This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: August 28, 2006.

Gary Kassof,

Bridge Program Manager, First Coast Guard District.

[FR Doc. E6–14834 Filed 9–6–06; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900–AI42

Claims Based on Aggravation of a Nonservice-Connected Disability

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending its adjudication regulations concerning secondary service connection. This amendment is necessary because of a court decision that clarified the circumstances under which a veteran may be compensated for an increase in the severity of an otherwise nonservice-connected condition which is caused by aggravation from a service-connected condition. The intended effect of this amendment is to conform VA regulations to the court's decision.

DATES: *Effective Date:* October 10, 2006.

FOR FURTHER INFORMATION CONTACT: Bill Russo, Chief, Regulations Staff, Compensation and Pension Service, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273–7211.

SUPPLEMENTARY INFORMATION: VA published in the **Federal Register** (62 FR 30547) a proposed rule to amend 38 CFR 3.310 by adding a new paragraph to implement a decision of the United States Court of Veterans Appeals (now the United States Court of Appeals for Veterans Claims) (CAVC) in the case of *Allen* v. *Brown*, 7 Vet. App. 439 (1995), that provided for establishing service connection for that amount of increase in an otherwise nonservice-connected condition which was caused by aggravation from a service-connected condition (*Allen* aggravation). We received comments from the Disabled American Veterans and the Vietnam Veterans of America, Inc. Based on the rationale set forth in the proposed rule and in this document, we are adopting the provisions of the proposed rule as a final rule with the changes indicated below.

One commenter expressed the opinion that VA should establish service connection for the entire aggravated injury or disease, but only pay compensation for that part of the condition that is due to aggravation by an already service-connected condition. The commenter opined that 38 U.S.C. 1110 and 1131 do not allow VA to establish service connection for part of a condition. The same commenter stated that it has been the policy of VA to compensate the entire disability where a service-connected condition and a nonservice-connected condition affect a single organ, body system, or function, and the two conditions have common symptoms that cannot be separated. This commenter felt that the policy was an acknowledgment by VA that the symptoms cannot be separated to allow proportioning the disability attributable to each organ, body system, or function. We do not agree with this proposed amendment to the rule.

In *Allen* v. *Brown*, 7 Vet. App. 439 (1995), the CAVC held that 38 U.S.C. 1110 requires VA to pay compensation for the aggravation of the nonservice-connected disability but did not, we believe, express a specific view on whether VA would be required or permitted to grant ''service connection'' for all or only part of the nonservice-connected disease. Section 1110 does not directly speak to awards of ''service connection,'' but merely authorizes compensation for ''disability,'' which the CAVC in *Allen* construed to mean ''impairment of earning capacity.'' Section 1110 further requires that the disability have been caused by an injury or disease incurred or aggravated in service. This is consistent with the proposed rule, which requires that the ''disability'' (the increased severity of the nonservice-connected condition) must be caused by a service-connected injury or disease. Accordingly, section 1110 does not support the commenter's position. In its holding in *Tobin* v. *Derwinski,* 2 Vet. App. 34 (1991), the CAVC apparently interpreted 38 CFR 3.310 to require VA to grant ''service connection'' for the portion of the nonservice-connected disability attributable to aggravation by the service-connected condition. Thus, when read in tandem, the CAVC's rulings require VA to service connect the degree of aggravation of a nonservice-connected condition by a service-connected disability and to pay compensation for that level of disability attributable to such aggravation. Although § 3.310 reasonably provides that any disability proximately caused by a service-connected disease will be considered part of the service-connected condition, for purposes of authorizing service connection and compensation, there is no clear basis for awarding service connection for the entire nonservice-connected condition, including aspects of that condition that are not attributable to a service-connected condition.

Although 38 U.S.C. 1110 neither uses nor defines the term ''service-connected,'' that term is defined in 38 U.S.C. 101(16) to mean, in pertinent part, that a ''disability was incurred or aggravated * * * in line of duty in the active military, naval, or air service.'' Nothing in that definition requires or authorizes VA to grant service connection for the entirety of a disease or injury that was not incurred or aggravated in service.

