

Practice, the Board is permitted to obtain evidence, clarify the evidence, cure a procedural defect, or perform any other action essential for a proper appellate decision in any appeal properly before it without having to remand the appeal to the agency of original jurisdiction. Some of the regulatory provisions governing this practice were recently invalidated by the United States Court of Appeals for the Federal Circuit. By way of this rulemaking, we propose removing the invalidated portions of the Board's development regulations and changing those regulations to provide that, with certain exceptions, the Board will remand a case to the agency of original jurisdiction when there is a need to obtain evidence, clarify the evidence, correct a procedural defect, or take any other action deemed essential for a proper appellate decision. We also propose to amend the definition of "agency of original jurisdiction," add a new provision that allows the Board to consider additional evidence without having to refer it to the agency of original jurisdiction for consideration in the first instance when this procedural right is waived by the appellant or the appellant's representative, and make other related changes and technical corrections to certain Appeals Regulations and Rules of Practice. The intended effect of this amendment is to make these regulations comply with a recent court decision.

DATES: Comments must be received on or before January 12, 2004.

ADDRESSES: Mail or hand-deliver written comments to: Director, Regulations Management (00REG1), Department of Veterans Affairs, 810 Vermont Avenue, NW., Room 1064, Washington, DC 20420; or fax comments to (202) 273-9026; or e-mail comments to OGCRegulations@mail.va.gov. Comments should indicate that they are submitted in response to "RIN 2900-AL77." All written comments will be available for public inspection at the above address in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 273-9515 for an appointment.

FOR FURTHER INFORMATION CONTACT: Steven L. Keller, Senior Deputy Vice Chairman, Board of Veterans' Appeals (01C), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202-565-5978).

SUPPLEMENTARY INFORMATION: The Board of Veterans' Appeals (Board or BVA) is the component of Department of Veterans Affairs (VA) in Washington,

DC, that decides appeals from denials of claims for veterans' benefits. An agency of original jurisdiction (AOJ), typically one of VA's 57 regional offices, makes the initial decision on a claim and subsequent decisions if VA receives additional evidence. A claimant who is dissatisfied with an AOJ's decision may appeal to the Board. After a claimant perfects an appeal to the Board, the AOJ certifies the appeal to the Board and transfers the record to the Board, so that the Board can decide the appeal.

While considering an appeal, a BVA veterans law judge, or panel of veterans law judges, sometimes discovers that more evidence is needed, that the current evidence must be clarified, or that a procedural defect must be cured for the appeal to be properly decided. Prior to regulatory changes effective in February 2002, if the Board determined that additional evidence needed to be obtained, current evidence clarified, or a procedural defect cured for the appeal to be properly decided, the case, pursuant to 38 CFR 19.9 (2001), generally had to be remanded to the AOJ to perform the needed action. In addition, any pertinent evidence submitted by the appellant or representative that was accepted by the Board, as well as any such evidence referred to the Board by the AOJ under 38 CFR 19.37(b), was required to be referred to the AOJ for review and preparation of a Supplemental Statement of the Case, unless this procedural right was waived by the appellant or representative, or unless the Board determined that the benefit or benefits to which the evidence related could be allowed on appeal without such referral. 38 CFR 20.1304(c) (2001).

In order to address a growing backlog of claims awaiting decision at VA's Regional Offices and to provide more expeditious processing of appeals, VA modified provisions of its Appeals Regulations and the Board's Rules of Practice to permit the Board to develop the record or cure procedural defects itself without remanding the appeal to the AOJ, and without having to obtain the appellant's waiver. These changes, which most significantly involved the amendment of 38 CFR 19.9 and 20.1304, were published in the **Federal Register** as final amendments on January 23, 2002, 67 FR 3099 (2002), with an effective date of February 22, 2002.

Under the changes made to 38 CFR 19.9 at that time, the Board was still permitted to remand a case needing further development, but no longer was required to do so. Additionally, under the new 38 CFR 19.9(a)(2)(ii), if the Board decided to provide the appellant with the notice required by 38 U.S.C.

5103(a) and/or 38 CFR 3.159(b)(1) (evidence required to substantiate a claim), the appellant would have 30 days to respond to the notice and furnish the requested evidence. Evidence submitted after the Board's decision, but before the expiration of the one-year period following the notice, would be referred to the AOJ for due consideration. 38 CFR 19.31 and 20.1304 also were revised to facilitate the development that could be undertaken at the Board.

A number of petitions challenging the 2002 revisions made to 38 CFR 19.9, 19.31, 20.903 and 20.1304 were filed with the United States Court of Appeals for the Federal Circuit (Federal Circuit). On May 1, 2003, the Federal Circuit issued a decision in *Disabled American Veterans v. Secretary of Veterans Affairs*, 327 F.3d 1339 (Fed. Cir. 2003), that invalidated 38 CFR 19.9(a)(2), and 19.9(a)(2)(ii). The Court concluded that the changes made to § 19.9(a)(2) were contrary to 38 U.S.C. 7104(a) because, if the Board obtained new evidence and rendered a decision on the basis of such evidence without obtaining a waiver from the claimant, such action would deprive the claimant of "one review on appeal" of the additional evidence.

On May 21, 2003, the VA Office of the General Counsel (OGC) issued a precedential opinion addressing the impact and effect of the Federal Circuit's decision in *Disabled American Veterans* on the authority of the Board to develop evidence with respect to cases pending before the Board on appeal. In pertinent part, the OGC found that the Court's decision does not prohibit the Board from developing evidence in a case on appeal before the Board, provided that the Board first obtains the appellant's waiver of initial consideration of such evidence by the agency of original jurisdiction. VAOPGCPREC 1-2003 (May 21, 2003).

Although the authority found in VAOPGCPREC 1-2003 still exists, it has been decided that, given its resources and experience, the Veterans Benefits Administration (VBA) is the most appropriate organization within the Department of Veterans Affairs to shoulder responsibility for developing most types of evidence and correcting procedural deficiencies in cases that have been appealed to the BVA. Therefore, in order to remove the two regulatory provisions invalidated by the Federal Circuit, and to effectuate the decision that the development of most types of evidence and correction of procedural deficiencies should be accomplished by VBA, VA proposes to amend 38 CFR 19.9 to require the Board to remand a case to the AOJ if it is found