



Making Veterans' Benefits Clear: The Regulation Rewrite Project

By William L. Pine and William F. Russo

After the Civil War, Abraham Lincoln called on the country “to care for him who shall have borne the battle and for his widow, and his orphan.”¹ The U.S. Department of Veterans Affairs (VA) implements this eloquently stated mission through a large body of complex regulations, including those that implement the compensation and pension benefit programs for veterans, their dependents, and their survivors. Through these programs, the VA provides more than \$41 billion annually to more than 3.7 million veterans and other beneficiaries. In 2007, the VA processed nearly 825,000 claims for disability benefits and added almost 250,000 new beneficiaries to its compensation and pension rolls. These statistics illustrate the economic significance of the compensation and pension programs and the number of Americans that they increasingly affect.

The Department of Veterans Affairs has produced numerous publications describing these programs, and many of these publications are available on the department's website. 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 the VA's compensation and pension programs have evolved over time; some originated in the 1910s. Over time, many authors have drafted and amended the regulations, 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 claims process as well as costly litigation.

For example, a claimant may have a claim with well-established facts, but he or she may still be uncertain as to whether the claim has merit, thus causing confusion about how best to present and argue the claim. In addition, if a VA employee is uncertain about what a regulation means and how to apply it, then the employee must research the meaning or seek guidance from a co-worker or from the VA's central office. Ambiguity in regulations takes time and money and increases the likelihood that outcomes of substantially similar claims will be inconsistent.

An ambiguous regulation led to the recent case of *Haas v. Nicholson (Haas I)*.² The regulation, 38 C.F.R. § 3.307(a)(6)(iii) (2008), provides, in pertinent part, the following:

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.

In *Haas I*, the appellant asserted that this regulation meant that service in the waters off the shore of the

Republic of Vietnam triggered the presumption of exposure to herbicides such as Agent Orange. 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.”

The U.S. Court of Appeals for Veterans Claims held that the regulation was ambiguous and rejected the VA’s interpretation of the regulation—that such service did not trigger the presumption—as unreasonable. Although, in *Haas v. Peake (Haas II)*, the Federal Circuit ultimately ruled that the VA’s interpretation was reasonable, the case caused years of litigation and uncertainty for veterans, their families, and for the VA.³

An ongoing project undertaken by the VA—the Rewrite Project—is rewriting these regulations. The VA’s efforts to reduce the ambiguities and contradictions in its regulations should reduce the uncertainty in claims and the amount of litigation resulting from these deficiencies.

History of the Project

In 2002, the VA began the Rewrite Project focusing on rewriting the regulations concerning the department’s compensation and pension benefit programs.⁴ Secretary Anthony J. Principi established an independent Office of Regulation Policy and Management, which was charged with centrally managing and coordinating the VA’s rule-making process and executing the Rewrite Project.

The Rewrite Project has three phases. In the first phase, the project staff researched the history of each of the current regulations and made recommendations regarding how each regulation should be rewritten. In the second phase, the staff drafted the new regulations and organized them into 13 subparts. In the now-ongoing final phase, the VA is publishing the new regulations—first as notices of proposed rulemaking, then ultimately as one final rule, which will be the new part 5 of Title 38 of the Code of Federal Regulations (C.F.R.).

The Rewrite Project strives to use plain language in 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; the regulations pertinent to a particular benefit or procedure must also be easy to find. Therefore, the Rewrite Project has reorganized the compensation and pension regulations into logical subparts, organizing each section so that readers can find the provisions that are relevant to them.

Methodology

One of the main challenges facing the Rewrite Project is that the VA is dealing with a dynamic body of law. To keep it current, the VA has amended its regulations dozens of times since the project began in February 2002. Most of these amendments have been the result of legislation,⁵ while others have been the result of litigation.⁶ The Rewrite Project has incorporated each of these amendments into

the new regulations in part 5 of the code.