Both commenters expressed concerns about the difficulties in establishing the degree of aggravation that is to be compensated. However, VA believes that, if medical evidence is adequately developed, computation of the degree of aggravation should be attainable. The degree of aggravation would be assessed based upon the objective medical evidence of record.

Both commenters objected to the proposed rule's requirement of ''medical evidence extant before the aggravation sufficient to establish the pre-aggravation severity of the disability.'' They suggested that a current medical opinion should be sufficient to establish the fact of aggravation.

Aggravation is a comparative term meaning that a disability has worsened from one level of severity to another. In order to establish the degree to which aggravation has occurred, it is necessary to compare the current level of severity to a prior level of severity. In cases of disabilities which pre-existed service, in standard aggravation claims under 38 U.S.C. 1153, the pre-service level of severity is generally established by a service entrance examination. If no disabilities are noted on that examination, the veteran is presumed to have been in sound condition when he or she entered service. If disabilities are noted on the entrance examination, the examiner should include sufficient findings to permit a determination of the degree of disability. If the findings indicate severe disability, the person would not be allowed on active duty. If the findings indicate mild to moderate disability, an assessment of fitness for duty would be made. If the person were allowed on active duty, there should be sufficient findings for a later assessment of the pre-service level of disability, which would be deducted from the post-service level of disability in a

standard aggravation claim. It is the Government's responsibility to conduct the entrance examination and to create and maintain a record of that examination. If the Government fails to conduct the examination or fails to provide sufficient findings for assessing the level of pre-service disability, or if the record of the examination is lost or destroyed, that should not operate to the disadvantage of the veteran. That is the reason for the language in 38 CFR 3.322 and 4.22, which requires deduction of the pre-service level of disability from the current level of disability only if the pre-service level of disability is ''ascertainable.''

The requirement for proof of baseline disability is much different in an *Allen* aggravation case. The threshold requirement for entitlement under § 3.310(a) is evidence demonstrating an increase in disability of a nonservice-connected disability that is proximately due to or the result of service. Thus, evidence of baseline disability is first necessary to establish entitlement to service connection. Plainly stated, such evidence of aggravation would necessarily include some demonstration of baseline disability in order to show an increase in severity. Once entitlement has been established, such evidence would also be necessary for purposes of determining the level of compensation. In so doing, the veteran would demonstrate that the nonservice-connected disability has increased in severity because of aggravation from a service-connected condition. Unlike the standard aggravation claim pursuant to 38 U.S.C. 1153 where the baseline level of severity (referred to in the text of the proposed rule as ''the pre-aggravation severity'') is based on an entrance examination, there is no Government responsibility to create and maintain medical records on nonservice-connected conditions for purposes of determining the baseline level of severity in *Allen* aggravation claims. The veteran must ''support'' the claim with medical evidence of the baseline level of severity of a nonservice-connected condition which can then be compared to the current level of severity to establish the fact of aggravation and the degree of disability for which the veteran will be compensated.

One commenter stated it would be unreasonable for VA to require proof of a baseline level of disability as a condition for granting service connection for aggravation. To illustrate, the commenter suggested that if a physician opined that a service-connected condition aggravated a nonservice-connected condition, VA would be required to concede aggravation, in the absence of any contrary evidence, even if there were no evidence of a baseline level of pre-aggravation disability.

This comment is premised upon the incorrect assumption that there is necessarily a difference under *Allen* between the issue of service connection and the degree of disability. As indicated, the evidence of baseline disability satisfies the initial requirement of additional disability necessary to establish entitlement, but also is necessary to demonstrate the level of disability due to aggravation. Because we cannot service connect the entire nonservice-connected condition, only the degree of disability resulting from aggravation may be service connected. Therefore, evidence concerning the degree of disability is essential to establish service connection in *Allen* aggravation claims and it is reasonable for VA to require claimant's to submit proof of a baseline disability level. Such a requirement is in accordance with VA's authority under 38 U.S.C. 501 to specify the types of proof that are necessary to establish a benefit.

