

PART 20—BOARD OF VETERANS' APPEALS: RULES OF PRACTICE

■ 1. The authority citation for part 20 continues to read as follows:

Authority: 38 U.S.C. 501(a) and as noted in specific sections.

■ 2. In § 20.1405, paragraph (a) is amended by redesignating paragraph (a)(2) as paragraph (a)(3), and adding a new paragraph (a)(2) to read as follows:

§ 20.1405 Rule 1405. Disposition.

(a) * * *

(2) *Advancement on the docket.* A motion may be advanced on the docket subject to the same substantive and procedural requirements as those applicable to an appeal under Rule 900(c) (§ 20.900(c) of this part).

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DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 20

RIN 2900-AL08

Board of Veterans' Appeals: Speeding Appellate Review for Aging Veterans

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends a Board of Veterans' Appeals (Board) Rule of Practice to provide that a case may be advanced on the Board's docket because of the appellant's advanced age. The change is necessary to speed the appellate process for the large group of aging veterans.

DATES: Effective Date: September 12, 2003.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION: The Board of Veterans' Appeals (Board) is an administrative body that decides appeals from denials of claims for veterans' benefits. An agency of original jurisdiction (AOJ), typically one of the Department of Veterans Affairs (VA)'s 57 regional offices, makes the initial decision on the claim. A claimant who is dissatisfied with an AOJ's decision may appeal to the Board. The Board's 55 Members decide about 35,000 to 40,000 cases per year.

Generally, the law requires that the Board consider and decide appeals in

the order in which they were filed. 38 U.S.C. 7107(a). However, the law also permits the Board, on motion, to advance cases for earlier consideration and determination under certain circumstances such as serious illness, severe financial hardship, and other sufficient cause shown. 38 U.S.C. 7107(a)(2). VA's implementing regulation, 38 CFR 20.900(c), currently specifies that "other sufficient cause" includes "administrative error resulting in a significant delay in docketing the case."

On June 12, 2002, VA published a proposed rule with request for comments, which would amend the Board of Veterans' Appeals Rule of Practice 900(c) (38 CFR 20.900(c)) to provide that a case may be advanced on the Board's docket because of the appellant's advanced age, defined as 75 or more years old. 67 FR 40255. The purpose of the proposed rule is to speed the appellate process for the cohort of aging veterans.

We received comments from seven individuals. The commenters urged VA to either amend or rescind the rule. Their concerns fell into three categories: (1) The ineffectiveness of defining "advanced age" as 75 or more years of age in advancing the claims of older veterans; (2) a conflict with the instructions set forth by the Secretary of Veterans Affairs on expediting, at VA's regional offices, the claims of older veterans; and (3) the inequality of allowing one case to be advanced over another.

We will address these concerns in turn.

1. *The ineffectiveness of defining "advanced age" as 75 years or older in advancing the claims of older veterans.* One commenter argued that an individual who met the requirements of the proposed rule for advanced age, 75 or more years of age, would "likely have died by the time the case runs its course." The commenter asserted that a claim remanded by the Board to the AOJ often remained active for another three to five years, and that a case appealed to the United States Court of Appeals for Veterans Claims takes 12 to 18 months to adjudicate. The commenter suggested lowering the threshold for "advanced age" from 75 to 70 years.

In the proposed rule, we explained our reasons for defining "advanced age" as 75 or more years of age. We seek to strike a balance between the statutory command that the Board consider appeals in docket order and the need to move some cases to the front of the line. We observed that approximately 18 percent of the total veteran population is age 75 or older whereas 27 percent of

the veteran population is age 70 or over, and that 75 is also an age at which a veteran is very near to his or her life expectancy. 67 FR at 40255-56.

In sum, 75 or more years of age represents a segment of the veteran population large enough to provide meaningful relief, but not so large as to dilute the general rule of "first come, first served." We have made no changes based on this comment.

2. *A conflict with the instructions set forth by the Secretary of Veterans Affairs on expediting, at VA's regional offices, the claims of older veterans.* One commenter asserted that defining "advanced age" as 75 or more years of age is in conflict with the Secretary's plan to expedite the processing of claims filed by older veterans. The commenter contended that the proposed rule does not show the same level of concern and stated that there should be uniformity in the way VA handles the cases of older veterans.

There are, however, significant differences between the factors facing the regional offices and the factors facing the Board.

In November 2001, the Secretary formed a "Tiger Team" at the Cleveland Regional Office for the purpose of processing the oldest claims in the Veterans Benefits Administration (VBA) and to focus on claims from veterans age 70 and older that had been pending over one year. Under Secretary for Benefits Daniel L. Cooper, Statement before the House Committee on Veterans' Affairs Subcommittee on Benefits (June 6, 2002) (transcript available at http://www.va.gov/OCA/testimony/06je0220_usa.htm). The emphasis was to process the claims of World War II and Korean War veterans whose claims were "mired in the system." *Id.*

The problem experienced by VBA is an increasing inventory of cases "original, reopened, and remanded—waiting for a decision and the lengthening time it takes to render a decision. The number of regional office cases awaiting decision in 2001 was nearly double that awaiting decision in 1996. 2003 Budget of the President, Department of Veterans Affairs at 281, available at <http://www.whitehouse.gov/omb/budget/fy2003/pdf/bud23.pdf>. By the end of 2001, claims awaiting decision exceeded 640,000. *Id.* VA projected that in 2002 it would take VBA in excess of 200 days to process a disability compensation claim. *Id.* at 282. In contrast, the Board has experienced neither an increased inventory nor any significant increase in the number of days it takes to adjudicate an appeal.