487 (2000). The Court revealed VA’s need to regulate in its instruction on remand to the Board of Veterans’ Appeals:

(1) How much money was received by a plaintiff other than [the VA claimant]; (2) Whether the money received by such a plaintiff was received ultimately by [the VA claimant] through estate distribution; (3) If so, whether such distribution was considered received by [the VA claimant]; and (4) Whether the money received by her attorney was, in contemplation of law, “received” by [the VA claimant].

Id. at 489.

73. Precedent Opinion 3-97, *supra* note 70; Summary of Precedent Opinions of the General Counsel, 62 Fed. Reg. 15,565, 15,566 (Apr. 1, 1997).

74. Dependency and Indemnity Compensation Benefits, 70 Fed. Reg. 61,326, 61,343–44 (Oct. 21, 2005) (to be codified at 38 C.F.R. § 5.522).

compensation (DIC) benefits to survivors of veterans who had received disability compensation at the total disability rate continuously for ten years prior to their death.⁷⁵ Section 5.522 identifies damages typically recoverable under wrongful death statutes that offset payments of certain dependency and indemnity compensation.⁷⁶ Paragraph 5.522(c)(1) will provide, in part, “Damages recoverable as compensation for injuries suffered by, or economic loss sustained by, the veteran prior to death such as wages lost prior to death, medical expenses, and compensation for the veteran’s pain and suffering prior to death are excluded [from the amount offset].”⁷⁷

This General Counsel’s Precedent Opinion is favorable to claimants because it reduces the amount of the offset.⁷⁸ By codifying this holding, Part 5 will clarify a difficult point of law for the public and VA employees.

Part 5 will codify two other General Counsel Precedent Opinions⁷⁹ to clarify the rules governing adjustment of disability compensation and DIC paid to incarcerated beneficiaries.⁸⁰ Pursuant to the holdings in those opinions, § 5.810(b) will identify participation in a community control program and confinement in a state hospital or halfway house as types of confinement or control of a person by civil authorities because of commission of a felony that are not incarceration. VA’s current regulations do not address these groups. The new regulation will clearly preclude adjustment of monetary benefits for such persons.

75. 38 C.F.R. § 3.22(a) (2008).

76. See *Dependency and Indemnity Compensation Benefits*, 70 Fed. Reg. at 61,343–44 (stating that such an “offset includes damages . . . such as reimbursement for the loss of support, services, and other contributions, which the surviving spouse or child would have received if the veteran had lived and, where allowed, reimbursement for pain, suffering or mental anguish of the survivors due to death”).

77. *Id.* at 61,343.

78. Precedent Opinion 3-97, *supra* note 70.

79. See VA General Counsel Precedent Opinion, *Reduction of Benefits Pursuant to 38 U.S.C. §§ 3113 and 505, VAOPGCPREC 3-90* (Mar. 20, 1990) (holding that confinement in a state hospital is not incarceration); VA General Counsel Precedent Opinion, *Reduction of Compensation During Incarceration Pursuant to 38 U.S.C. § 3113—Community Control*, VAOPGCPREC 59-91 (June 24, 1991) (finding that participation in a community control program is not incarceration); Summary of Legal Interpretation of the General Counsel—Precedent Opinion 3-90, *Reduction of Benefits*, 55 Fed. Reg. 26,805 (June 29, 1990); Summary of Precedent Opinions of the General Counsel, 56 Fed. Reg. 50,149 (Oct. 3, 1991).

80. See *Unified Agenda of Federal Regulatory and Deregulatory Actions*, 72 Fed. Reg. 23,112 (Apr. 30, 2007) (announcing the proposed rule stage for “Apportionments to Dependents and Payments to Fiduciaries and Incarcerated Beneficiaries”).