Finally, in the example suggested by the commenter, if a physician determines that a service-connected condition has aggravated a nonservice-connected condition, it is reasonable to expect that that medical opinion would be based on evidence of the baseline and the current level of disability of the nonservice-connected condition. Thus, the requirement to provide proof of a baseline level of disability is not as onerous as contemplated and suggested by this commenter.

We have, however, reconsidered the requirement of ''medical evidence extant before the aggravation'' to establish the baseline level of severity when computing the degree of aggravation. It could be difficult for some claimants to identify the date of onset of the aggravation and then to locate medical evidence created before that date to establish the baseline. Thus, limiting the medical evidence for baseline calculation to that which existed prior to the onset of aggravation could likely result in unfavorable decisions in several claims. Obviously, if such records were available, they would establish the lowest baseline level of severity and, hence, the greatest degree of aggravation when compared to the current level of severity. However, since aggravation is generally an ongoing process, medical evidence establishing the aggravation could be created at any time between the onset of aggravation and the date of the current claim. VA's acceptance of medical evidence created at any time between the onset of aggravation and the date of the current claim for purposes of establishing the baseline level of severity would be more favorable to claimants, although claims granted in this regard would likely result in findings of smaller degrees of aggravation and less compensation. We are, therefore, amending the proposed rule to allow the acceptance, for baseline purposes, of medical evidence created at any time between the onset of aggravation and the receipt of medical evidence establishing the current level of severity. The earlier medical evidence will establish the baseline level of severity for comparison with the current level of severity to determine the degree of aggravation that may be service-connected and compensated. For example, if the onset of aggravation was sometime in 1996, but the veteran can only produce medical evidence from 1999, the 1999 medical evidence would be accepted for purposes of establishing the baseline level of severity. The rule will also state that VA will also accept, for baseline purposes, medical evidence created before the onset of aggravation.

One commenter suggested that the provisions of 38 CFR 3.322 with regard to in-service aggravation of pre-service disabilities should have equal application in *Allen* aggravation claims. Specifically, § 3.322 provides that no deduction for the pre-service level of disability may be made unless that pre-service level is ''ascertainable.'' It also provides that no deduction is to be made if the aggravated disability becomes totally disabling. We do not agree with this suggestion. As mentioned earlier, when a pre-service level of disability is not ascertainable, the Government has failed to discharge its responsibility to conduct, and/or maintain a record of, an adequate entrance examination. That failure should not be allowed to disadvantage the veteran in any way. In *Allen* aggravation claims the Government has no such responsibility. The responsibility for establishing a baseline level of disability in such claims rests with the veteran. If no baseline can be established, no aggravation can be demonstrated, and the deduction issue would be moot.

With respect to the provision concerning no deduction when the aggravated disability is totally disabling, we believe such action is prohibited by the *Allen* decision itself. There the Court stated with parenthetical emphasis that ''such veteran shall be compensated for the degree of disability (but only that degree) over and above the degree of disability existing prior to

the aggravation.'' Based on that language it is clear that only the incremental increase in disability is to be compensated. To hold otherwise could lead to absurd results. For example, if, 20 years after service, a Vietnam veteran developed a nonservice-connected psychosis which was 70 percent disabling but also had a service-connected disability that aggravated the psychosis causing it to be totally disabling, then the application of 38 CFR 3.322 would require payment of compensation at the 100 percent rate for a 70 percent nonservice-connected condition, when the aggravated percentage is 30 percent. Such a result could not have been intended by the *Allen* court, and we decline to apply § 3.322 to *Allen* aggravation claims in the manner suggested.