Regulations use terms that have precise legal meanings—known as terms of art—which derive from statutes and other regulations. Drafters of regulations must use terms of art consistently to prevent ambiguity in the regulations and avoid confusion on the part of the person using the regulations. Current regulations use many terms inconsistently, and the Rewrite Project has focused on addressing these inconsistencies. For example, the current regulations use “terminate” and “discontinue” interchangeably without intending any difference in meaning. They also use “claimant,” “beneficiary,” “veteran,” and “individual” interchangeably, even though these terms have substantive differences. The VA intends to avoid repeating this problem in the new regulations. To achieve consistency, project staff created a Global Issues List, which prescribes the consistent use of multiple terms. The editors of the rewritten regulations use this list to review the regulations before publication.

The new regulations in part 5 of Title 38 of the code restate virtually the entire substance of current part 3, but thousands of provisions in part 3 have been rearranged to improve the organization of the presentation. As a reference tool for the public, part 5 includes a distribution table showing where each provision that was found in part 3 will be in the revised regulation. The distribution table is organized with a fine level of detail to ensure that no current provisions are inadvertently left out of the new regulations. The rewritten regulations also include a derivation table listing the part 5 provisions and the part 3 provisions from which they derive. The VA will publish these tables as appendixes to part 5 in the Code of Federal Regulations to serve as a helpful reference tool.

Improved Organization of New Regulations

Part 5 of Title 38 of the C.F.R. will reorganize the VA’s current regulations into 13 subparts.

- Subpart A—General Provisions will include general definitions and policy provisions.
- 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 service during periods of war.
- Subpart C—Adjudicative Process, General, will explain the VA’s claims procedures, including rules for filing VA benefits claims; rules regarding the duties of the VA and the rights and responsibilities of claimants and beneficiaries; and general evidence requirements, general effective dates for awards, revision of decisions, and protection of VA ratings.
- Subpart D—Dependents and Survivors will inform readers how the VA determines whether an individual is a dependent or a survivor for purposes of determining eligibility for VA benefits and will also provide the evidence requirements to reach these determinations.
- Subpart E—Claims for Service Connection and Disability Compensation will explain how the VA determines service

connection and entitlement to disability compensation and will address service-connected and other disability compensation, presumptions related to service connection, and special ratings for severely injured veterans.

- Subpart F—Nonservice-Connected Disability Pensions and Death Pensions will include information on the three types of VA nonservice-connected pensions.
- 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.
- Subpart H—Special and Ancillary Benefits for Veterans, Dependents, and Survivors will pertain to special and ancillary benefits, including benefits for children who have various birth defects.
- Subpart I—Benefits for Certain Filipino Veterans and Survivors will deal with the various benefits available to Filipino veterans and their survivors.
- Subpart J—Burial Benefits will explain burial allowances.
- Subpart K—Matters Affecting the Receipt of Benefits will contain provisions regarding bars to benefits, forfeiture of benefits, and renouncement of benefits.
- Subpart L—Payments and Adjustments to Payments will include general rate-setting rules, several adjustment and resumption regulations, and election-of-benefit rules.
- Subpart M—Apportionments to Dependents and Payments to Fiduciaries and Incarcerated Beneficiaries will list regulations governing those categories of beneficiaries.

The current regulations have several weaknesses. Some regulations are so poorly organized that their intended meaning is obscure. For example, paragraph (a) of 38 C.F.R. § 3.344, “Stabilization of disability evaluations,” consists of 10 long sentences that relate to whether, how, and when the VA reduces disability ratings that have been in effect for more than five years. These sentences are in no particular order, causing potential confusion as to the relationship between them. The new regulations will organize material in small, discrete, and clearly labeled paragraphs that are ordered in a logical sequence. Thus, part 5 will significantly clarify the rules by organizing them more logically.

A second weakness in the VA’s current regulations is the convoluted expression of simple concepts, which makes the department’s technical regulations difficult to understand and to 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. The new regulation will simplify this phrase by replacing “in the absence of the provision of” with one simple word: “without.”

