

that further evidence, clarification of the evidence, or correction of a procedural defect is needed. The currently existing exceptions to this requirement that are contained in 38 CFR 19.9(b) are being retained. These exceptions were in effect prior to the 2002 changes made to § 19.9, and one—the Board's consideration of a change in law without the necessity of a remand to the AOJ—was specifically upheld as being a valid provision by the Federal Circuit in the *Disabled American Veterans* decision. A new remand exception also is being added to reflect, as further discussed below, the addition of § 20.1304(c). That new provision will provide appellants with the option of waiving initial consideration by the AOJ of evidence referred to, or received by, the Board.

VA also proposes to revise the definition of “agency of original jurisdiction,” as set forth in 38 CFR 20.3(a), to mean “the Department of Veterans Affairs activity or administration, that is, the Veterans Benefits Administration, Veterans Health Administration, or National Cemetery Administration, that made the initial determination on a claim.” This change is being made to broaden the definition of AOJ so that it is not limited to a particular office within one of the VA activities and administrations, including the office that made the initial determination on a claim. The term “activity” comes from the definition of agency of original jurisdiction included in 38 U.S.C. 7105(b)(1). The purpose of this change is to provide the Administrations, particularly VBA, with the requisite flexibility to process remanded appeals in the most efficient and effective manner possible by reassigning work to different offices as deemed appropriate by management. See *The Veterans' Benefits Improvements Act of 1994*, Public Law 103–446, sections 302, 108 Stat. 4645, 4658 (1994), 38 U.S.C.A. 5101 (West 2003) (Historical and Statutory Notes). This will enable VBA to use its available resources to complete any necessary development and readjudication of a remanded appeal at the most appropriate location.

Additionally, VA proposes to re-promulgate former § 20.1304(c) in substantially the same form as it existed prior to the 2002 regulatory amendments and its removal at that time from the Board's Rules of Practice. Under certain circumstances pertinent evidence may be submitted directly to and accepted by the Board, or may be referred to the Board by the AOJ pursuant to 38 CFR 19.37(b). Unless the Board determines that the benefit or

benefits to which the evidence relates may be fully allowed on appeal, and hence there is no possibility of prejudice to the appellant, such newly received evidence must be referred to the AOJ for initial review. Under the proposed revision, such referral will not be required when the appellant or the appellant's representative waives the procedural right to have the newly submitted evidence considered by the AOJ in the first instance. Allowing an appellant to affirmatively waive initial AOJ consideration of newly submitted evidence will reduce the need for Board remands whenever new pertinent evidence is received and considered by the Board in the first instance. In turn, this proposed change will allow for the faster processing of the claims of individual appellants, as well as the processing of appeals at both the AOJ and Board levels, due to the reduction in the number of cases that otherwise would require remand.

Several technical corrections also are being made to 38 CFR 20.1304 to reflect the redesignation of current paragraph (c) as paragraph (d), and the addition of the new paragraph (c) discussed above. In addition, the redesignated paragraph (d) is being amended to reflect that a waiver, in accordance with new paragraph (c) of this section, of initial AOJ consideration of pertinent evidence received by the Board must be obtained from each claimant when a simultaneously contested claim is involved. The purpose of this change is to fully protect the procedural rights of all of the parties involved in a simultaneously contested claim.

This proposed rulemaking also would make several minor amendments and technical corrections to the rules affected by this rulemaking. In addition to the above amendments, we propose revising 38 CFR 19.9 to change the title of “Board Member” to “Veterans Law Judge.” On February 10, 2003, 38 CFR 19.2 was revised to allow the use of the title “Veterans Law Judge” as an alternative to “Member of the Board.” 68 FR 6621 (2003). The change in language in § 19.9 is being proposed to conform to the new § 19.2.

An amendment is being proposed to 38 CFR 19.38, “Action by agency of original jurisdiction when remand received,” to remove the requirement that the AOJ must notify the Board as to the action it has taken on a remanded case. Prior to the Veterans Appeal Control and Locator System (VACOLS) becoming the Department's sole computer appeals tracking system, the AOJs were required to keep the Board informed of the status of Board remand cases. Such action is no longer needed,

however, because VACOLS is now the sole appeals tracking system within the Department for both the Board and the AOJs, and any final action taken on a case by the AOJ will be reflected in VACOLS. It is the responsibility of the AOJs to return remanded cases to the Board that are not fully granted by the AOJ on remand. The Board does not have any jurisdiction to take further action on a remanded matter until it is returned by the AOJ. This amendment will make the regulation conform to current practice.

Three changes are being proposed to 38 CFR 20.903, “Notification of evidence secured and law to be considered by the Board and opportunity for response.” Section 20.903(a) currently provides that, if the Board requests a legal or medical opinion, both the appellant and the appellant's representative will be notified of the request, but when the opinion is received a copy of the opinion is only provided to the representative or to the appellant, but not to both. Except in circumstances governed by 38 U.S.C. 5701(b)(1), where disclosure of an opinion could possibly be injurious to the physical or mental health of a claimant, it makes no sense to provide an appellant with a copy of an opinion request, but not with a copy of the opinion that is obtained in response to that request. Accordingly, we propose amending § 20.903(a) to state that the Board will furnish a copy of any legal or medical opinion obtained to both the appellant and the appellant's representative, if any. This change will ensure that the appellant is fully informed about and aware of any such opinions obtained by the Board.

The second change being proposed to § 20.903 relates to paragraph (b). If, pursuant to 38 CFR 19.9(a) or 19.37(b), the Board obtains pertinent evidence that was not submitted by the appellant or appellant's representative, Rule 903(b) currently provides that the Board must notify the appellant and the appellant's representative, if any, of the evidence obtained by furnishing a copy of such evidence, and providing a period of 60 days for response, which may include the submission of relevant evidence or argument. With certain exceptions covered elsewhere in the regulations, the AOJ, rather than the Board, will be developing evidence for initial consideration. Consequently, it is being proposed that Rule 903(b) be removed as a result of this change in practice.

The third and final change being proposed to § 20.903 relates to paragraph (c), which is being redesignated as paragraph (b) in light of