Both commenters suggested that it would be difficult, if not impossible, for VA to determine, for deduction purposes, the degree of increase in a nonservice-connected condition that is attributable to ''the normal progression of the disability'' and that perhaps that provision in the proposed rule should just be deleted on the basis of workload considerations. While we agree that it could be difficult to establish the degree of increased disability due to ''normal progression,'' that does not relieve VA of the responsibility to consider such evidence if it exists. In *Allen* aggravation claims VA can only pay compensation for the increased disability attributable to aggravation from a service-connected condition. Any increase attributable to other causes is beyond the scope of *Allen* and may not be compensated unless specifically authorized by statute. While authoritative medical evidence on the degree of increase due to ''normal progression'' of a disease is rare, if it exists in an individual case, VA cannot ignore it and cannot adopt the suggestion to delete this provision in the proposed rule.

However, in analyzing and responding to the above suggestion, we noted that the proposed rule uses language different from that found in 38 U.S.C. 1153 and 38 CFR 3.306. The proposed rule uses the phrase ''normal progression of the disability'' whereas the cited statute and regulation dealing with aggravation use the phrase ''natural progress of the disease.'' Although the choice of words in the proposed rule is slightly different from the statutory phrasing, no change in meaning was intended. For purposes of clarity, however, we will incorporate the statutory phrasing in the first and last sentences of 3.310(b). The proposed rule also uses the term ''disability'' to mean ''disease or injury'', in four other instances. The term ''disability'' is used in 38 U.S.C. 1153 and 38 CFR 3.306 to mean the level of disability, rather than the disease or injury itself. To avoid any possible confusion about our intent (to refer to the disease or injury), we believe it will provide greater clarity to use the term ''disease or injury'' instead of disability in 3.310(b). We are also changing ''rather than'' to ''and not due to'' to provide a more parallel structure for the first sentence of 3.310(b).

One commenter urged VA to include in this regulation some directions to field personnel on how to evaluate the ''natural progress'' of a disease including the effects of such variables as race, age, gender and geographic location on such ''progress.'' The commenter also opined that VA was incapable of providing adequate directions on this subject.

We do not believe that special instructions for evaluating ''natural progress'' are necessary. Any evidence of ''natural progress'' of a disease would be in the form of medical evidence. Since our field personnel are already charged with assessing the credibility and weight of such evidence with regard to other issues in a claim, it would not be appropriate to have a separate set of instructions for assessing the credibility and weight of medical evidence relating to ''natural progress'' of a disease. The variables mentioned by the commenter would be considered by the medical professional who was providing the evidence of ''natural progress.'' Therefore, no changes in the proposed rule are warranted based on this comment.

One commenter noted that VA has taken a pro-veteran approach to allowing a veteran to claim the aggregate disability caused by a service-connected and nonservice-connected condition, demonstrated by § 4.127, which provides that a veteran with a mental retardation or a personality disorder may also have a mental disorder that may be service-connected. Section 4.127 states that a veteran may have co-existing mental disorders, one service-connectable and the other congenital or developmental, and that the service-connectable disorder should not be overlooked because of the congenital or developmental disorder. Nothing in § 4.127 provides for granting service connection for the co-existing mental retardation or personality disorder.

While VA will compensate overlapping symptoms as if the overlapping symptoms were all due to the effects of the service-connected condition, we do this in specific situations where it is impossible for a medical examiner to distinguish which symptoms are due to the service-connected disability and which are due to the nonservice-connected disability, such as where two separate disabilities share common symptoms. Where various symptoms affecting a single body part or system can be separated into those attributable to the service-connected disability and those attributable to the nonservice-connected disability, VA evaluates for compensation only those symptoms attributable to the service-connected disability.

While VA agrees that the provision referred to by the commenter is pro-veteran, it does not stand for the proposition that VA grants service connection for conditions not related to military service. No changes are warranted based on this comment.

One commenter also referenced the principle codified in 38 U.S.C. 1160 and 38 CFR 3.383, which provide for special consideration when a specified degree of disability is service-connected in certain organs or extremities and there is a nonservice-connected disability affecting the corresponding paired organ or extremity. In this situation, VA is authorized to pay disability compensation as if the combination of disabilities in those paired organs or extremities were service-connected. The commenter expressed the opinion that this demonstrates that VA will grant service connection for a nonservice-connected disability.