Incorporation of 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. Other legal precedents have proscribed VA practices in adjudicating

certain types of claims, some of which have never been codified into the VA’s regulations. The new regulations will include at least 53 of these judicial precedents in the VA’s regulations.

Among the most significant judicial precedents is *Caluza v. Brown*,⁷ which sets out the basic requirements for proving service connection in VA claims: (1) a current disability, (2) incurrence or aggravation of a disease or injury in service, and (3) a link between the two. To aid readers, the VA will include this concise statement of the law as it relates to establishing one’s connection to military service.

Another example of including judicial precedents in the revision involves the current regulation that provides that “medical judgment will be exercised in making determinations relative to the effect of intercurrent injury or disease.” The regulation is not explicit about whose medical judgment is to be used, however. In *Colvin v. Derwinski*,⁸ the court held that, in making its decision on a claim, the Board of Veterans’ Appeals must consider only independent medical evidence to support findings rather than provide their own medical judgment. The VA has since construed this holding as applying to VA claims adjudicators in general. To implement the court’s ruling in *Colvin*, part 5 will not repeat the “medical judgment” language found in part 3 of the old regulation. In this way, the rewritten regulation will ensure that the VA’s adjudicators consider only evidence of record in a claim and that they do 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 the court’s decision in *Routen v. West*,⁹ in which 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.” Another example of including judicial precedent will be found in the new regulation that will codify *Splane v. West*,¹⁰ in which the Federal Circuit ruled that the presumption of service connection found in 38 U.S.C. § 1112(a) applies not only to diseases incurred in service but also to diseases that existed prior to service and were aggravated by such service.

Incorporation of VA General Counsel Precedent Opinions

The VA’s general counsel occasionally issues “precedent opinions” that are binding on the VA,¹¹ some of which have never been codified into the VA’s regulations. The new regulations will codify the holdings of at least 26 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 of this improvement involves VA General Counsel Precedent Opinion 3-97.¹² In some programs, the law requires the VA to offset the amount of certain benefits by the amount of a beneficiary’s income, and the courts

have clearly indicated the need for regulatory guidance on how to calculate such offsets.¹³ The VA's general counsel issued the following opinion on this issue:

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.

The new regulations will incorporate General Counsel Precedent Opinion 3-97 in 38 C.F.R. § 5.522. The VA pays dependency and indemnity compensation benefits to survivors of a veteran who had received disability compensation at the total disability rate continuously for 10 years prior to the veteran's death. Section 5.522 identifies the damages that are typically recoverable under wrongful death statutes that offset payments of certain dependency and indemnity compensation. The section provides, 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]."¹⁴ This General Counsel's Precedent Opinion is favorable to claimants, because it reduces the amount of the offset. By codifying this holding, part 5 will clarify a difficult point of law for the public as well as for VA employees.

The new regulations will codify two other General Counsel Precedent Opinions¹⁵ in order to clarify the rules governing adjustment of disability compensation or dependency and indemnity compensation paid to incarcerated beneficiaries. Pursuant to the holdings in those opinions, part 5 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. The VA's current regulations do not address these groups, and the new regulation will clearly preclude adjustment of such persons' monetary benefits.

Gap Filling

It is common for a body of law to have gaps that result in a lack of guidance in certain specific situations. The Rewrite Project staff has identified several such gaps in the current regulations that the project intends to fill.¹⁶

For example, the new regulations will clarify that a discharge or release from a period of service under other than honorable conditions or a discharge or dismissal from a period of service for commission of an act that results in a statutory bar to VA benefits, prohibits the individual from receiving VA benefits only for that period of service.

Neither type of discharge bars the award of benefits based on other periods of service that qualify. This revision will fill the gap in 38 C.F.R. § 3.12, which fails to clarify this point, and will avoid potential confusion in cases where the veteran had one period of service that ended with a dishonorable discharge 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 discussed above. In *Haas II*, the Federal Circuit noted that the new regulations would clarify the 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."