E. Gap-Filling

It is common for a body of law to have gaps, resulting in a lack of guidance in certain specific situations. Part 5 will fill the gaps in current Part 3 that the Rewrite Project staff has identified.⁸¹

In two new rules,⁸² Part 5 will clarify that a discharge or release from a period of service under other than honorable conditions or a discharge or dismissal for commission of an act that results in a statutory bar to VA benefits, bars VA benefits only for that period of service. Neither discharge bars the award of benefits based upon other qualifying periods of service.⁸³ This will fill the gap in 38 C.F.R. § 3.12, which fails to clarify this point, and avoid potential confusion in cases where the veteran had one period of service that ended with a discharge under dishonorable conditions but also had one or more other periods of service that ended with a discharge under other-than-dishonorable conditions.

The Rewrite Project also strives to eliminate the type of gap that caused the ambiguity that provoked the *Haas* litigation.⁸⁴ In *Haas II*, the Federal Circuit noted that Part 5 will clarify VA's rules on herbicide exposure "to make it clear that veterans who served in waters offshore but did not enter Vietnam, either on its land mass or in its inland waterways cannot benefit from this presumption."⁸⁵

CONCLUSION

As discussed above, VA's new regulations will serve the three constituencies of VA's compensation and pension regulations significantly better than current Part 3 does. These three constituencies are (1) the veterans and dependents whose benefits the regulations implement, (2) the veterans' representatives in the claims process, and (3) the VA staff who apply the regulations. Because Part 5 will be clearer than Part 3, claims can be more precise and the claims process will therefore be more efficient.

Non-attorney veterans service officers, employed by veterans

81. Compare 38 C.F.R. § 3.12 (2008) (lacking a provision regarding the basic eligibility for VA benefits of certain former service members who had more than one period of service), with Service Requirements for Veterans, 69 Fed. Reg. 4820, 4838 (Jan. 30, 2004) (to be codified at 38 C.F.R. §§ 5.30(b)(1) & 5.31(b)(1)) (filling in the gap).

82. Service Requirements for Veterans, 69 Fed. Reg. at 4838.

83. *Id.*

84. See *supra* notes 5–11 and accompanying text.

85. *Haas II*, 525 F.3d 1168, 1182 (Fed. Cir. 2008) (quoting Presumptions of Service Connection for Certain Disabilities, and Related Matters, 69 Fed. Reg. at 44,620 (to be codified at 38 C.F.R. pt. 5)). The ambiguity of regulation 38 C.F.R. § 3.307 will be further clarified in proposed Part 5. Presumptions of Service Connection for Certain Disabilities, and Related Matters, 69 Fed. Reg. 44,614, 44,620 (July 27, 2004) (to be codified at 38 C.F.R. pt. 5).

organizations, represent VA claimants and beneficiaries free of charge in VA claims around the country. However, in 2006, Congress enacted legislation that for the first time allows veterans to pay private attorneys to represent them at VA Regional Offices.⁸⁶ Undoubtedly, many attorneys previously unfamiliar with veterans' benefits law will enter this practice and need to become proficient in this field. The new Part 5 regulations will help these new practitioners gain the needed proficiency more efficiently and thoroughly. They will make it much easier for attorney and non-attorney representatives to represent their clients effectively because the criteria for various benefits, including detailed evidentiary requirements, will be better organized and more clearly stated.

VA staff will also benefit from the new Part 5 regulations, which will help them do their jobs more effectively. Reorganization and simplification of the compensation and pension regulations will make it easier for those who work with them daily to find and understand the rules that apply to each claim. It will be much easier to lay the evidence in a claim next to the relevant rules and decide whether the facts in the case satisfy the requirements for a benefit. The more clearly VA's rules can be applied to the facts of a claim, the less often VA staff must attempt to interpret the rules. This should result in more consistent and accurate decisions for veterans and their families.

With simpler organization and clearer content, VA's regulations will be easier to find, understand, and apply. This will in turn allow VA to adjudicate claims more accurately and promptly. This is what our veterans and their families both need and deserve.

86. Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, § 101, 120 Stat. 3403 (2006); Accreditation of Agents and Attorneys; Agent and Attorney Fees, 73 Fed. Reg. 29,852 (May 22, 2008) (to be codified at 38 C.F.R. pt. 14).