Section 3.383 does not authorize a grant of service connection for the disability affecting the nonservice-connected paired organ or extremity. Rather, the disability of the nonservice-connected paired organ or extremity remains nonservice-connected but is compensated as if it was service-connected. Further, section 3.383 merely reiterates statutory provisions in 38 U.S.C. 1160 and in no way suggests that VA has general authority to grant service connection for nonservice-connected conditions. Thus, this comment is not directly relevant to the subject of the proposed rule. We make no changes based on this comment.

One commenter opined that the determinations of the level of disability must be made by medical personnel and not Rating Veterans Service Representatives. This commenter urged VA to include in the Adjudication Manual a provision stating this.

We make no changes based on this suggestion. While the Adjudication Manual may need to be amended to reflect the procedures necessary to implement this regulatory change, the

suggestion itself is beyond the scope of this rulemaking.

Based on our review of the proposed amendment, we are making a minor change in wording. In the first sentence of new paragraph (b), we are changing ''shall'' to ''will'' to reflect VA's current efforts to write regulations in plain language.

Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Order classifies a rule as a significant regulatory action requiring review by the Office of Management and Budget if it meets any one of a number of specified conditions, including: Having an annual effect on the economy of $100 million or more, creating a serious inconsistency or interfering with an action of another agency, materially altering the budgetary impact of entitlements or the rights of entitlement recipients, or raising novel legal or policy issues. VA has examined the economic, legal, and policy implications of this final rule and has concluded that it is a significant regulatory action under Executive Order 12866 because it materially alters the rights of entitlement recipients based upon a court decision.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521).

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in an expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more (adjusted annually for inflation) in any given year. This rule would have no such effect on State, local, and tribal governments, or on the private sector.

Regulatory Flexibility Act

The Secretary hereby certifies that this regulatory amendment will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. The reason for this certification is that these amendments would not directly affect any small entities. Only VA beneficiaries and their survivors could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), these amendments are exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program numbers are 64.109, Veterans Compensation for Service-Connected Disability, and 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Radioactive materials, Veterans, Vietnam.

Approved: May 26, 2006.

Gordon H. Mansfield,

Deputy Secretary of Veterans Affairs.

Editorial Note: This document was received at the Office of the Federal Register on September 1, 2006.

■ For the reasons set forth in the preamble, VA is amending 38 CFR part 3 as set forth below:

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

■ 1. The authority citation for part 3, subpart A, continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

■ 2. Section 3.310 is amended by revising the section heading; by redesignating paragraph (b) as paragraph (c); and by adding a new paragraph (b) to read as follows:

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

* * * * *

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

(Authority: 38 U.S.C. 1110 and 1131)

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BILLING CODE 8320–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 90 and 95

[WT Docket 01–90; ET Docket 98–95; RM–9096; FCC 06–110]

Amendment of the Commission's Rules Regarding Dedicated Short-Range Communications Services in the 5.850–5.925 GHz (5.9 GHz Band)

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document the Commission takes certain actions in response to four petitions for reconsideration filed by 3M Company, ARINC Incorporated, Intelligent Transportation Society of America and John Hopkins University of Applied Physics Laboratory. Each petitioner seeks reconsideration of the Commission's *Report and Order*, which adopted licensing and service rules for the Dedicated Short Range Communications (DSRC) Service in the Intelligent Transportation Systems (ITS) Radio Service, located in the 5.850–5.925 GHz band (5.9 GHz band) licensing and service rules for the Dedicated Short Range Communications (DSRC) Service in the Intelligent Transportation Systems (ITS) Radio Service located in the 5.850–5.925 GHz band (5.9 GHz band).

DATES: Effective November 6, 2006.

FOR FURTHER INFORMATION CONTACT: Technical Information: Tim Maguire, *Tim.Maguire@FCC.gov*, Public Safety and Critical Infrastructure Division, Wireless Telecommunications Bureau, (202) 418–0680, or TTY (202) 418–7233. Legal Information: Jeannie Benfaida,