Implementation of the VA's New Regulations

On Oct. 31, 2008, the Rewrite Project published the 18th of 20 notices of proposed rulemaking.¹⁷ The final rules are scheduled to be published by the end of fiscal year 2012. Replacing one body of law with another creates challenges for any adjudicative body, and the VA is no exception. The department will need to update its information technology tools and its internal operating procedures to account for the new regulations. In addition, the VA will need to train their employees thoroughly in the new regulations, including their organizational structure and substantive changes.

To make the transition smoother for VA staff and other regulation users, the VA plans to promulgate part 5 of 38 C.F.R. with an applicability date. For claims pending with the VA before that date, part 3 of the old code would continue to apply. Part 5 would only affect claims filed on or after the applicability date. Clearly delineating the claims that the VA will administer under part 3 from the claims it will administer under part 5 should avoid any unnecessary confusion or litigation regarding any possible retroactive effect of part 5.¹⁸

Beneficial Impact of the VA's New Regulations

The VA's compensation and pension regulations serve three constituencies: (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. The VA's new regulations will serve these groups significantly better than the current regulations do, because they will facilitate more precise claims and enable a more efficient claims process.

Veteran service officers who are not attorneys and are employed by veterans 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.¹⁹ Undoubtedly, many attorneys previously unfamiliar with case law pertaining to veterans' benefits will enter this practice; therefore these attorneys need to become proficient in this field. The new regulations will assist these practitioners in gaining the needed proficiency and will make it much

easier for attorneys and individuals who are not attorneys to represent their clients effectively because the criteria for various benefits, including detailed evidentiary requirements, will be organized better and stated more clearly.

VA staff will also benefit from the new regulations, which will help staff members 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 to be paid. The more clearly the VA's rules can be applied to the facts of a claim, the less often VA staff must attempt to interpret the rules. This improvement should result in more consistent and accurate decisions for veterans and their families.

Conclusion

With simpler organization and clearer content, the VA's regulations will be easier to find, understand, and apply. Therefore, the results of the Rewrite Project will, in turn, allow the Department of Veterans Affairs to adjudicate claims more accurately and promptly. This service is what our veterans and their families both need and deserve. **TFL**

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Endnotes

¹U.S. Department of Veterans Affairs, *The Origin of the VA Motto*, www.va.gov/opa/feature/celebrate/vamotto.asp (describing the impact of Lincoln's address to the VA's mission); Abraham Lincoln, U.S. President, *Second Inaugural Address*, in INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES 143 (1989).

²20 Vet. App. 257 (2006).

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

⁴See William A. Moorman and William F. Russo, *Serving Our Veterans Through Clearer Rules*, 56 ADMIN. L. REV. 207, 209 (2004) (outlining the steps taken to clarify the regulations).

⁵Filipino 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).

⁶See, 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)).

⁷7 Vet. App. 498, 506 (1995).

⁸1 Vet. App. 171, 175 (1991).

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

¹⁰216 F.3d 1058 (Fed. Cir. 2000).

¹¹See 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 regulations or until overruled by a subsequent opinion or judicial decision).

¹²62 Fed. Reg. 15,565 (April 1, 1997).

¹³*Bryan v. West*, 13 Vet. App. 482, 487 (2000).

¹⁴Dependency and Indemnity Compensation Benefits, 70 Fed. Reg. at 61,343–44; *Id.* at 61,343.

¹⁵VA General Counsel Precedent Opinion 3-90, 55 Fed. Reg. 26,805 (June 29, 1990) and VA General Counsel Precedent Opinion 59-91 56 Fed. Reg. 50,149 (Oct. 3, 1991).

¹⁶*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).

¹⁷Payments and Adjustments to Payments, 73 Fed. Reg. 65,212 (Oct. 31, 2008) (to be codified at 38 C.F.R. pt. 5).

¹⁸See *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 VA Board's decision to deny restoration of claimant's 100 percent service-connected disability rating for schizophrenia).

¹⁹Veterans 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).